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BRIEFING NOTE

Potential NAFTA Challenge to Quebec's Ban of 2,4-D Lawn Pesticides

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ISSUE SUMMARY

U.S. chemical manufacturer Dow AgroSciences LLC ("Dow") is challenging the legality of Quebec's ban on the lawn herbicide 2,4-D under Chapter 11 of the North American Free Trade Agreement (NAFTA). The David Suzuki Foundation and Équiterre, represented by legal counsel at Ecojustice, call upon the Government of Canada to vigorously defend Quebec's ban on lawn chemicals. We call on all federal parties to officially declare support for Quebec's precautionary approach and to examine how the federal Pesticide Management Regulatory Agency (PMRA) could more effectively apply this principle when it comes to registration of pesticides used on lawns and gardens.

RECOMMENDATIONS:

1. The federal government should vigorously defend Quebec's ban on 2,4-D lawn pesticides in the arbitration proceeding. The federal minister of international trade should immediately and publicly announce Canada's intentions in this regard and acknowledge the appropriate precautionary basis for Quebec's action.
2. The federal government should ensure more robust application of the precautionary principle in PMRA risk assessments of pesticides.
3. The federal government should assert the position that non-discriminatory regulatory measures enacted for a public purpose in accordance with due process are not, under international law, expropriations or violations of the minimum standard of treatment rules. As such, such regulatory measures are not subject to any compensation.

BACKGROUND

Quebec's *Pesticides Management Code* was phased into effect between 2003 and 2006. It prohibits the use and sale of 20 active ingredients¹ in lawn pesticides and prescribes additional restrictions on pesticide use outside public daycares and schools. The Code is grounded in the precautionary principle. The advisory group whose recommendations formed the basis for development of the Code explicitly recognized this orientation:

Two important principles have guided the group's thought process: the principle of precaution, which implicates that in the absence of scientific certainty on the

¹ The active ingredient in a pesticide is the substance that controls the targeted pest.

toxicity of pesticides, we have to be prudent with regards to their use, as well as the principle of exemplarity...²

In determining which pesticides to ban, Quebec developed a methodology to screen for lawn chemicals that are associated with increased risks of cancer or endocrine disruption. All forms of 2,4-D were included in the ban on the basis of the International Agency for Research on Cancer (IARC) classification of chlorophenoxy herbicides as possible human carcinogens. Chlorophenoxy herbicides are a class of chemicals that includes 2,4-D.

Ontario recently became the second Canadian province to ban the use and sale of lawn and garden pesticides - including 2,4-D – with new regulations that will enter into force in April 2009. Several other provinces are considering cosmetic pesticide bans.

LEGAL PROCESS

On August 25, 2008, Dow filed a notice of intent to seek compensation from the Government of Canada for lost profits resulting from the ban on 2,4-D lawn herbicides in Quebec. The company then submitted a formal notice of arbitration on March 31, 2009, under NAFTA article 1105 (minimum standard of treatment, including fair and equitable treatment in accordance with international law) and article 1110 (expropriation or measure tantamount to expropriation). Dow is seeking \$2 million in damages, as well as “further relief including additional damages”.

Dow argues that the Quebec ban was imposed without scientific justification and disputes the cancer risk associated with 2,4-D. Dow suggests that the ban was not based on scientific criteria but rather on a precautionary approach that was only supposed to apply until recognized organizations had completed their assessments. Pointing to the recent PMRA decision to continue federal registration of 2,4-D, Dow claims that the ban ought to have been lifted, and that it is arbitrary, irrelevant and unfair.

Dow and the Government of Canada must jointly appoint a 3-member arbitration panel. Each may choose one of the panellists, and the third panellist is nominated jointly as the Chair. Once the panel is constituted, Ecojustice will file documents on behalf of Équiterre and David Suzuki Foundation seeking leave (permission) of the panel to intervene as “non-disputing parties” in this matter and to file an *amicus curiae* submission. .

In terms of the investor-state dispute resolution process, we are particularly concerned about two issues. First, even where matters of public interest are engaged, NAFTA Chapter 11 only guarantees legal standing to eligible investors, leaving other civil society actors to engage in a limited fashion (in writing only) at the discretion of the arbitrators. Given how the *amicus curiae* process has developed in the NAFTA Chapter 11 case law, we have no confidence that a future Dow panel will have the discretion to

² *Rapport du groupe de réflexion sur les pesticides en milieu urbain*, March 2002 (as translated by the David Suzuki Foundation). <http://www.mddep.gouv.qc.ca/pesticides/reflexion/rapport-pesticide.pdf>

benefit from oral submissions from non-disputing parties with a distinct interest and expertise in the matter. This lack of inclusiveness contrasts sharply with the rules of practice before the Supreme Court of Canada.

Second, we are concerned about the imbalance that NAFTA Chapter 11 establishes between investor protection and the Parties' sovereign duty to protect the environment and public health. Over the past several years, a series of investor claims in each of the NAFTA Parties have filed claims alleging that certain domestic environmental and/or public health measures conflict with the terms of NAFTA Chapter 11. While we are sensitive to the potential for environmental trade protectionism, the uncertainty that Chapter 11 (and other bilateral investment treaties) has generated regarding the requirement to compensate investors for legitimate, non-discriminatory regulatory measures is an overriding concern. Despite this underlying legal risk, provinces and municipalities are moving forward to protect human health and the environment against the unnecessary risks associated with cosmetic pesticides. However, we believe that all jurisdictions across Canada would benefit from greater certainty that non-discriminatory regulatory measures enacted for a public purpose in accordance with due process are not, under international law, expropriations or violations of the minimum standard of treatment rules.

ANALYSIS

A central argument in the Dow filing is that the IARC classification of chlorophenoxy herbicides does not establish the carcinogenicity of 2,4-D in particular. Several authorities have indeed pointed to a scarcity of evidence concerning 2,4-D, as cited by Dow. In the absence of sufficient evidence to definitively establish the cancer risks (or lack thereof) associated with 2,4-D, reference to the IARC classification of chlorophenoxy herbicides as a group is entirely appropriate. Lack of evidence does not necessarily equate to lack of hazard nor justify abandoning precautionary measures given the documented risks associated with closely related chemicals.

Furthermore, the European Union Strategy for Endocrine Disrupters classifies 2,4-D in Category II on its priority list of suspected endocrine disrupting chemicals.³ Quebec's methodology for determining which pesticides to ban included consideration of endocrine disrupting potential, but international reference lists were not available at the time. Were Quebec to review its classification of 2,4-D under the *Pesticides Management Code*, the chemical could be banned on the basis of its endocrine disrupting potential as well as cancer risk. 2,4-D is also associated with other serious illnesses, including neurological disorders, neurodevelopmental problems, and damage to the immune and reproductive systems.

A second argument advanced by Dow is that the Quebec ban on 2,4-D lawn chemicals is inconsistent with the PMRA decision to continue registration of this pesticide. The PMRA re-evaluation, completed in May 2008, concluded that products

³ The E.U. Strategy for Endocrine Disrupters classified the priority list of suspected endocrine disrupters in three categories on the basis of the strength of evidence. Expert reviewers identified at least some in vitro evidence of biological activity related to endocrine disruption for chemicals in Category 2.

containing 2,4-D do not pose unacceptable risks to human health or the environment if used according to directions. In Canada, federal and provincial governments share jurisdiction for pesticide regulation. Provinces have the authority to impose regulations that are more restrictive of pesticide use than federal laws and regulations in consideration of the public interest and general welfare. The inconsistency between the PMRA registration decision and the ban on 2,4-D lawn chemicals in Quebec and now Ontario is concerning, but points to a weakness in the federal risk assessment. A Notice of Objection to the PMRA's re-evaluation decision for 2,4-D is currently pending.

Also, the Washington-based Natural Resources Defence Council has filed a petition to cancel the U.S. registration of 2,4-D. The petitioner argues that published, scientific information about exposure factors and health effects were not properly considered in the U.S. decision to re-register 2,4-D. The Canadian re-evaluation decision relied in on the same data set used in this disputed U.S. assessment. Denmark, Norway, and Sweden have discontinued registration of 2,4-D.

It should be noted, as well, that *all* pesticides banned in Quebec (and Ontario) are federally registered. Quebec did not need to consider banning chemicals that are not approved by the PMRA. "Inconsistency" between federal and provincial standards is an inherent and appropriate feature of provincial pesticide bans: Quebec applies a higher standard of precaution when it comes to the use and sale of lawn pesticides.

We agree with the conclusions of the *Institut national de santé publique du Québec* (INSPQ) in this regard:

Considering the available data, the elements that remain less known, and the vulnerability of groups of more sensitive individuals, there are enough elements to justify prudence and application of the precautionary principle in the case of the cosmetic use of pesticides.⁴

CONCLUSION

1. There is a legitimate concern that chlorophenoxy herbicides – a class of chemicals that includes 2,4-D – may cause cancer. In keeping with the precautionary principle, the scarcity of data on the carcinogenicity of 2,4-D specifically should not be used as an excuse to postpone measures to protect public health and the environment.
2. 2,4-D exposure is also associated with a number of other serious health risks. Quebec's published methodology for determining which pesticides to ban includes consideration of endocrine disrupting potential, in addition to carcinogenicity. Although no international reference lists to identify endocrine disrupters were available at the time, the European Union has since developed a priority list of suspected endocrine disrupting chemicals which includes 2,4-D in Category II.
3. Federal registration of 2,4-D points to a weakness in the PMRA risk assessment and does not undermine the precautionary basis for Quebec's ban. Denmark, Norway,

⁴ Institut national de santé publique du Québec, *Réflexions sur l'utilisation des pesticides en milieu urbain*, December 2001 (as translated by the David Suzuki Foundation)

and Sweden have banned 2,4-D and a petition pending in the U.S. calls for all registrations of the chemical to be cancelled.

4. The ban on 2,4-D lawn chemicals in Quebec (and Ontario) is a legitimate exercise of the provincial power to impose regulations that are more restrictive of pesticide use than federal standards, in consideration of the public interest and general welfare.

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