

Ban on pesticides may face NAFTA test

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Dow AgroSciences is considering using the controversial investor-protection provisions of the North American free-trade agreement to seek compensation from the federal government over Quebec's ban on the cosmetic use of pesticides.

The company, a maker of the weed-killer 2,4-D, filed a notice of intent to submit a claim to arbitration under NAFTA in late August. The 27-page legal action was posted yesterday on the Foreign Affairs website, where it is listed as a dispute to which Canada is a party.

In its notice, Dow says the Quebec ban outlawing the use of bug and weed sprays for merely appearances' sake around homes breaches legal protections owed by Canada to U.S. investors under the trade agreement.

NAFTA has provisions, known as Chapter 11, that restrict the ability of a country to take measures "tantamount to nationalization or expropriation" of an investment from a firm from another NAFTA member. Besides Canada, the United States and Mexico are in the trade pact.

The Indianapolis-based company, whose 2,4-D is a standard ingredient in many commercial weed sprays, is seeking compensation of not less than \$2-million, plus legal costs and yet-to-be specified damages.

Dow's legal brief accuses the Quebec government of implementing a pesticide ban that "is not based on science" and was applied to 2,4-D "without providing any meaningful opportunity" for the company to make its case that the herbicide is safe.

Quebec instituted its pesticide ban in 2006, and Dow's action could have wide-ranging impacts. Ontario has recently adopted a similar measure, as have many municipalities, based on a precautionary public-health approach of minimizing exposures to these chemicals.

Although pesticide bans are spreading in Canada, the degree of health risk posed by the sprays is highly contentious. While such respected groups as the Canadian Cancer Society have argued in favour of bans, Health Canada says the pesticides it allows on the market are safe, if used as directed.

Ironically, Health Canada issued its assessment backing the safety of 2,4-D in May, shortly after Ontario said it would follow Quebec's lead by banning the lawn and garden chemicals.

The Dow claim is the latest in a long string of disputes to arise under Chapter 11 – a legal back-channel that permits foreign investors to detour local courts and sue the federal government before an international tribunal.

Foreign Affairs lists nine active arbitrations to which Canada has been named as a party.

The government is defending against a similar Chapter 11 claim filed by another U.S.-based chemical producer over lindane, a suspected carcinogen banned or no longer used in many countries. When Canada moved to end the use of the fungicide on seed treatments, U.S.-based Chemtura Corp. sued for \$100-million in damages. That arbitration is going on behind closed doors.

Many of the NAFTA Chapter 11 actions have been based on complaints that pollution regulations harm business, raising concerns that companies are trying to use the trade treaty to stop governments from taking actions to protect public health or the environment.

Kathleen Cooper, a senior researcher with the Canadian Environmental Law Association, says that the Quebec ban is backed by medical and environmental organizations, and enjoys wide support in public-opinion surveys. She says she is troubled that chemical producers can invoke NAFTA in an effort to "undermine the decisions of democratically elected governments."

Rick Smith, executive director of Environmental Defence, says Dow is "quite transparently" trying to stop pesticide bans from spreading around the country and he predicts the company will face a public backlash for its position.

But Dow, in its submission, says Quebec has consistently ignored decisions supporting as safe the continued use of 2,4-D from Health Canada and other regulators.

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