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Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code

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SEEKING A REGULATORY CHILL IN CANADA: THE DOW AGROSCIENCES NAFTA CHAPTER 11 CHALLENGE TO THE QUÉBEC PESTICIDES MANAGEMENT CODE

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I. INTRODUCTION

In the early 1990s, during the heated public debate before its passage, and in the years following, many legal experts warned of the threat posed by the North American Free Trade Agreement[1] (NAFTA) to Canadian public interest policies.[2] These warnings focused on two

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The authors dedicate this Article to the hundreds of environmental and public health activists across Canada whose perseverance over many years has fundamentally changed the relationship that many Canadians have with the environment around their homes and in their communities, and whose efforts have eliminated needless exposure to pesticides for the benefit of present and future generations and the environment. The authors also wish to acknowledge Rizwan Khan, student-at-law at CELA, for research assistance on this Article.

[1] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[2] *See, e.g.*, PIERRE MARC JOHNSON & ANDRE BEAULIEU, THE ENVIRONMENT AND NAFTA:

overall concerns with NAFTA's Chapter 11 dealing with Investment and the Investor-State Dispute Settlement (ISDS) mechanisms. First, Chapter 11 grants foreign "investors"—that is foreign-based corporations operating in Canada—wide-reaching, quasi-constitutional commercial rights.[3] Second, despite health and environmental safeguards in NAFTA's preamble and Chapter 11 itself, the rights granted to investors would be interpreted and applied by internationally established, commercially focused tribunals. Therein, additional key aspects of Chapter 11 would be applied that provide for over-arching investor rights. Moreover, these tribunals would operate outside of the Canadian judicial system's existing public-interest and procedural safeguards, and could therefore allow bias in favour of foreign investors over the intent of both domestic law and public aspirations for legal reform.[4]

Concurrent with the NAFTA debate during the early 1990s, a unique step was taken in a small Québec town spawning a powerful grassroots movement across Canada. In 1991, following several years of citizen-led actions seeking reductions in pesticide use, a municipal by-law passed by Hudson, Québec, banned the cosmetic use of pesticides on private property. The term "cosmetic" refers to pesticide use solely for the purpose of influencing the appearance of lawns or gardens. It is also referred to as non-essential or unnecessary use. The Hudson by-law was challenged in *Spraytech v. Hudson*, which culminated ten years later in a landmark Supreme Court of Canada ruling upholding the by-law.[5]

After the *Hudson* decision, dozens of Hudson-style by-laws were passed across Canada limiting the cosmetic use of pesticides.[6] Québec continued to lead the effort against cosmetic pesticide use, passing legislation banning cosmetic pesticide use in 2003 that targeted certain

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UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW 26, 65 (1996); JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS 39 (1997); Michelle Swenarchuk, *Stomping on the Earth: Trade, Trade Law, and Canada's Ecological Footprints*, 5 BUFF. ENVTL. L.J. 197, 198-99 (1998).

[3] *See, e.g.*, Samrat Ganguly, Note, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power To Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 115-22 (1999).

[4] *See, e.g.*, David Schneiderman, *Canadian Constitutionalism and Sovereignty After NAFTA*, 5 CONST. F. 93, 94-98 (1994); Charles E. Reasons, *NAFTA and Inequality: A Canadian Perspective*, 5 CONST. F. 72, 74 (1994); Swenarchuk, *supra* note 2, at 201, 208-14; *see also* Michael W. Dunleavy, *The Limits of Free Trade: Sovereignty, Environmental Protection and NAFTA*, 51 U. TORONTO FAC. L. REV. 204, 235-39 (1993).

[5] 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241 (Can.).

[6] MIKE CHRISTIE, PRIVATE PROPERTY PESTICIDE BY-LAWS IN CANADA: POPULATION STATISTICS BY MUNICIPALITY (Dec. 31, 2010), *available at* www.flora.org/healthyottawa/BylawList.pdf.

pesticides and pesticide uses province-wide.[7] Ontario followed in 2008[8] with a more comprehensive province-wide cosmetic pesticide ban that prohibited the use and sale of hundreds of pesticide products while retaining the ability to use pesticides for, among other reasons, public health and agriculture protection. Currently, additional municipal by-laws or provincial laws focused on curtailing the cosmetic use of pesticides are in place or the subject of active debate across the country.

In 2008, NAFTA's Chapter 11 investor rights provisions intersected with this twenty-year effort to limit cosmetic pesticide use. Dow AgroSciences (Dow), a United States-based chemical manufacturer, gave notice that it would challenge the Québec Pesticides Management Code[9] arguing that Canada was in breach of the minimum standard of treatment and expropriation provisions of Chapter 11. These provisions, and subsequent sections of Chapter 11,[10] allow companies to sue countries if their expected returns on investment are reduced by government actions. Dow sought $2 million in compensation, based on an alleged lack of due process in the passage of Québec's law and damage to its investment in Canada.[11] Notably, the *Dow* claim was focused on its commercial interest in a single pesticide, 2,4-Dichlorophenoxyacetic acid (2,4-D). Though 2,4-D was among the pesticides heavily used for cosmetic purposes, the Québec law and many local by-laws in Québec and across Canada, as well as other provincial statutes, had to do with many more pesticides.

The *Dow* case was largely unsuccessful either in influencing the Québec by-law or in its widely understood purpose: to create a regulatory chill on further pesticide bans across Canada. Nevertheless, it is a valuable case study of how investors can attempt to use their rights under NAFTA to thwart the intent of existing laws or to undermine the passage of similar laws elsewhere in the same jurisdiction.

Lastly, the precautionary principle, which also had its beginnings in the 1980s and early 1990s, developed rapidly at the international level and in domestic legislation in many countries.[12] Notably, the *Dow* claim under Chapter 11 challenged the validity of Québec's application of the

[7] Pesticides Act, R.S.Q., c. P-9.3, r. 1 (Can.).

[8] Pesticides Act, R.S.O. 1990, c. P.11 (Can.).

[9] Pesticides Act, R.S.Q., c. P-9.3, r. 1 (Can.).

[10] NAFTA, *supra* note 1, arts. 1105, 1110, 1116-1117.

[11] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Notice of Intent To Submit a Claim to Arbitration Under Chapter Eleven of the North American Trade Agreement (Aug. 25, 2008), *available at* www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/dow-01.pdf.

[12] Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL. L. 221, 223-35 (1997).

precautionary principle.[13] This Article addresses the contrast between the *Dow* claim within NAFTA's narrow focus on commercial interests and the broader lens of longstanding and widespread public support in Canada for a precautionary response to cosmetic pesticide use.

II. COSMETIC PESTICIDE BANS IN CANADA

A. INTRODUCTION AND HISTORICAL CONTEXT

From the mid-1980s onward, a reliable sign of spring for the legal intake staff at the Canadian Environmental Law Association (CELA) was calls from the public about the spraying of pesticides in schools, parks, and playgrounds.[14] Typical callers were young mothers who saw this spraying as needlessly creating health risks for their children. The concerned mothers would ask why the spraying of pesticides was allowed and how they could stop it.[15] CELA helped these parents organize deputations to school boards, municipal parks departments, and municipal councils. In a more direct approach, one young mother requested the spraying schedule from the City of Toronto Parks Department in order to avoid the spraying since it made her children cough. When the trucks arrived at the park, the mother had the entrance blockaded with strollers.

As a result of many such efforts in Ontario and other provinces, slow but steady change occurred with many parks departments, school boards, and even entire municipalities agreeing to reduce or eliminate pesticide use on public lands. These efforts often focused on playgrounds or other areas used by children. In Québec, these changes increasingly occurred via municipal by-laws, as discussed further below.

Optimistically named "the turnaround decade," the 1990s dawned as a time of tremendous hope for addressing environmental problems.[16] In the build-up to the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, often incomplete but very troubling scientific evidence continued to mount about many

[13] *Dow AgroSciences*, Notice of Intent, ¶ 7.

[14] Statistical tracking of legal intake and summary advice calls and emails at CELA (as required as one condition of funding from Legal Aid Ontario) during the late 1980s and through the 1990s indicates dozens of calls per year about pesticide spraying in parks and schools, and on urban lawns, beginning in April. This is one of the most common issues raised in intake requests and provides a rationale for focusing on pesticide issues in CELA's organizational strategic planning.

[15] Our colleagues at the Sierra Legal Defense Fund, now Ecojustice Canada, and at the Toronto Environmental Alliance, can recall similar heralds of spring in Canada.

[16] *See* WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE (1987).

environmental woes. The Rio Declaration on Environment and Development[17] contained twenty-seven lofty principles about moving towards a more sustainable and equitable world, with Principle 15 focused on applying a precautionary approach in response to scientific uncertainty.

Also during the late 1980s and early 1990s, regulatory action was being taken in Canada and many other countries on a few highly toxic substances, often in response to evidence about cancer risks. These actions notably included progressively phasing out several organochlorine pesticides that would go on to dominate the first list of toxic substances named under the Stockholm Convention on Persistent Organic Pollutants.[18] Adding to the evidence about these notorious pesticides, rapidly growing literature indicated greater vulnerability in children to a much longer list of pesticides. These child health risks were comprehensively documented in a landmark U.S. National Research Council study[19] that influenced an overhaul of pesticide regulation in the United States and countries worldwide, including Canada.

Another emerging area of scientific research was endocrine disruption, a term that originated from a multidisciplinary meeting held in 1991 among experts in the fields of anthropology, ecology, comparative endocrinology, histopathology, immunology, mammalogy, medicine, law, psychiatry, psychoneuroendocrinology, reproductive physiology, toxicology, wildlife management, tumor biology, and zoology. A statement issued at the meeting raised alarm bells about reproductive and other health risks that might result from prenatal exposure to toxic substances, including pesticides.[20] Going well beyond the primary focus on cancer that then dominated regulatory toxicology, this rapidly expanding body of research was later summarized in the book *Our Stolen Future*[21] as it continues to be summarized online[22] and

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[17] United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug. 12, 1992), *available at* www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[18] UNITED NATIONS ENV'T PROGRAMME, STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS, Annex A, at 21 (May 22, 2001), *available at* www.pops.int/documents/convtext/convtext_en.pdf.

[19] COMM. ON PESTICIDES IN THE DIETS OF INFANTS & CHILDREN ET AL., PESTICIDES IN THE DIETS OF INFANTS AND CHILDREN 359-63 (1993).

[20] H. BERN ET AL., STATEMENT FROM THE WORK SESSION ON CHEMICALLY-INDUCED ALTERATIONS IN SEXUAL DEVELOPMENT: THE WILDLIFE/HUMAN CONNECTION 1 (1992), *available at* endocrinedisruption.org/assets/media/documents/wingspread_consensus_statement.pdf.

[21] THEO COLBORN ET AL., OUR STOLEN FUTURE: ARE WE THREATENING OUR FERTILITY, INTELLIGENCE, AND SURVIVAL? A SCIENTIFIC DETECTIVE STORY (1996).

[22] OUR STOLEN FUTURE, www.ourstolenfuture.org (last visited Nov. 20, 2013).

extensively in scientific literature.[23] This early recognition of endocrine disrupting chemicals initiated concerns about chronic low-level exposures to mixtures of chemicals. Currently, these concerns remain matters of extreme scientific complexity and challenge in the regulatory assessment of toxic substances[24] and consistently underscore public calls for reducing chemical exposures whenever possible.

It was in this context of Rio-inspired optimism for precautionary policy change and the expanding scientific evidence of cancer and other chemical exposure health risks that many Canadians supported the ban of cosmetic pesticide use.

B. HUDSON, QUÉBEC: THE MOUSE THAT ROARED[25]

In 1991, the Town of Hudson, Québec, adopted By-law 270,[26] which restricted the use of pesticides within its perimeter to specific locations and enumerated uses, and imposed fines ranging from $100 to $4,000 for its violation.[27] The by-law allowed continued, but limited pesticide use. For example, pesticides could be used by farmers or to protect public health.[28] But the by-law essentially banned pesticides for cosmetic uses in landscaping and lawn care.[29] The by-law was passed in response to public concerns regarding safety and the adverse effects of pesticide use.[30]

In 1992, the municipality charged two landscaping companies,

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[23] *See, e.g.*, Evanthia Diamanti-Kandarakis et al., *Endocrine-Disrupting Chemicals: An Endocrine Society Scientific Statement,* 30 ENDOCRINE REV. 293 (2009); R. Thomas Zoeller et al., *Endocrine-Disrupting Chemicals and Public Health Protection: A Statement of Principles from the Endocrine Society*, 2012 ENDOCRINOLOGY 4097; WORLD HEALTH ORG. & UNITED NATIONS ENV'T PROGRAMME, STATE OF THE SCIENCE OF ENDOCRINE-DISRUPTING CHEMICALS 2012 (Åke Bergman et al. eds., 2013), *available at* www.who.int/iris/bitstream/10665/78101/1/9789241505031_eng.pdf.

[24] ANDREAS KORTENCAMP ET AL., STATE OF THE ART REPORT ON MIXTURE TOXICITY: FINAL REPORT 7-165 (Dec. 22, 2009); European Parliament Resolution of 14 March 2013 on the Protection of Public Health from Endocrine Disrupters, EUR. PARL. DOC. P7_TA(2013)0091 (2013).

[25] LEONARD WIBBERLEY, THE MOUSE THAT ROARED (1955). This Cold War satirical novel prompted further satirical works in the same genre and ongoing usage of the book title to characterize David-and-Goliath-type political struggles.

[26] HUDSON, QUE., BY-LAW 270 (1991) (Can.).

[27] *Id.* art. 11.

[28] *Id.* art. 3.

[29] *Id.* art. 2.

[30] 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, ¶ 6 (Can.) ("The by-law responded to residents' concerns, repeatedly expressed since 1985."); *id.* ¶ 13 ("[T]he by-law was enacted by the Town in the public interest and in response to health concerns expressed by residents. The court noted that these concerns were recorded in the Town Council's meeting minutes and manifested themselves in letters to Council, as well as a petition with more than 300 signatures.").

Spraytech and Chemlawn, with unpermitted use of pesticides in contravention of the by-law.[31] The companies plead not guilty and asked the court to declare the by-law outside the Town's authority.[32] The Québec Superior Court denied the companies' motion for a declaratory judgment and upheld the validity of the by-law,[33] and the Québec Court of Appeal affirmed the ruling.[34] Nearly ten years after the by-law was enacted, the two landscaping companies appealed to the Supreme Court of Canada.[35]

A notable difference between the Hudson by-law and other efforts to control pesticide use was that the Hudson by-law included private property. Hudson's power to create the by-law derived from the Québec Cities and Towns Act.[36] Indeed, by the time the case reached the Supreme Court, over thirty-five similar municipal by-laws existed elsewhere in Québec. The very strong public sentiment in favour of these by-laws was epitomized in a high-profile campaign led by an articulate young cancer survivor, Jean-Dominic Lévesque-René. Diagnosed with Non-Hodgkin's lymphoma in 1994, Jean-Dominic spent his childhood and teenage years alongside many other activists in town hall meetings, organizing protests, and lobbying municipalities and provincial officials to ban cosmetic pesticide use.[37]

These actions, mostly by small municipalities in Québec, prompted the Toronto Environmental Alliance to seek CELA's advice as to whether similar powers existed in Ontario. A generic opinion[38] prepared in 1999 confirmed that Ontario municipalities had similar powers to pass pesticide control by-laws under the provincial Municipal Act.[39] Bolstered by this opinion, health and environmental organizations stepped up their lobbying efforts in many Ontario municipalities. While the organizations encountered sympathetic ears among many politicians, the oft-repeated response was the fear of lawsuits and the need to wait

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[31] *Id.* ¶ 7.

[32] *Id.*

[33] *Id.* ¶ 10.

[34] *Id.* ¶ 13.

[35] *Id.* ¶ 1.

[36] Cities and Towns Act, R.S.Q., c. C-19 (Can.).

[37] Michelle Lalonde, *Pesticide Fight Heads for Top Court: Lawn-Care Firms Challenging Municipal Ban on Controversial Chemicals*, THE MONTREAL GAZETTE, Dec. 4, 2000, at A1.

[38] Theresa McClenaghan, Ontario Municipal Pesticide By-Laws: Preliminary Legal Opinion for the Toronto Environmental Alliance (1999) (unpublished opinion) (on file with authors); *see also* Theresa McClenaghan, *Bill 111—Ontario's New Municipal Act and Pesticide By-law Powers,* 26 INTERVENOR (2001), *available at* www.cela.ca/article/hudson-quebec-pesticide-law/bill-111-ontarios-new-municipal-act-and-pesticide-law-powers.

[39] Municipal Act*,* 2001, S.O. 2001, c. 25 (Can.).

for the Supreme Court of Canada's decision on the Hudson by-law. CELA's later intervention in the *Hudson* case before the Supreme Court was primarily directed to bringing the implications of the case for other provinces to the Court's attention.[40]

C. THE SUPREME COURT OF CANADA'S DECISION IN *HUDSON*

In 2001, a unanimous decision by the Supreme Court of Canada upheld the trial and appellate courts' determination that the by-law was valid.[41] Multiple aspects of the *Hudson* decision are relevant to this Article's discussion of issues that arose in the *Dow* claim against the Québec Pesticides Management Code under Chapter 11. These aspects range from the procedural access and rights accorded to multiple interveners to the substantive and *obiter* reasons given by the Court.

1. Procedural Fairness

The Rules of the Supreme Court of Canada provide that any party may bring a motion for leave to intervene before a judge.[42] The test for intervention is set out in Rule 57, which provides that an intervention must be relevant, useful, and different from those of the other parties.[43] Essentially, the Supreme Court is looking to public interest interveners to help in the development of legal principles.[44] Interveners can assist the Court by explaining how a particular legal issue has implications in the broader public policy context and its potential to impact decisions in other cases or circumstances, which extend beyond the appeal before the Court.[45] Interveners can also aid the Court by bringing a group's expertise and special knowledge to bear on a particular legal issue.[46] The Court grants most applications for leave to intervene.[47] Once intervention

[40] TORONTO ENVTL. ALLIANCE ET AL., FACTUM OF THE INTERVENERS (Sept. 2000), *available at* s.cela.ca/files/uploads/ff_hudson.pdf.

[41] 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241 (Can.).

[42] Rules of the Supreme Court of Canada, SOR/2002-156, 55-59 (Can.), *amended by* SOR/2011-74 (applicable to intervention and governing motions for leave to intervene) (Can.); *see* Supreme Court Act, R.S.C. 1985, c. S-26 (Can.) (the enabling statute).

[43] Rules of the Supreme Court of Canda, SOR/2002-156. 57 (Can.), *amended by* SOR/2011-74 (Can.); *see* Supreme Court Act, R.S.C. 1985, c. S-26 (Can.) (the enabling statute).

[44] Emily White, *The Art of Intervention,* 21 NAT'L 27, 29 (2012), *available at* www.nationalmagazine.ca/Articles/October-November-2012/The-art-of-intervention.aspx.

[45] Benjamin R.D. Alarie & Andrew J. Green, *Interventions Before the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance*, 48 OSGOODE HALL L.J. 381, 400 (2010).

[46] White, *supra* note 44, at 29.

[47] Alarie & Green, *supra* note 45, at 400.

has been granted, an intervener is allowed to file a brief factum and make an appearance before the Supreme Court at the case hearing.[48]

CELA sought to intervene on its own behalf and also represented one individual and nine other groups ranging from community-based citizens groups to national organizations.[49] The Sierra Legal Defence Fund (SLDF), a national environmental organization now known as Ecojustice Canada, also intervened on behalf of the Federation of Canadian Municipalities, World Wildlife Fund Canada, and Nature-Action Québec Incorporated. CELA and SLDF collaborated closely so as to raise a complementary set of issues with the Court.

2. Substantive and Obiter Reasons for Denying the Appeal

The appellants in *Hudson* argued that the by-law was invalid and *ultra vires* on the grounds that it was not authorized under provincial enabling legislation, and it conflicted with federal and provincial laws related to pesticides.[50] Concerning the power delegated to municipalities to pass by-laws, the appellants argued that this delegated authority did not include the power to regulate the use of pesticides.[51]

CELA's *amicus* brief argued for the government's ability to legislate and create by-laws because these "are political activities, carried out by the elected representatives, based upon community concerns and standards, balancing a number of competing interests," in contrast to the appellant's argument that such measures had to be "wise scientific decisions."[52] The Supreme Court agreed with the arguments advanced by CELA and SLDF that the municipality legitimately relied upon the "general welfare" powers under Section 410 of the Cities and Towns Act, noting these more open-ended provisions "allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation."[53] Because such general grants of power are not accompanied by more specific grants (there being none in the Cities and Towns Act relating to

[48] *Id.* at 383.

[49] The interveners represented by CELA were the Canadian Environmental Law Association, Toronto Environmental Alliance, Sierra Club of Canada, Parents' Environmental Network, Healthy Lawns–Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee, and one individual, Dr. Merryl Hammond.

[50] 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, ¶¶ 7, 17, 24, 34 (Can.).

[51] *Id.* ¶¶ 12-13, 17, 34.

[52] TORONTO ENVTL. ALLIANCE ET AL., *supra* note 40, ¶ 26.

[53] *See Hudson,* 2 S.C.R. 241, ¶ 19.

pesticide use), the issue for the Court was whether general welfare provisions, absent a specific grant, could authorize By-law 270.[54]

The Supreme Court found that such open-ended provisions could indeed authorize by-laws outside of any specific grant of powers but noted as a limitation that the issue "must be closely related to the immediate interests of the community within [its] territorial limits" and agreed that this was the case for a by-law that concerned the use and protection of the local environment within the community.[55] Moreover, further concurring with arguments raised in CELA's *amicus* brief, the Supreme Court noted that similar by-law making powers exist in seven other provinces.

To the issue of the appellant's claim of conflict with provincial or federal statutes, throughout the decision, the Supreme Court again echoed the arguments advanced by CELA and SLDF.[56] The Supreme Court noted that federal pesticide legislation provides a registration process to address the import, export, manufacture, sale, packaging, and labeling of pesticides in Canada.[57] At the provincial level, pesticide law regulates permitting and licensing of vendors and commercial applicators or pesticides.[58] The municipal by-law was narrowly focused and imposed restrictions on pesticide application use within a specific geographic locale by applying legitimate powers to enact by-laws for the "general welfare" of the community in response to local challenges and concerns.[59] Thus, the Supreme Court held that the Hudson by-law did not occupy the same field as the provincial and federal regulatory framework.[60] Indeed, the court found that the by-law was in fact complementary to federal and provincial law and observed that, "[a]long with By-law 270, these laws establish a tri-level regulatory regime."[61]

In concluding its discussion on statutory interpretation, the Supreme Court accepted SLDF's argument that the preventative approach taken by the Town of Hudson to restrict the non-essential use of pesticides was consistent with the precautionary principle.[62] Noting the work of

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[54] *Id.* ¶ 52.

[55] *Id.* ¶¶ 53-54.

[56] *Id.* ¶¶ 18-20, 22-24, 27, 30, 35-39, 44-46, 48-49; *see also* JERRY V. DEMARCO, ASSESSING THE IMPACT OF PUBLIC INTEREST INTERVENTIONS ON THE ENVIRONMENTAL LAW JURISPRUDENCE OF THE SUPREME COURT OF CANADA: A QUANTITATIVE AND QUALITATIVE ANALYSIS, 30 S.C.L.R. (2d) 299, 321-24 (2005).

[57] *Hudson,* 2 S.C.R. 241, ¶ 35.

[58] *Id.* ¶¶ 36, 39.

[59] *Id.* ¶¶ 3, 23, 26-27, 49.

[60] *Id.* ¶ 31.

[61] *Id.* ¶ 39.

[62] *Id.* ¶ 31.

multiple scholars,[63] the Supreme Court stated in *obiter*, "there may be currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law."[64] Additionally, the Supreme Court noted, "in the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action."[65]

The *Hudson* decision exemplifies how public interest interveners can provide important assistance to the courts. The Supreme Court has explicitly acknowledged this influential role,[66] and it has been established qualitatively and quantitatively in an analysis of several cases before the Supreme Court between 1992 and 2004, including *Hudson*.[67] The analysis showed that the Supreme Court rarely indicates which aspects of its decisions interveners influence.[68] However, by carefully reviewing the full range of written interventions and supporting authorities and then comparing these materials to the Supreme Court's decisions, this analysis shows a profound influence. For example, the Supreme Court primarily relied upon those authorities introduced by the main parties, as would be expected.[69] However, for those authorities uniquely introduced by public interest interveners across seven different cases, the author noted that "[r]egardless of the reasons, it is quite clear that, judged from the perspective of unique authorities, interveners have indeed kept their promise of introducing useful and different submissions and have added immense value to the Court's jurisprudence."[70]

D. HUDSON-STYLE BY-LAWS PROLIFERATE ACROSS CANADA

The *Hudson* case was hailed as a major victory by environmental, health, and community groups.[71] Following the Supreme Court decision,

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[63] JAMES CAMERON & JULI ABOUCHAR, *The Status of the Precautionary Principle in International Law*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW 29 (David Freestone & Ellen Hey eds., 1996); McIntyre & Mosedale, *supra* note 12.

[64] *See Hudson,* 2 S.C.R. 241, ¶ 32 (quoting CAMERON & ABOUCHAR, *supra* note 63, at 30-31).

[65] *Id.* ¶ 32.

[66] Canadian Council of Churches v. Canada (Minister of Emp't & Immigration), [1992] 1 S.C.R. 236, ¶ 43 ("Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts.").

[67] DEMARCO, *supra* note 56, at 330.

[68] *Id.* at 301.

[69] *Id.* at 310.

[70] *Id.* at 311.

[71] CANADIAN ENVTL. LAW ASS'N, VICTORY FOR PESTICIDE REDUCTION AND LOCAL DEMOCRACY (June 28, 2001), *available at* www.cela.ca/newsevents/media-release/victory-

municipalities across the country were faced with a rise of public demand to enact similar pesticide by-laws. Many did so increasingly in larger cities. For example, Toronto undertook a scientific literature review and extensive public consultation that culminated in a Hudson-style by-law in 2003. After reviewing the evidence about pesticide risks,[72] Toronto's Medical Officer of Health supported a by-law concluding with language grounded in a precautionary approach that "when risks to human health are unnecessary or uncertain, the wisest course of action is to substitute safer alternatives and methods, rather than incurring risks that may prove unacceptable in the long run."[73] The involvement and support of progressive voices in the medical profession, from local physicians to officials in public health departments, to provincial and national organizations, was highly influential in the local and provincial campaigns that occurred following the Supreme Court ruling.

A strategic choice was made in numerous municipalities to avoid the chance of lawsuits and strictly follow the Hudson model. Toronto confirmed the wisdom of this approach when CropLife Canada, an association representing pesticide manufacturers, filed a lawsuit challenging the by-law. However, echoing the Québec Superior and Appeal Courts in *Hudson*, the Ontario Superior Court[74] and the Ontario Court of Appeal[75] up-held Toronto's by-law under Ontario's Municipal Act, citing the Supreme Court decision in *Hudson*. CropLife sought leave to appeal to the Supreme Court of Canada, but its application was dismissed given that the issues to be addressed were substantially similar to those in *Hudson*.[76] At present, there are over 170 pesticide by-laws in effect across Canada with more being actively discussed.[77]

E. PROVINCE-WIDE BANS IN QUÉBEC AND ONTARIO

Québec continued in the frontline of this movement. As a result of

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pesticide-reduction-and-local-democracy.

[72] TORONTO PUB. HEALTH, LAWN AND GARDEN PESTICIDES: A REVIEW OF HUMAN EXPOSURE & HEALTH EFFECTS RESEARCH (Apr. 2002), *available at* www.toronto.ca/health/pesticides/pdf/pesticides_lawnandgarden.pdf.

[73] TORONTO PUB. HEALTH, PLAYING IT SAFE: HEALTHY CHOICES ABOUT LAWN CARE PESTICIDES 1 (Apr. 2002), *available at* www.toronto.ca/health/hphe/pdf/playingitsafe.pdf.

[74] Croplife Canada v. Toronto (2003), 68 O.R. 3d 520 (Can. Ont. Sup. Ct. J.).

[75] Croplife Canada v. Toronto (2005), 75 O.R. 3d 357, *aff'd,* (2003) 68 O.R. 3d 520 (Can. Ont. C.A.).

[76] Croplife Canada v. Toronto (2005), 75 O.R. 3d 357, *leave to appeal to S.C.C. refused*, 31036 (Nov. 17, 2005) (Can.).

[77] CHRISTIE, *supra* note 6, at 1.

extensive public consultation beginning in 1998, Québec passed legislation banning certain pesticide uses on a province-wide basis.[78] The Pesticides Management Code,[79] enacted in 2003 but not implemented until 2006, prohibited the use and sale of thirteen active ingredients in insecticides, herbicides, and fungicides then typically used in lawn care, and specified a list of low-risk bio-pesticides allowed for use inside and outside child care centers and elementary and secondary schools.[80] As under the Hudson-style by-laws, golf courses were exempt, but requirements were put in place for them to develop pesticide reduction plans.[81]

Québec devised a screening method to decide which pesticides to include that involved comparing pesticides commonly used in lawn care with lists of chemicals associated with cancer or endocrine disruption. Regarding 2,4-D specifically, all forms of this pesticide were included in the ban because, as one of the chlorophenoxy herbicides, it had been classified as a possible human carcinogen by the International Agency for Research on Cancer.[82]

The main reason for the ban was to limit the harmful effects of pesticides on human health—especially on the health of children—and on the environment. This rationale flowed from the March 2002 recommendations of the Groupe de réflexionsur les pesticides en milieu urbain, a focus group organized to consolidate the results of public consultation and mandated to address means of reducing pesticide use for green space maintenance.[83] Their recommendations derived from two guiding principles—precaution and exemplary behavior. They noted that precaution was necessary since the toxicity of pesticides has yet to be thoroughly studied and thus they must be used carefully. Exemplary behavior would help contribute to changing habits through pesticide management in urban environments.

Québec officials also pointed to biomonitoring results in Québec children that showed ninety-eight percent of all children carried pesticides in their bodies from various sources (e.g. food, water), but

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[78] *The Pesticides Management Code*, GOV'T OF QUÉBEC, www.mddep.gouv.qc.ca/pesticides/permis-en/code-gestion-en/#why (last updated Mar. 2011).

[79] Pesticides Act, R.S.Q., c. P-9.3, r. 1 (Can.).

[80] *Id.* arts. 25-26, 31-33, scheds. I-II.

[81] *Id.* arts. 73-74.

[82] INT'L AGENCY FOR RESEARCH ON CANCER, AGENTS CLASSIFIED BY THE IARC MONOGRAPHS 11 (July 16, 2013), *available at* monographs.iarc.fr/ENG/Classification/ClassificationsAlphaOrder.pdf.

[83] GROUPE DE REFLEXIONSUR LES PESTICIDES EN MILIEU URBAIN, RAPPORT [REPORT] Mar. 2002 (Can.), *available at* www.mddep.gouv.qc.ca/pesticides/reflexion/rapport-pesticide.pdf. Note this document is only available in French.

found lawn-care herbicides only in those children living in municipalities without a pesticide ban.[84] More generally, the precautionary foundation of the Québec law derived from the opinion of public health experts who stated in an earlier report from the Québec National Public Health Institute that based on "data which are presently available, the fact that certain aspects remain poorly understood, and the increased vulnerability of certain groups provide ample reason to justify taking a prudent approach and applying the precautionary principle with respect to pesticide use."[85]

In 2007, a newly elected Liberal government in Ontario confirmed an election promise that it was committed to enacting legislation for a province-wide ban on cosmetic pesticide use. Calling for this law was a broad-based coalition of health and environmental organizations,[86] many of whom had documented the greater risk to children from pesticides,[87] including a comprehensive literature review by the Ontario College of Family Physicians.[88] Repeated opinion polling[89] showed overwhelming public support for the ban, and after two years of extensive public consultation Ontario passed the most comprehensive legislation in North America. The law was passed in June 2008 but slated for proclamation in

[84] CARACTÉRISATION DE L'EXPOSITION AUX PESTICIDES UTILISÉS EN MILIEU RESIDENTIAL CHEZ DES ENFANTS QUÉBÉCOIS AGES DE 3 Â 7 ANS [CHARACTERIZATION OF EXPOSURE TO PESTICIDES USED IN RESIDENTIAL ENVIRONMENTS IN QUÉBEC CHILDREN AGES 3 TO 7 YEARS] Aug. 2004 (Can.), *available at* www.inspq.qc.ca/pdf/publications/319-CaracterisationPesticidesEnfants.pdf. Note this document is only available in French.

[85] INSTITUT NATIONAL DE SANTE PUBLIQUE DU QUÉBEC, THOUGHTS ON URBAN USE PESTICIDES 8 (Dec. 2001), *available at* www.inspq.qc.ca/pdf/publications/206-ThoughtsOnUrbanUsePesticides.pdf.

[86] CANADIAN ASS'N OF PHYSICIANS FOR THE ENV'T ET AL., HEALTH AND ENVIRONMENTAL ORGANIZATIONS SUPPORT ONTARIO-WIDE BAN ON COSMETIC PESTICIDES (Jan. 2008), *available at* s.cela.ca/files/uploads/ONPesticideBanStatement.pdf.

[87] CHILDREN'S HEALTH PROJECT, ENVIRONMENTAL STANDARD SETTING AND CHILDREN'S HEALTH (May 25, 2000), *available at* s.cela.ca/pdf/CHP.pdf.

[88] THE ONTARIO COLL. OF FAMILY PHYSICIANS, SYSTEMATIC REVIEW OF PESTICIDE HUMAN HEALTH EFFECTS 167-69 (Apr. 23, 2004), *available at* www.ocfp.on.ca/docs/pesticides-paper/pesticides-paper.pdf?sfvrsn=1.

[89] *See, e.g.*, Press Release, Can. Ass'n of Physicians for the Envt., As Gov't Prepares Regs, Health and Enviro Groups Want End to Spraying (Sept. 4, 2008), *available at* s.cela.ca/files/uploads/MR080904_pesticidepoll.pdf; ORACLE POLL RESEARCH, SURVEY REPORT (Feb. 2007), *available at* www.flora.org/healthyottawa/PFO%20CAPE%20Ont%20Poll%202007.pdf. Numerous additional polls were conducted in Ontario municipalities during debates about pesticide by-laws, with results consistently showing 70% and higher levels of support for bans on cosmetic pesticide use. Results of additional polls with similar results conducted at the municipal or provincial level from across Canada are summarized on the Coalition for Healthy Ottawa's website. *Pesticide Polls and Surveys Across Canada*, THE COALITION FOR A HEALTHY OTTAWA, www.flora.org/healthyottawa/pesticide-ban-public-opinion-poll.htm (last updated May 24, 2012).

the following year after the creation of implementing regulations. It came into force on Earth Day, April 22, 2009, banning the use and sale of hundreds of pesticides end-use products. The Ontario legislation stayed within the Hudson by-law model of an overall ban with exceptions to allow the use of pesticides for limited reasons such as public health protection,[90] and to allow for phased pesticide reduction on golf courses.[91]

F. THE RE-EVALUATION OF 2,4-D

The Québec[92] and Ontario[93] bans included the pesticide 2,4-D, in all its various end-product uses for lawn care. During the three-year implementation phase for the Québec law lasting from 2003 to 2006, the province committed to review its inclusion of 2,4-D in light of its ongoing re-evaluation,[94] which began in 2004[95] by the Pest Management Regulatory Agency (PMRA), a department of Health Canada responsible for pesticide registration.

In May 2008, PMRA finalized its re-evaluation process and allowed the continued sale and use of certain products containing 2,4-D, including those used for lawn and turf.[96] Revisions to label requirements addressed worker health and safety issues as well as environmental releases.[97] The decision also included a data call-in requirement for a developmental neurotoxicity study and a multi-generation reproductive study, and noted "additional protective measures have been incorporated

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[90] Pesticides Act, R.S.O. 1990, c. P.11, art. 7.1 (Can.).

[91] Pesticides Act, R.S.O. 1990, c. P.11, arts. 7.1(2), 35(1) (Can.); Pesticides Act, R.O. 63/09, arts.18-20 (Can.).

[92] Pesticides Act, R.S.Q., c. P-9.3, r. 1 (Can.).

[93] Pesticides Act, R.O. 63/09, arts. 4(5), 16 (Can.); ONTARIO MINISTRY OF THE ENV'T, CLASS 9 PESTICIDES 1 (June 28, 2013), *available at* www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@category/@pesticides/documents/natived docs/stdprod_080203.pdf.

[94] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Notice of Arbitration, ¶ 29 (Mar. 31, 2009), *available at* www.naftaclaims.com/Disputes/Canada/Dow/Dow-Canada-NOA.pdf ("In the March 5, 2003 news release announcing the Code, Québec stated that: Due to the continuing uncertainty about their harmfulness herbicides made up of active ingredients, 2,4-D, MCPA and Mecoprop will continue to be prohibited for precautionary reasons until the availability of the products' re-evaluation results by recognized organizations.").

[95] HEALTH CANADA PEST MGMT. REGULATORY AGENCY, RE-EVALUATION OF THE LAWN AND TURF USES OF 2,4-D, PROPOSED ACCEPTABILITY FOR CONTINUING REGISTRATION – PACR 2005-01 (Feb. 21, 2005).

[96] HEALTH CANADA PEST MGMT. REGULATORY AGENCY, RE-EVALUATION DECISION: (2,4-DICHLOROPHENOXY) ACETIC ACID [2,4-D] (May 16, 2008).

[97] *Id.* at 1, 3, 6-7, 49-59.

into the risk assessment to account for this data gap."[98] The United States Environmental Protection Agency (EPA) had come to a similar conclusion in 2005 about allowing continued use of 2,4-D, but also noted that concern existed about the potential for endocrine disruption and a lack of studies to specifically assess 2,4-D's endocrine disruption potential.[99]

Despite the results of PMRA's re-evaluation of 2,4-D, both Québec and Ontario maintained their approach of banning this pesticide for cosmetic purposes.[100] The legislative authority to do so is clear in that provincial law may be more, but not less, restrictive than federal law dealing with the same matter, so long as it does not conflict with the intent of federal law.[101] As noted above, this provincial sphere of authority was discussed in detail in the Supreme Court's ruling in *Hudson*, where the Court described provincial legislation as complementary to federal and municipal regulation of pesticide use and establishing a "tri-level regulatory regime."[102]

G. FROM THE GRASSROOTS TO THE SUPREME COURT AND BACK AGAIN

In summary, for more than fifteen years diverse civil society groups in Canada sought and obtained precautionary public policy support to reduce health and environmental risks from the non-essential use of pesticides.[103] While 2,4-D often received the most attention throughout this debate,[104] the bans were never intended to be confined to this single pesticide. Through democratic action at the local level, in town hall meetings, before municipal councils and committees, in public education workshops and more, these groups achieved significant public policy

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[98] *Id.* at 8.

[99] U.S. ENVTL. PROT. AGENCY, REREGISTRATION ELIGIBILITY DECISION FOR 2,4-D (June 2005), *available at* www.epa.gov/oppsrrd1/REDs/24d_red.pdf.

[100] *See supra* Part II.D-E.

[101] *See* 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, ¶¶ 11, 16-19, 26, 28-29, 35, 37-39 (Can.).

[102] *Id.* ¶ 39.

[103] *See supra* Part II.A-B, D-E; *see also* Kathleen Cooper & Theresa McClenaghan, *Ban Stands: Canadian Municipalities Have the Power To Restrict Pesticide Use Thanks to Hudson Québec and the Supreme Court*, 31 ALTERNATIVES J. 2, 23 (2005).

[104] *See, e.g.*, Letter from Can. Envt'l Law Ass'n et al. to Pest Mgmt. Regulatory Agency (Apr. 22, 2005), *available at* s.cela.ca/files/uploads/508_2_4_D.pdf; Response to Consultation, Beyond Pesticides (Washington, D.C., on behalf of 51 organizations), 2,4-Dichlorophenoxyacetic Acid Risk Assessment, Docket ID No. OPP-2004-0167 (Mar. 4, 2005) (on file with authors); Meg Sears et al., *Pesticide Assessment: Protecting Public Health on the Home Turf*, 11(4) PAEDIATRICS & CHILD HEALTH 229, 233 (Apr. 2006).

changes followed by the passage of local by-laws restricting the use of pesticides on private property.[105] The groups also pushed for and participated in multi-year, multi-stakeholder consultation processes with a view to obtaining province-wide bans.[106]

Likewise in the courts, particularly in Canada's highest court, procedural rights enabled public interest organizations and citizens to bring much broader considerations of public policy than just the arguments advanced by the pesticide companies in *Hudson*.[107] The Supreme Court of Canada was clearly influenced by the submissions made by the public interest interveners, and the extent of their influence is reflected in "several passages in the judgment ranging from the contextual statements (such as the opening passage) to the heart of the legal question on appeal (such as the appropriate conflict test)."[108] The judgment set a precedent in guiding municipalities on how they may legitimately use municipal powers to protect health and environment and, more broadly, incorporated a public interest perspective by interpreting By-law 270 in a manner that was consistent with international law's precautionary principle.[109]

III. DOW'S NAFTA CHALLENGE TO QUÉBEC'S PESTICIDES MANAGEMENT CODE

A. INTRODUCTION AND NAFTA CONTEXT

In the years following the Supreme Court decision in *Hudson*, municipal by-laws were proliferating across Canada. Specifically, Québec and Ontario were considering provincial statutes, and the multi-year process continued to re-evaluate 2,4-D. The parallel story unfolding in the late 1990s and early 2000s was the use of NAFTA Chapter 11's ISDS mechanism to make claims challenging environmental and health regulations. Analysts pointed to "the unexpectedly broad and aggressive use of this process to challenge public policy and public welfare

[105] *See supra* Part II.B, D.

[106] *See supra* Part II.E; *see, e.g.*, Press Release, Can. Envt'l Law Ass'n, CELA in Cheering Section for Province-Wide Ban on Non-Essential Pesticides (Aug. 30, 2007), *available at* www.cela.ca/newsevents/media-release/cela-cheering-section-province-wide-ban-non-essential-pesticides.

[107] *See* DEMARCO, *supra* note 56, at 321-24.

[108] *Id.* at 324.

[109] *Id.* at 324; *see also* Arlene Kwasniak & Alison Peel, *Municipal Regulation of Pesticide Use*, 16(3) ENVIRONMENTAL LAW CENTRE OF ALBERTA NEWS BRIEF (2001), *available at* www.elc.ab.ca/pages/Publications/NewsBrief.aspx?id=476.

measures, including environmental measures."[110] Trade scholars commented on the significant imbalance between private investors' rights and the protection and promotion of the broader public goods under NAFTA's Chapter 11 regime.[111] They noted that this disparity is exacerbated by the lack of transparency and public access to the process, the limited opportunity for public participation, and the cloud of secrecy over the actual adjudication of arbitration proceedings.[112]

In contrast, investors contemplating initiating a claim face virtually no constraints other than to follow the procedural requirement set out in Section B of Chapter 11.[113] Filing a Notice of Intent to arbitrate, which triggers a consultation process, commences the investor claim process. The investor is then required to file the actual Notice of Arbitration. An investor may submit a dispute to arbitration through one of the two methods provided by the International Centre for the Settlement of Investment Disputes (ICSID) or through the processes provided by the United Nations Commission on International Trade Law (UNCITRAL). Thus, when the claim is issued, a process selected by the investor governs the arbitration.[114] For many years, there was no legal obligation on governments to make these notices public,[115] though policy has changed in this area, as discussed in more detail below with respect to the adjudication of NAFTA disputes. The only mandatory notification requirement is that a claimant notify the NAFTA Commission Secretariat of its request to convene a panel.[116]

It is noteworthy that, for almost a century prior to NAFTA, ISDS mechanisms had existed in bilateral investment agreements between developed and developing countries.[117] Uniquely, NAFTA was the first

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[110] HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT 5 (1999), *available at* www.iisd.org/pdf/nafta.pdf.

[111] HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS (2001), *available at* www.iisd.org/pdf/trade_citizensguide.pdf; Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 147-49 (2002).

[112] Tollefson, *supra* note 111, at 148-49, 162-65; *see also* MANN, *supra* note 111, at 20.

[113] MANN, *supra* note 111, at 39.

[114] *Id.* at 37.

[115] *Id.* at 42; *see also* NAFTA FREE TRADE COMM'N, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (July 31, 2001), *available at* www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf [hereinafter NOTES OF INTERPRETATION].

[116] Tollefson, *supra* note 111, at 163.

[117] KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY 40 (2009).

to contain ISDS provisions applying to more than one developed country.[118] Such provisions originated to protect investments from less developed judicial systems prevalent in developing countries,[119] or otherwise politically unstable countries[120] where investors demanded the security of a neutral and binding international tribunal before which they could advance claims against government actions that resulted in loss, or substantial loss, of their investment value.[121]

Under NAFTA, ISDS claims have proliferated against Canadian public interest measures. By January 2013, thirty-four NAFTA investor claims had been commenced against Canada. Close to half of those claims were related to environmental and health policy measures (see Table 1). Commenting on this trend as early as 1999, analysts noted that "the provisions designed to ensure security and predictability for the investors have now created uncertainty and unpredictability for environmental (and other) regulators."[122]

There is rich irony here. The ISDS mechanism originated as a means to protect the rights of investors from unfair or arbitrary action by countries with less developed judicial systems.[123] However, in Canada, the NAFTA ISDS arbitration mechanism can undermine domestic public interest regulation[124] while providing the public with greatly limited recourse to engage in these disputes[125] when compared to the sophisticated procedural tools available to them within Canada's modern judicial system.

Before turning to the particulars of the Dow claim, the following section reviews the procedures for adjudication of Chapter 11 disputes and associated procedural reform efforts to address criticisms about lack of public access to proceedings that concern public interest regulation. It is followed by brief summaries of two aspects of NAFTA: the nature of environmental and health protections contained therein; and two of Chapter 11's substantive rights, namely those relied upon by Dow in its Notice of Arbitration: Articles 1105 and 1110.

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[118] Francis C.R. Price, *Public Good: Private Gain. NAFTA, Chapter 11*, 26 LAWNOW 36, 36 (Dec. 1, 2001).

[119] TIENHAARA, *supra* note 117, at 48.

[120] MANN, *supra* note 111, at 5, 7.

[121] *Id.*

[122] MANN & VON MOLTKE, *supra* note 110, at 5.

[123] MANN & VON MOLTKE, s*upra* note 110, at 48; TIENHAARA, *supra* note 117, at 48.

[124] Gus Van Harten, *Reforming the NAFTA Investment Regime*, *in* BOS. UNIV., THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA 43-46 (Nov. 2009), *available at* www.bu.edu/pardee/files/2009/11/Pardee-Report-NAFTA.pdf.

[125] *Id.* at 47-48.

1. Adjudication of Chapter 11 Disputes

A three-member tribunal adjudicates investor claims under Chapter 11. The disputing parties, that is, the investor and the state, each nominate a member while a third neutral arbitrator is appointed on the agreement of both Parties or by the Secretary General of the ICSID from the ICSID Panel of Arbitrators.[126] Although this is the norm in commercial arbitration, critics have charged that Chapter 11 "is problematic when issues of public welfare and public policy are placed against private interests."[127] The ability of each Party to choose its arbitrator is also a significant difference between domestic courts and the arbitration process.[128] Tribunal members appointed to adjudicate disputes generally tend to have a commercial law background, leading to concerns that arbitrators may lack the necessary expertise to consider the broader public policy implications that arise in the context of Chapter 11 claims.[129] Moreover, tribunal members are required to interpret the rights granted to investors within Chapter 11 in the context of NAFTA's objectives, which are purely commercial, set forth in Article 102.

> Article 102: Objectives
> 1. The objectives of this Agreement . . . are to:
> a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
> b) promote conditions of fair competition in the free trade area;
> c) increase substantially investment opportunities in the territories of the Parties;
> d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
> e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
> f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.[130]

Since NAFTA's adoption, efforts have been made to improve transparency of the decisionmaking process in response to claims that Chapter 11 is biased in favour of the commercial rights of foreign

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[126] NAFTA, *supra* note 1, art. 1125.
[127] MANN, *supra* note 111, at 38-39.
[128] *Id.*
[129] *Id.* at 39.
[130] NAFTA, *supra* note 1, art. 102.

investors.[131] One scholar described the context of these reforms as follows: "[T]he three NAFTA governments have accepted the public interest arguments that lawsuits against our governments involving large sums of public money, which also concern public regulations and government decisions, may not be treated the same, procedurally, as truly private merely commercial disputes between corporate actors."[132]

Reform efforts of the NAFTA governments have included measures related to improving public access to Chapter 11 tribunals in three areas (access to tribunal documents, participation in tribunals, and observation of tribunal proceedings) as follows:

- In August 2001, the NAFTA Free Trade Commission (FTC) issued Notes of Interpretation on Chapter 11 committing NAFTA governments to make public all documents submitted to or issued by Chapter 11 tribunals, except in limited circumstances.[133] This FTC guidance also addressed the interpretation of minimum standard of treatment to be accorded foreign investors (as discussed further below).
- In October 2004, the FTC issued a statement with recommendations for non-disputing party participation, which gives explicit support for admitting non-disputing parties as *amici curiae*.[134]
- In 2003 and 2004, NAFTA parties also committed to making NAFTA arbitrations open to the public.[135]

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[131] Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter,* 36 VAND. J. TRANSNAT'L L. 37, 48 (2003).

[132] MICHELLE SWENARCHUK, THE NAFTA INVESTMENT CHAPTER: EXTREME CORPORATE RIGHTS 5 (June 11, 2003), *available at* s.cela.ca/files/uploads/451nafta.pdf.

[133] NOTES OF INTERPRETATION, *supra* note 115.

[134] NAFTA FREE TRADE COMM'N, STATEMENT OF THE FREE TRADE COMMISSION ON NON-DISPUTING PARTY PARTICIPATION (Oct. 2004), *available at* www.naftaclaims.com/Papers/Nondisputing-en.pdf [hereinafter FTC STATEMENT].

[135] Press Release, Office of the U.S. Trade Representative, NAFTA Commission Announces New Transparency Measures (Oct. 7, 2003), *available at* www.ustr.gov/about-us/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen; *see also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, NAFTA FREE TRADE COMMISSION JOINT STATEMENT—"A DECADE OF ACHIEVEMENT" (July 16, 2004), *available at* www.ustr.gov/archive/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html; HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., THE FREE TRADE COMMISSION STATEMENTS OF OCTOBER 7, 2003, ON NAFTA'S CHAPTER 11: NEVER-NEVER LAND OR REAL PROGRESS? 3 (2003), *available at* www.iisd.org/pdf/2003/trade_ftc_comment_oct03.pdf. Mann notes that the statements released separately by the U.S. and Canada are not binding on Tribunals. Previous Tribunals, including the Methanex tribunal, have ruled that without the arbitrating parties consent the process cannot be open

The second of these reforms, the FTC interpretative statement on Chapter 11,[136] provides guidance on when a tribunal is empowered to accept an *amicus curie* submission. These include whether the submissions would truly assist the tribunal in reaching a decision, whether the submission would address matters within the scope of the dispute, whether the *amicus* has demonstrated a significant interest in the dispute, and whether there is a public interest in the dispute.[137]

Reform efforts have also occurred within the ICSID,[138] which resulted in the adoption of Arbitration Rules on transparency and *amicus* submissions in 2006.[139] Under the UNCITRAL and other rules, the tribunal's power to accept *amicus* briefs is part of a more general discretion to conduct the proceeding as it deems appropriate in order to do justice in each instance.[140] The UNCITRAL Working Group on Arbitration and Conciliation is preparing a legal standard on transparency for inclusion in its rules, rather than merely in its guidelines.[141] This standard aims to make important information and documents available early in the arbitral proceedings, for hearings to be held in public where possible, and to allow third parties to make submissions in the proceedings.[142]

These reforms have unevenly improved the situation by removing, to some extent, the shroud of secrecy surrounding NAFTA tribunal

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to the public. Only an amendment to NAFTA could create a legally binding requirement for arbitrations to be open to the public. Such a legal requirement is different from acceptance of *amicus* briefs, which a tribunal can do without the consent of either or both the arbitrating parties. *Id.* at 3.

[136] FTC STATEMENT, *supra* note 134.

[137] *Id.* ¶ B6.

[138] Ignacio Torterola, *The Transparency Requirement in the New UNCITRAL Arbitration Rules: A Premonitory View,* INVESTMENT TREATY NEWS, Sept. 23, 2010, *available at* www.iisd.org/itn/2010/09/23/the-transparency-requirement-in-the-new-uncitral-arbitration-rules-a-premonitory-view/.

[139] INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATION AND RULES 115, 117, 122 (Apr. 2006), *available at* icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[140] ADVOCATES FOR INT'L DEV., AMICUS CURIAE & INVESTMENT ARBITRATIONS: PART TWO 4 (Feb. 29, 2012), *available at* a4id.org/sites/default/files/user/Amicus%20Curiae%20Legal%20Guide%20Part%20Two%20LG.pdf

[141] U.N. Comm'n on Int'l Trade L., Rep. of Working Group II (Arbitration and Conciliation) On Its 58th Sess., Feb. 4, 2013-Feb. 8, 2013, ¶¶ 15-94, U.N. Doc. A/CN.9/765, *available at* daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/808/19/PDF/V1380819.pdf?OpenElement. The Working Group has completed its third reading of the rules on transparency and produced a revised draft of the rules on transparency of the UNCITRAL Arbitration Rules. Under Articles 3, 4 and 6, the new rules require an arbitral tribunal, subject to certain conditions, to make documents available to the public, facilitate public access to hearings, and allow the participation of third persons.

[142] ADVOCATES FOR INT'L DEV., *supra* note 140, at 6.

proceedings. However, tribunals maintain broad discretion to allow greater public access including whether to accept *amicus* briefs. This discretion remains notwithstanding ICSID Rule 37(2)[143] or the FTC recommendations[144] concerning procedures for the participation of non-disputing parties.

The first *amicus* brief accepted by a NAFTA tribunal was in *Methanex v. U.S.* in 2001, a case that provided an important first step towards increasing transparency and access to NAFTA tribunal proceedings.[145] Since *Methanex*, there have been four NAFTA tribunals that addressed *amicus curiae* applications, all operating under UNCITRAL Arbitration Rules[146] as well as applying the criteria found in the FTC statement on non-disputing party participation.[147] These included tribunals in *Merrill & Ring Forestry v. Canada; Glamis Gold, Ltd. v. U.S.; Grand River Enterprises Six Nations v. U.S.;* and *Apotex v. United States*. In all but one, *Apotex v. U.S.*, the *amicus* request was denied.[148]

While there is now a well-established precedent for the public to participate in Chapter 11 arbitration through the *amicus* process, this right remains subject to the discretion of the panel and is determined on a case-by-case basis.[149] Moreover, the extent to which the public will be able to gain complete access to documents filed by the Parties to the arbitration proceedings is unclear. To date, there is no formal guideline governing the *amicus* process beyond the brief FTC statement noting recommendations for tribunal procedures in accepting written submissions and the ICSID Arbitration Rule 37 regarding submissions of non-disputing parties.[150]

Commentators note that in order to allow a full hearing, including public interest issues, there should be a requirement for panels to accept

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[143] INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES, *supra* note 139, at 117.

[144] FTC STATEMENT, *supra* note 134.

[145] HOWARD MANN, INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES, THE FINAL DECISION IN METHANEX V. UNITED STATES: SOME NEW WINE IN SOME NEW BOTTLES 11-13 (Aug. 2005), *available at* www.iisd.org/pdf/2005/commentary_methanex.pdf; *see also* FTC STATEMENT, *supra* note 134.

[146] UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES (AS REVISED IN 2010) (2011), *available at* www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[147] FTC STATEMENT, *supra* note 134.

[148] Sarah Schadendorf, *Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations,* 1 TRANSNAT'L DISP. MGMT. 1, 6 (2013).

[149] FTC STATEMENT, *supra* note 134, ¶¶ A1, B6.

[150] MANN, *supra* note 111, at 45; *see also* FTC STATEMENT, *supra* note 134.

amicus curiae submissions.[151] As well, in order to achieve greater consistency than that currently provided by the NAFTA ad hoc tribunals, it has long been suggested, though not acted upon, that a permanent review panel be established.[152] This review panel would specialize in the construction and interpretation of NAFTA provisions[153] and provide binding precedents.[154]

Overall, these reforms, and suggested reforms, have not changed the fact that public participation in the Chapter 11 arbitration proceedings remains generally limited to the filing of *amicus curiae* briefs, at the discretion of the tribunal, in contrast to broader rights and proceedings available before domestic courts. Nor have these reforms changed the fact that public interest, environmental, and health measures continue to be targeted by foreign investors under Chapter 11, as illustrated by the *Dow* claim and other similar claims, as summarized in Table 1.

2. Chapter 11 Overrides Environment and Health Measures in NAFTA

Despite the fact that NAFTA contains provisions that appear to ensure a government's ability to protect the environment and public health, namely within NAFTA's preamble and Articles 1101 and 1114, these are trumped by other provisions to protect investor rights.

Moreover, NAFTA provisions must be interpreted according to relevant international law rules of treaty interpretation as elaborated in the Vienna Convention on the Law of Treaties. These rules require that when interpreting the substantive provisions of treaties, like NAFTA, one must consider the object and purpose of the treaty, which in the case of NAFTA are purely commercial, as well as the treaty's context.[155] The NAFTA preamble, having less legal force than the body of the agreement, includes resolutions to "undertake each of the preceding [liberalizing goals] in a manner consistent with environmental protection and conservation; preserve their flexibility to safeguard the public

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[151] Stephen J. Byrnes, *Balancing Investor Rights and Environmental Protection in Investor-State Dispute Settlement Under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 U.C. DAVIS BUS. L.J. 103, 127 (2007).

[152] *Id.* at 103.

[153] INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES, POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION, Annex, at 3 (Oct. 22, 2004), *available at* icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf (stating that an ICSID appellate body would have to be composed of "persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties.").

[154] *Id.*; *see also* Byrnes, *supra* note 151.

[155] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 115 U.N.T.S. 331.

welfare; promote sustainable development; [and] strengthen the development and enforcement of environmental laws and regulations."[156]

NAFTA also contains Non-Precluded Measures clauses in Article 1101(4) for public health measures and in 1114(1) for environmental protection measures. These articles carve out any "measure . . . appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns"[157] from liability. One scholar notes that Article 1114 "explicitly reserves each nation's sovereign right to adopt laws or policies of general application controlling or regulating or restricting investments so as to preserve or protect the environment."[158]

However, in order to benefit from these provisions' protection, the measures must be "otherwise consistent with this Chapter [11]."[159] As a result, Articles 1101 and 1114 have not effectively shielded many public interest measures, nor deterred investors from bringing claims. Rather, as discussed further below, the interpretation and application of other Chapter 11 substantive rights, provided for in Articles 1105 and 1110, can threaten environmental and public health measures.

3. Minimum Standard of Treatment—Article 1105

Investors' legitimate expectations are incorporated into their Claims for Arbitration and are considered by NAFTA tribunals to determine if a measure meets the Chapter 11 minimum standard of treatment provision found in Article 1105.[160] The legal test established for Article 1105, although vague and not easily definable, broadly requires determining whether a government measure was developed according to due process, with transparency, in good faith, and according to natural justice.[161] In short, Article 1105 is meant to protect an international investment from arbitrary government measures.[162] Legitimate investor expectations are

[156] NAFTA, *supra* note 1, pmbl.

[157] NAFTA, *supra* note 1, art. 1114(1).

[158] Sanford E. Gaines, *Environmental Policy Implications of Investor-State Arbitration Under NAFTA Chapter 11,* 7 INT'L ENVTL. AGREEMENTS: POL., L., ECON.171, 175 (2007).

[159] NAFTA, *supra* note 1, art. 1114(1).

[160] IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 37, 165-69 (May 11, 2008); *see also* Glamis Gold, Ltd. v. United States, NAFTA/ICSID, Award, ¶ 561 (June 8, 2009), *available at* italaw.com/documents/Glamis_Award.pdf.

[161] S*ee Glamis Gold, Ltd.*, Award.

[162] Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-)Construction of NAFTA Chapter 11,* 25 NW. J. INT'L L. & BUS. 279, 287 (2005); *see also* NOTES OF INTERPRETATION, *supra* note 115.

an element of this legal test.[163] These expectations also inform the test's other components, which include:

- How stable and predictable does the investor consider the host party's legal framework to be;
- Does the investor consider the conduct to be arbitrary or discriminatory;
- Does the investor consider the measure to have been put in place with transparency and procedural fairness; and
- Does the investor consider the measure to be reasonable.[164]

4. Expropriation—Article 1110

NAFTA's Chapter 11 expropriation provision in Article 1110 anticipates the possibility that government action could be tantamount to direct expropriation, where government takes possession of private property in exchange for compensation. The provision provides that governments are allowed to expropriate an investment only: (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance with due process of law and Article 1105(1), and (d) on payment of compensation.[165] If these criteria are not met, an investor will have a right to claim compensation.

The expropriation provision covers both direct and indirect expropriation. Direct expropriation occurs when the government takes possession of private property in exchange for compensation. Indirect expropriation is generally accepted by international investment tribunals, such as those established under Chapter 11, to occur when regulations have the effect of substantially reducing the value of property. In other words, the effect of indirect expropriation is considered similar to the effect of a direct expropriation. However, a measure is not considered an indirect expropriation if it results from *bona fide* regulation within the regulatory powers of a state, even if economic injury results.[166] To determine whether a general measure amounts to an indirect

[163] *See Glamis Gold, Ltd.*, Award, ¶¶ 619-22.

[164] TUDOR, *supra* note 160; s*ee also* Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 39-41 (2011).

[165] NAFTA, *supra* note 1, art. 1110(1).

[166] S.D. Meyers, Inc. v. Gov't of Can., Partial Award, ¶ 281 (Nov. 13, 2000), *available at* italaw.com/documents/SDMeyers-1stPartialAward.pdf; *see also* Methanex v. U.S., UNCITRAL/NAFTA, Amended Statement of Defense of the Respondent United States of America, ¶¶ 410-11 (Dec. 5, 2003), *available at* naftaclaims.com/Disputes/USA/Methanex/MethanexSuppStatementOfDefenseAmend.pdf.

expropriation requires consideration of the degree of interference with the investment, the purpose of the measure, and the investor's *legitimate* expectations in relation to the use and enjoyment of its investment.[167]

In regards to an investors' legitimate expectation, the jurisprudence on Article 1110 suggests that an investor should expect a host state to adopt legitimate and proportionate regulatory measures in the general public's interest.[168] In addition, a tribunal will also take specific commitments made by a government to an investor into account in its determination of investor expectations.[169] For example, Dow considered the Government of Québec's commitment to review its 2,4-D ban in light of PMRA's re-evaluation of the pesticide to be a legitimate expectation.[170]

B. OVERVIEW OF DOW'S CLAIM

Following the Supreme Court decision in *Hudson* as pesticide bylaws proliferated across Canada and both Québec and Ontario considered enacting provincial statutes, environmental organizations in Québec and Ontario heard persistent rumours of a possible NAFTA challenge.[171] Such a challenge came in 2008 against Québec's provincial ban,[172] three months after PMRA finalized its decision to allow the continued registration of 2,4-D,[173] and two months after Ontario passed legislation to ban cosmetic pesticide use province-wide.[174] Ontario's new law would not come into force until implementing regulations could be developed, the crucial details of which were the subject of active debate, notably about what pesticides would ultimately be included in the ban.[175]

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[167] Moloo & Jacinto, *supra* note 164, at 19, 21, 24.

[168] *Id.* at 24; *see also* Parkerings-Compagniet AS v. Rep. of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), *available at* www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

[169] Moloo & Jacinto, *supra* note 164, at 24-25.

[170] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Notice of Arbitration, ¶ 9 (Mar. 31, 2009).

[171] Personal communication between the author, Kathleen Cooper, and the following: Gideon Foreman, Canadian Association of Physicians for the Environment; Angela Rickman, formerly with the Sierra Club of Canada; Lisa Gue, David Suzuki Foundation; William Amos, Ecojustice; Rich Waite, formerly with the Toronto Environmental Alliance; and Sidney Ribaux, Equiterre.

[172] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Notice of Intent To Submit a Claim to Arbitration Under Chapter Eleven of the North American Trade Agreement (Aug. 25, 2008).

[173] HEALTH CANADA PEST MGMT. REGULATORY AGENCY, *supra* note 96.

[174] Pesticides Act, R.S.O. 1990, c. P.11, art. 7.1 (Can.).

[175] Pesticides Act, R.O. 63/09, art. 4(5), 16 (Can.); ONTARIO MINISTRY OF THE ENV'T, *supra* note 93.

In August 2008, Dow filed a Notice of Intent to Submit a Claim to Arbitration, on its own behalf and on behalf of its Canadian subsidiary, against the Government of Canada under Chapter 11.[176] The Notice of Intent sought $2 million from the Government of Canada as well as "further relief including additional damages,"[177] to compensate for alleged losses caused by the Government of Québec's ban on the sale and use of pesticides containing 2,4-D, on lawns other than golf courses.[178]

Dow's Notice of Arbitration[179] followed in March 2009 and sought, pursuant to NAFTA's Article 1135(b),[180] "by way of restitution (a) the repeal of the Ban; and (b) such damages, costs, interest, amounts for tax consequences . . . resulting from Canada's breaches which cannot adequately be compensated by restitution."[181] Dow further claimed, alternatively, pursuant to Article 1135(a), "an award in the amount of at least two million dollars for damages caused by Canada's breaches of its obligation under Chapter 11 NAFTA for, but without limitation, loss of sales, profits, goodwill, investment and other costs related to the products"[182] and further costs associated with, among other things, legal representation, expert fees, and tax consequences.[183]

With these two claims, the Notice of Arbitration made a peculiar distinction between Article 1135(a) and 1135(b), seeking first the repeal of the ban as well as monetary damages pursuant to Article 1135(b) and, in the alternative, a monetary award of compensation pursuant to Article 1135(a).[184] However, in the entirety of Article 1135, the only remedies available for investors are monetary damages and any applicable interest under Article 1135(a),[185] and restitution of property, again, in the form of monetary damages, and any applicable interest under Article 1135 (b).[186] Nowhere is the repeal of a measure outlined as an available remedy.

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[176] *Dow AgroSciences*, Notice of Intent.

[177] *Id.* ¶ 60(f).

[178] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Notice of Arbitration, ¶ 17 (Mar. 31, 2009). Environmental organizations saw the small amount of money claimed by Dow as an indication of the NAFTA claim service as an advocacy device to try to scare off Ontario and other provinces from cosmetic pesticide bans. *See* Press Release, Canadian Envtl. Law Ass'n, Cosmetic Pesticide Bans Unaffected by DOW-Québec Deal (May 30, 2011), *available at* www.cela.ca/newsevents/media-release/cosmetic-pesticide-bans-unaffected-dow-quebec-deal.

[179] *Dow AgroSciences*, Notice of Arbitration.

[180] NAFTA, *supra* note 1, art. 1135(1).

[181] *Dow AgroSciences*, Notice of Arbitration, ¶ 55.

[182] *Id.* ¶ 56(a).

[183] *Id.* ¶ 56(b)-(e).

[184] *Id.* ¶ 56(a)-(e).

[185] NAFTA, *supra* note 1, art. 1135(a).

[186] *Id.* art. 1135(b).

Substantive reasons for the claim as spelled out in the Notice of Arbitration supported Dow's overall claim that Canada, due to the actions of Québec, was in breach of two NAFTA obligations contained in Chapter 11[187] and as such "as a party to NAFTA, Canada is responsible for the NAFTA-inconsistent conduct of Québec."[188] Dow further proposed that three arbitrators be appointed and that the arbitration take place in Ottawa, Ontario.[189]

The foundation of Dow's concerns was that the Québec ban on 2,4-D had been adopted and maintained notwithstanding two key admissions by the government of Québec. First, documents obtained by Dow via Freedom of Information (FOI) requests included statements by Québec government officials that the ban on 2,4-D could not be scientifically defended. Rather, these officials noted that the ban should rest instead on "less firm grounds" such as the precautionary principle or a policy decision resulting from the will of the population (similar to an existing Québec Forest Protection Strategy that prohibited use of chemical pesticides).[190] Dow stated that "these [FOI] documents make clear that Québec recognized the absence of a scientific basis for its ban on 2,4-D. Moreover, even its stated reliance on an interpretation of the precautionary approach was motivated by political considerations, rather than any legitimate scientific concerns."[191]

The second admission, according to Dow, was that the FOI documents obtained indicated that due to the scientific uncertainty concerning the toxicity of 2,4-D, Québec officials intended to review the ban on 2,4-D in light of the results of ongoing reviews by regulatory agencies in Canada and the United States.[192]

In 2005 and 2008, following prevailing risk assessment practices, the EPA[193] and the PMRA[194] concluded that insufficient evidence existed to consider 2,4-D to be a cancer risk. More generally, these two agencies made an overall finding that the continued use of this pesticide was an acceptable risk. Dow cited the PMRA conclusions and noted they were in accord with similar findings made in the late 1990s and early 2000s by other regulatory agencies and expert review panels in the United States, New Zealand, and within the World Health

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[187] *Dow AgroSciences*, Notice of Arbitration, ¶¶ 8-9.
[188] *Id.* ¶ 7.
[189] *Id.* ¶ 57.
[190] *Id.* ¶¶ 22-24.
[191] *Id.* ¶ 25.
[192] *Id.* ¶¶ 26-29, 41.
[193] U.S. ENVTL. PROT. AGENCY, *supra* note 99.
[194] HEALTH CANADA PEST MGMT. REGULATORY AGENCY, *supra* note 96.

Organization.[195] Dow further claimed that, despite these most recent conclusions of the PMRA and the EPA, Québec "has also failed to act in accordance with its earlier commitments to review the Ban following the re-evaluation of 2,4-D."[196]

First, the specific claimed breaches of NAFTA obligations were with respect to the provisions of Article 1105.[197] Canada was accused of failing to treat Dow "in accordance with international law, including fair and equitable treatment and full protection and security."[198] Further, Dow claimed that Article 1105 was individually and cumulatively breached by Québec's actions "in improperly imposing the Ban, in failing and refusing to review and repeal the Ban, in breaching the Claimant's legitimate expectations, in conducting biased and improper reviews and advancing improper conclusions, and in prohibiting the sale and use of 2,4-D."[199] Further, Dow maintained that Canada was "in breach of international law and its obligations under Article 1105 in respect of basic due process, transparency, good faith and natural justice."[200]

The second claimed breach was with provisions of Article 1110.[201] Dow claimed that the effect of Québec's actions from 2003 to 2009, individually and cumulatively, amounted to measures tantamount to expropriation of Dow's investment.[202] Citing Article 1110, Dow noted that such measures could be justified "only if they are: for a public purpose; on a non-discriminatory basis; in accordance with due process and Article 1105(1); and on payment of compensation on a prescribed basis."[203] Dow stated that none of these criteria had been met by Québec—"most particularly, no compensation has ever been paid or offered"[204]—and thus Canada was in breach of Article 1110 obligations to avoid direct or indirect expropriation of an investor, except in accordance with the four criteria listed in Article 1110, noted above.[205]

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[195] *Dow AgroSciences*, Notice of Arbitration, ¶¶ 31-32, 34.
[196] *Id.* ¶ 46.
[197] NAFTA, *supra* note 1, art. 1105.
[198] *Dow AgroSciences*, Notice of Arbitration, ¶ 47.
[199] *Id.* ¶ 48.
[200] *Id.* ¶ 49.
[201] NAFTA, *supra* note 1, art. 1110(a).
[202] *Dow AgroSciences*, Notice of Arbitration, ¶50.
[203] *Id.* ¶ 51.
[204] *Id.* ¶ 52.
[205] *Id.* ¶ 53.

C. INITIAL REACTIONS FROM NONGOVERNMENTAL ORGANIZATIONS AND POLITICIANS

Public interest environmental and health organizations reacted with dismay to Dow's Notice of Intent and later the Notice of Arbitration, and called on the federal government, specifically the Minister of International Trade, to vigorously defend Québec's law, and acknowledge the appropriate precautionary basis for Québec's action.[206] Specifically, these organizations asserted that non-discriminatory regulatory measures for a public purpose in accordance with due process, are not, under international law, expropriations or violations of the minimum standard of treatment rules and thus not subject to compensation.[207] The organizations further called on the federal government to ensure more robust applications of the precautionary principle in PMRA risk assessments of pesticides.[208]

As a result of public interest groups raising this issue with federal politicians, the Parliamentary Standing Committee on International Trade took up the matter. Prior to the Notice of Arbitration being filed, this committee recommended to the Canadian Parliament, which concurred with the statement later in the same year, "that the Government vigorously defend Québec's Pesticides Management Code in the case opposing Dow Agroscience and the Government of Canada in order to safeguard Québec's right to enact legislation and make regulations in the public interest."[209]

Dow's action was widely perceived as an attempt to bring a regulatory chill on efforts across Canada, particularly in Ontario, Canada's most populous province with a government actively considering a sweeping ban on hundreds of pesticide products. As one legal commentator observed, the claim by Dow appeared to be aimed "as much at deterring other governments from taking similar steps to reduce pesticide use for health and environmental reasons, as much as it [was] meant to win compensation of $2 million, as claimed, for the incidental

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[206] DAVID SUZUKI FOUND. ET AL., BRIEFING NOTE: POTENTIAL NAFTA CHALLENGE TO QUÉBEC'S BAN OF 2, 4-D LAWN PESTICIDES 1 (Apr. 9, 2009), *available at* www.ecojustice.ca/media-centre/media-backgrounder/Dow%2024-D%20Backgrounder-English-2009-04-09%20_WA_.pdf/at_download/file.

[207] *Id.* at 1.

[208] *Id.* at 1.

[209] CANADA HOUSE OF COMMONS STANDING COMM. ON INT'L TRADE, REPORT 2—CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (Mar. 31, 2009), *available at* www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3787580&Language=E&Mode=1&Parl=40&Ses=2.

impacts on Dow's sales in Québec."[210]

However, when asked in 2008 about a NAFTA challenge to the new Ontario law, then-Environment Minister John Gerretsen was unconcerned. Referring to the legal research done by lawyers with the Ontario Ministry of Environment confirming the validity of province's authority to regulate the use of pesticides, the Minister said, "Bring it on."[211]

There were, of course, legitimate concerns given the fact that such claims have been particularly threatening to environmental and other public welfare measures, as summarized in Table 1. However, the Ontario Environment Minister's reaction was a direct result of confidence in a multi-year process by a sophisticated government in a modern democracy to develop a highly popular law.

D. TRADE-FOCUSED NOTIONS OF FAIRNESS AND DUE PROCESS: IRONIC CONSEQUENCES

As noted above, ISDS mechanisms originated in agreements between developed and less developed nations to provide measures that would protect investors from unfair or arbitrary action by countries with less developed judicial systems.[212] The unexpected and ironic consequence of including such mechanisms in NAFTA has been to undermine domestic public interest regulation using a dispute resolution mechanism that denies the public the procedural fairness that exists in their modern judicial system.[213] This consequence is largely due to the narrow purview of NAFTA, with its overall objectives focused on trade and the paramount importance assigned to investor rights by the terms of Chapter 11.[214]

Article 1105 speaks to the obligation of a Party "to accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[215] The provision has been broadly interpreted to require that government measures will be developed with due process, transparency, in good faith, and according to natural justice.[216] These are

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[210] Van Harten, *supra* note 124, at 43.

[211] Communication from John Gerretsen, Minister of Env't for Ontario, at a meeting of health and environmental organizations to Kathleen Cooper (Oct. 2008) (on file with authors).

[212] Price, *supra* note 118, at 36.

[213] MANN, *supra* note 111, at 37-46; *see infra* Table 1.

[214] NAFTA, *supra* note 1, art. 102, ch.11.

[215] NAFTA, *supra* note 1, art. 1105(1).

[216] TUDOR, *supra* note 160, at 37.

indeed important and valid principles derived from the rule of law, which has defined the legal framework of democratic governments. As such, these expectations similarly constitute a minimum standard of treatment that Canadians or the citizens of any other modern democracy have come to expect from their lawmakers and their courts. However, under NAFTA, the application of these principles has tended to be considerably narrowed in the context of a dispute over the minimum standard of treatment, where the focus has largely been confined to matters of trade and investment. In the *Dow* example, this narrow focus is on lost sales of a single pesticide by a single company.

This narrow lens can ignore the due process that was provided to the Canadian public on the broader, but directly related, issue of cosmetic pesticide bans. As described above,[217] a significant amount of such due process accorded to the public occurred in a transparent fashion, during more than fifteen years of efforts at the level of local and provincial governments in Québec, in the Québec Courts, and at the Supreme Court of Canada, not to mention similar extensive activity elsewhere in Canada either by municipal or provincial governments or in the Ontario courts. It is also important to note that as specific by-laws were developed, and became the subject of legal challenges, the due process that was provided under Canada's legislative and judicial systems stands in sharp contrast to the NAFTA arbitration process, which has largely been cloaked in secrecy and where public participation, when it is allowed, lacks key aspects of basic procedural fairness.[218]

Similarly, Article 1110 provides that regulatory measures enacted by a government must be for a public purpose through the due process of law and applied without discrimination.[219] Otherwise, the measure may give rise to investor claims for compensation if it results in expropriation or is tantamount to expropriation. Here again, despite many years of due process, a tribunal operating within the narrow objectives of NAFTA's trade focus would make the determination as to whether Québec's pesticide ban amounts to expropriation.[220] As noted above, members of these tribunals have expertise that rarely extends beyond commercial law. Further, their proceedings provide limited opportunity for broader public input as compared to that available under the Canadian legislative and judicial system. Thus, Article 1110, like Article 1105, provides far greater emphasis on the investor's legitimate commercial expectations as

[217] *See supra* Part II.

[218] *See* discussion *supra* Part II, III.A.1-2.

[219] NAFTA, *supra* note 1, art. 1110.

[220] *See* discussion *supra* Part III.A.1.

opposed to the public's legitimate expectations that their government will enact environmental measures to protect their welfare.[221]

Equiterre, a Québec-based environmental group, and the David Suzuki Foundation, a Canadian environmental organization based in Vancouver, British Columbia, expressed these concerns in response to Dow's Notice of Arbitration.[222] They announced their intention to file a joint *amicus curiae* submission once a tribunal was established.[223] However, both groups expressed concerns that even in cases such as *Dow*, where "matters of the 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."[224] Given how the *amicus curiae* process has developed in Chapter 11 case law, the organizations claimed they had no confidence that even when the panel was established, it would have the discretion to benefit from oral submissions from non-disputing parties with a distinct interest and expertise in the matter. The groups noted that this was in sharp contrast with the rules of practice for intervention before domestic courts such as the Supreme Court of Canada.[225]

E. THE MAIN STICKING POINT: PRECAUTIONARY DECISIONMAKING

As described above, Dow's Notice of Arbitration focused on the contention that Québec had no scientific basis to impose a ban on 2,4-D, and had acknowledged as much.[226] According to Dow's interpretation of Québec government documentation, Québec recognized the absence of a scientific basis for its ban on 2,4-D and "even its stated reliance on an interpretation of the precautionary approach was motivated by political considerations, rather than any legitimate scientific concerns."[227]

More specifically, Dow pointed to a 2003 Methodology Report[228] used by the Québec government, which Dow claimed had not been made available for comment. As reviewed in the Briefing Note[229] prepared by

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[221] Julie A. Soloway, *Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11*, 33 CAN. BUS. L.J. 92, 107-08 (2000).

[222] DAVID SUZUKI FOUND. ET AL., *supra* note 206.

[223] *Id.* at 2.

[224] *Id.*

[225] *Id.* at 2-3.

[226] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Notice of Arbitration, ¶ 23-25 (Mar. 31, 2009).

[227] *Id.* ¶ 25.

[228] *Id.* ¶¶ 27-28.

[229] DAVID SUZUKI FOUND. ET AL., *supra* note 206, at 2.

environmental organizations, Québec applied what it referred to as science-based criteria to select pesticides for inclusion in the ban; namely, to include pesticides that are included on lists compiled by internationally reputable sources as being suspected to cause cancer or to be associated with endocrine disruption although at the time such lists only existed for substances associated with cancer.[230] Québec relied upon the International Agency for Research on Cancer and its classification as possible human carcinogens the group of chlorophenoxy herbicides, which includes 2,4-D.[231] Québec also admitted, as Dow spelled out in the Notice of Arbitration,[232] that insufficient data existed to assign this classification to individual substances within the group, but indicated that when the PMRA re-evaluation was complete, it would reconsider the inclusion of 2,4-D in the ban. When the positive result of the federal re-evaluation did not alter Québec's ban on 2,4-D, Dow concluded that "Québec ha[s] failed to honour its commitment to re-evaluate the Ban, notwithstanding the completion of re-assessments subsequent to the Ban by both the PMRA and the EPA."[233]

It can be concluded from a review of Dow's arguments that a clear assumption is being made that precautionary decisionmaking is not scientific. Further, when the Québec ban on 2,4-D was not reversed after the PMRA and other regulatory agencies concluded that continued registration was acceptable, the arguments made in Dow's Notice of Arbitration indicate that Dow clearly considered Québec's prior commitment to review its ban was the same as agreeing to reverse it.

In contrast, environmental organizations disputed the results of the PMRA's risk assessment of 2,4-D. In this circumstance, these groups note the ability of risk assessment to reach a conclusion as to a chemical's acceptable risk on the basis of an incomplete consideration of potential health effects.[234] For example, they pointed out that the European Union Strategy for Endocrine Disruptors had proposed that 2,4-D be considered a Category II chemical on its priority list of suspected endocrine disrupting chemicals,[235] a health outcome not

[230] *Id.* at 3-4.

[231] INT'L AGENCY FOR RESEARCH ON CANCER, *supra* note 82.

[232] *Dow AgroSciences*, Notice of Arbitration, ¶¶ 21-29.

[233] *Id.* ¶ 30.

[234] Letter from Canadian Envtl. Law Ass'n et al., to Pest Mgmt. Regulatory Agency, Proposed Acceptability for Continuing Registration (PACR) 2005-01: Re-Evaluation of the Lawn and Turf Uses of (2,4-Dichlorophenoxy) Acetic Acid [2,4-D] (Apr. 22, 2005), *available at* s.cela.ca/files/uploads/508_2_4_D.pdf; Press Release, Canadian Envtl. Law Ass'n, *supra* note 178; *see also* Theresa McClenaghan et al., *Environmental Standard Setting and Children's Health: Injecting Precaution into Risk Assessment,*12(2) J. ENVTL. L. & PRAC. 245, 249-54 (2003).

[235] DAVID SUZUKI FOUND. ET AL., *supra* note 206, at 3.

considered in the PMRA risk assessment. Although the PMRA did note that evidence indicated possible endocrine disruption effects of 2,4-D, this evidence was not considered in the re-evaluation decision due to a lack of validated test protocols.[236] To this day, the complexity of endocrine disruption science continues to challenge the development of such test protocols.[237] Regulatory agencies around the world continue to work towards establishing official lists of endocrine disrupting substances.[238] Where such lists are noted in scientific reviews about endocrine disrupting substances, 2,4-D is included and done so in the context of calls for more precautionary decisionmaking about the seriousness of effects related to endocrine disrupting chemicals.[239]

An extensive debate exists, as summarized below, about whether the precautionary principle is unscientific.[240] Closely related, an equally extensive critique exists challenging the notion that chemical risk assessment, as conducted by the PMRA and other regulatory agencies, is a purely science-based exercise.[241] Each of these debates is briefly summarized here.

1. Applying Precaution and Risk Assessment—Both Are Science-Based Decisionmaking

Recognizing that there are various formulations of the precautionary

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[236] HEALTH CANADA PEST MGMT. REGULATORY AGENCY, *supra* note 96, at 22, 42-43.

[237] WORLD HEALTH ORG. & UNITED NATIONS ENV'T PROGRAMME, *supra* note 23, at ix, xv-xvii, 234-37; NAT'L RESEARCH COUNCIL, SCIENCE AND DECISIONS—ADVANCING RISK ASSESSMENT 93-119 (2009).

[238] Laura M. Plunkett et al., *An Enhanced Tiered Toxicity Testing Framework with Triggers for Assessing Hazards and Risks of Commodity Chemicals*, 58 REG. TOXICOLOGY & PHARMACOLOGY 382, 387 (2010); Robert J. Kavlock et al., *Toxicity Testing in the 21st Century: Implications for Human Health Risk Assessment*, 29(4) RISK ANALYSIS 485, 487 (2009); ORG. FOR ECON. COOPERATION AND DEV., INFORMATION ON OECD WORK RELATED TO ENDOCRINE DISRUPTORS (2012), *available at* www.oecd.org/env/ehs/testing/50067203.pdf; Report on the Protection of Public Health from Endocrine Disruptors, EUR. PARL. DOC. A7-0027/2013, at 6-8, 10, 13-14 (Jan. 28, 2013), *available at* www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0027+0+DOC+PDF+V0//EN; U.S. ENVTL. PROT. AGENCY, ENDOCRINE DISRUPTOR SCREENING PROGRAM COMPREHENSIVE MANAGEMENT PLAN 6-7 (June 2012), *available at* www.epa.gov/endo/pubs/EDSP-comprehensive-management-plan.pdf.

[239] WORLD HEALTH ORG. & UNITED NATIONS ENV'T PROGRAMME, *supra* note 23, at 190.

[240] Theresa McClenaghan, *Precautionary Principle, in* ENCYCLOPEDIA OF QUALITY OF LIFE AND WELL-BEING RESEARCH (Alex C. Michalos ed., forthcoming). Note that content in this section is drawn from parallel research and writing undertaken by Ms. McClenaghan for this chapter in press. *See also* Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 174-78 (2001).

[241] D. Santillo et al., *The Precautionary Principle: Protecting Against Failures of Scientific Method and Risk Assessment*, 36 MARINE POLLUTION BULL. 939, 941 (1998); McClenaghan et al., *supra* note 234.

principle,[242] the statement from the Rio Declaration on Environment and Development has been followed sufficiently often that for some, it is the most authoritative version.[243] The Declaration states that "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[244]

Leaving aside the various critiques of this formulation,[245] it is fundamentally about applying precaution when there is the potential for serious harm to the environment or human health,[246] and scientific uncertainty as to the extent of the harm or the causes of the harm.[247] "Uncertainty" in this context means more than speculation,[248] and is about the extent of the harm, as well as causation.[249] It is science-based because there must be a basis on which to conclude that a threat of harm is serious and perhaps irreversible. While this latter point may continue to be disputed, within the precautionary principle debate, most agree that it is a tool for bringing science and policy together for effective decisionmaking on difficult subjects where much is at stake.[250]

Closely related, an equally extensive critique exists challenging the notion that chemical risk assessment, as conducted by the PMRA and other regulatory agencies, is a purely science-based exercise. The

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[242] Carl F. Cranor, *Asymmetric Information, the Precautionary Principle, and Burdens of Proof, in* PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE 75 (Carolyn Raffensperger & Joel Tickner eds., 1999).

[243] Claudia Saladin, *Precautionary Principle in International Law,* 6 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 270, 271-73 (2000); John S. Applegate, *The Taming of the Precautionary Principle,* 27 WILLIAM & MARY ENVTL. L. & POL'Y REV. 13, 13 (2002).

[244] UNITED NATIONS CONFERENCE ON ENV'T & DEV., U.N. AGENDA 21, RIO DECLARATION, Principle 15, (reprinted in 31 I.L.M. 874 (1992)), *available at* www.un.org/esa/dsd/agenda21/.

[245] *See* Saladin, *supra* note 243, at 273; WORLD COMM'N ON THE ETHICS OF SCIENTIFIC KNOWLEDGE & TECH., THE PRECAUTIONARY PRINCIPLE 12 (Mar. 2005), *available at* unesdoc.unesco.org/images/0013/001395/139578e.pdf.

[246] Gwynne Lyons et al., *An Environmentalist's Vision of Operationalizing the Precautionary Principle in the Management of Chemicals,* 6 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 289, 289-90 (2000).

[247] Carl Smith, *The Precautionary Principle and Environmental Policy—Science, Uncertainty, and Sustainability*, 6 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 263, 265 (2000); Joel A. Tickner & Polly Hoppin, *Children's Environmental Health: A Case Study in Implementing the Precautionary Principle*, 6 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 281, 281 (2000).

[248] *Telstra v. Hornsby Shire Council* [2006] NSWLEC 133, at ¶ 147-48, 204 (Austl.); *see* WORLD COMM'N ON THE ETHICS OF SCIENTIFIC KNOWLEDGE & TECH., *supra* note 245, at 31.

[249] *See* CAMERON & ABOUCHAR, *supra* note 63, at 20; Saladin, *supra* note 243, at 275; *Telstra*, NSWLEC 133, ¶ 140.

[250] *See* Santillo et al., *supra* note 241, at 941.

limitations of risk assessment have been extensively described[251] including, for example:

- limits on criteria for the selection of hazards to assess;
- the practice of leaving out some hazards due to bias or lack of knowledge;
- the inability to factor impacts of cumulative effects, additive or synergistic effects;
- limits on the ability to quantify impacts;
- the role of professional judgment to assess and/or fill data gaps;
- the limitations arising from health or other impact end-points under consideration such as endocrine disruption or other complex conditions involving complex dose-response and/or long latency periods, and lack of data about such impacts;
- lack of data about substances, processes, and ecosystem variables;
- tendency to make type II errors as a result of designing studies to rigorously avoid type I errors;[252]
- potential for surprise in behaviour of systems and so on.

In sum, the apparent "certainty" resulting from the expression of risk assessment analytical results in quantitative terms is often illusory.

The Dow Notice of Arbitration challenged the legitimacy of the precautionary principle as a basis for decisionmaking and claimed that the scientific result from the PMRA risk assessment was sufficient to reverse Québec's unscientific decision. In contrast, environmental groups disputed the notion that the PMRA risk assessment result was purely scientific, and supported Québec's decision to retain its ban on a precautionary basis in light of ongoing scientific uncertainty.

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[251] *See* Santillo et al., *supra* note 241, at 941-48; Smith, *supra* note 247, at 264; David Kriebel et al., *The Precautionary Principle in Environmental Science*, 109 ENVTL. HEALTH PERSP. 871 (2001); CANADIAN ENVTL. LAW ASS'N, IMPLEMENTING PRECAUTION: AN NGO RESPONSE TO THE GOVERNMENT OF CANADA'S DISCUSSION DOCUMENT "A CANADIAN PERSPECTIVE ON THE PRECAUTIONARY APPROACH/PRINCIPLE" 5 (Apr. 2002), *available at* www.cela.ca/sites/cela.ca/files/uploads/419precautionary.pdf; WORLD COMM'N ON THE ETHICS OF SCIENTIFIC KNOWLEDGE & TECH., *supra* note 245, at 26 (additionally describing unexpected outcomes and complex systems that may suddenly change state); ROYAL COMM'N ON ENVTL. POLLUTION, CHEMICALS IN PRODUCTS: SAFEGUARDING THE ENVIRONMENT AND HEALTH 11-46 (June 26, 2003), *available at* webarchive.nationalarchives.gov.uk/20090128002317/http://www.rcep.org.uk/chreport.htm.

[252] In simple terms, Type II errors are those in which a causal association is missed, whereas Type I errors are those in which there is a mistaken finding of a causal association.

2. What Would a Tribunal Have Done?

The *Dow* matter was settled without going before a tribunal, as discussed further below. It is speculative to consider what a tribunal would have decided particularly given the fact that tribunals are not bound by the rules of precedent that apply in court proceedings. Nevertheless, the matter can be considered in light of other tribunal rulings on similar matters.

Dow's Notice of Arbitration essentially asked the tribunal to read into Chapter 11 a requirement that a strict science-based test was necessary for regulations affecting sales of Dow's products.[253] This interpretation flows from Dow's legitimate expectations for the minimum standard of treatment provided for in Article 1105, and specifically, whether as an investor it considered a measure to be reasonable and not arbitrary, which in Dow's opinion turned on whether the Québec ban on 2,4-D had a scientific basis.[254]

The legitimate expectations of investors are a major consideration for NAFTA tribunals when applying the legal tests for the provisions relied upon by Dow. Legitimate expectations of investors are held to include measures based on scientific studies and international guidelines, not measures based on the precautionary principle, which is often inaccurately conflated by NAFTA tribunals as a political basis.[255] This focus on a scientific basis underlying the measures in dispute occurred in the *Ethyl* and *Chemtura* cases, which preceded Dow.

Ethyl Corp. v. Government of Canada involved a NAFTA investor claim concerning a chemical ban justified on the basis of health and environmental risks. The case involved the chemical MMT,[256] a gasoline additive suspected of neurotoxicity. The claim called into question the scientific basis of the ban, with Ethyl claiming the ban amounted to an expropriation of its investment.[257] In 1998, the Canadian government settled with Ethyl for $13 million.[258] As part of the settlement, the Government of Canada publicly declared that there was no scientific

[253] Howard Mann, *DOWning NAFTA?,* INVESTMENT TREATY NEWS (May 2, 2009), *available at* www.iisd.org/itn/2009/05/03/downing-nafta/.

[254] *See* Moloo & Jacinto, *supra* note 164, at 41; *see also* Glamis Gold, Ltd. v. United States,, Award, ¶ 24 (June 8, 2009), *available at* italaw.com/documents/Glamis_Award.pdf.

[255] *See* Moloo & Jacinto, *supra* note 164, at 30, 33 (arguing that the precautionary measures in the Ethyl claim were driven by political pressure).

[256] Methylcyclopentadienyl manganese tricarbonyl.

[257] Ethyl Corp. v. Gov't of Can., NAFTA/UNCITRAL, Statement of Claim, ¶¶ 19-50 (Oct.2, 1997), a*vailable at* www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-04.pdf.

[258] *See* Gaines, *supra* note 158, at 183.

basis to prohibit MMT under Canadian federal law, and explicitly acknowledged that "current scientific information fails to demonstrate that MMT impairs the proper functioning of automotive on-board diagnostic systems . . . and there is no scientific evidence to modify the conclusions drawn by Health Canada in 1994 that MMT poses no health risk."[259] The unavailability of scientific evidence to support the Canadian measure was a key factor in Canada's decision to settle in *Ethyl*.[260]

Similarly, in 2010 Canada successfully defended against an investor claim by Chemtura on scientific grounds. Chemtura's claim was also based on alleged breaches of the minimum standard of treatment and expropriation provisions as a result of a ban on lindane, a pesticide used in the production of canola.[261] The tribunal held that the government of Canada's scientific review of lindane "falls within acceptable scientific parameters,"[262] but that it was "not for the Tribunal to review the scientific basis of the PMRA's decision."[263] As such, the *Chemtura* decision is an example of adjudicators putting emphasis on the scientific process underlying the risk assessment and regulatory action.

Although NAFTA's text does not explicitly preclude a public interest precautionary measure from being considered as a legitimate measure, tribunals have not upheld such an interpretation. Rather, they have held such measures to be legitimate on the basis that they were supported by a scientific study, or by an established international guideline, rather than a precautionary approach.[264] As the International Institute of Sustainable Development argued in its *amicus* submission to the tribunal in *Methanex*, Chapter 11 does not require that environment and health measures be supported by a risk assessment or scientific study.[265] Rather, a breach of the minimum standard of treatment

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[259] Press Release, Environment Canada, Government To Act on Agreement on Internal Trade (AIT) Panel Report on MMT (July 20, 1998) as cited in Gaines, *supra* note 158, at 183; *see also* Ken Traynor, *How Canada Became Shill for Ethyl Corp: NAFTA and the Erosion of Federal Environmental Protection*, 23(3) THE INTERVENOR (Sept. 1998); GRACE WOOD & MARIKA EGYED, RISK ASSESSMENT FOR THE COMBUSTION PRODUCTS OF METHYLCYCLOPENTADIENYL MANGANESE TRICARBONYL (MMT) IN GASOLINE (Dec. 6, 1994), *available at* publications.gc.ca/collections/Collection/H46-1-34-1994E-1.pdf.

[260] *See* Moloo & Jacinto, *supra* note 164, at 29.

[261] Chemtura Corp. v. Gov't of Can., NAFTA/UNCITRAL, Award (Aug. 2 2010), *available at* www.worldcourts.com/pca/eng/decisions/2010.08.02_Chemtura_v_Canada.pdf.

[262] *Id.* ¶ 131.

[263] *Id.* ¶ 131.

[264] *See* Moloo & Jacinto, *supra* note 164, at 26-27; *see also* Methanex Corp. v. United States, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction & Merits, at Part II.D, 14 (Aug. 3, 2002), *available at* www.state.gov/documents/organization/51052.pdf.

[265] *Methanex Corp.*, NAFTA/UNCITRAL, Amicus Curiae Submissions ¶ 21 (Mar. 9, 2004), *available at* www.state.gov/documents/organization/30475.pdf.

provisions should simply involve an assessment of whether the measure was taken arbitrarily.[266]

However, some international investment law specialists note in relation to the history of precautionary measures considered by NAFTA tribunals that "settlement is a good idea in expropriation claims where governments base their measures on the precautionary principle, as they are more likely to trigger the requirement of compensation than a measure based on science evidencing a legitimate concern."[267]

While tribunals have expected a demonstration of traditional scientific evidence and/or risk assessments to uphold the legitimacy of an environmental or health measure, there is in fact no express requirement in NAFTA to do so. As one scholar asserts, "[s]uch a test is simply not expressed in NAFTA or any other investment treaty, and would seriously constrain if not fully deny governments the ability to establish acceptable risk levels to human health and the environment based on the precautionary principle."[268]

F. STALEMATE: ALL SIDES CLAIM VICTORY

In May 2011, almost three years after Dow brought its Notice of Arbitration claim, no further filings occurred and a settlement was reached without the case proceeding before a NAFTA tribunal. The Settlement Agreement[269] refers to an exchange of letters between the Government of Canada and the Government of Québec wherein the parties agree to the terms of the Settlement Agreement,[270] including that Québec's ban on 2,4-D be upheld,[271] the withdrawal of Dow's Notice of Arbitration,[272] and that no compensation be provided.[273] As well as a "full and final settlement,"[274] the Government of Québec also acknowledged several "agreed principles"[275] that essentially restate the

[266] *See* Afilalo, *supra* note 162; *see also* Moloo & Jacinto, *supra* note 164, at 54-55.

[267] *See* Moloo & Jacinto, *supra* note 164, at 30.

[268] Mann, *supra* note 253; *see also* HOWARD MANN, ASSESSING THE IMPACT OF NAFTA ON ENVIRONMENTAL LAW AND MANAGEMENT PROCESSES (Oct. 2000), *available at* www.iisd.org/pdf/2001/trade_mann_final.pdf.

[269] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Settlement Agreement, ¶ 9 (May 25, 2011), *available at* www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/dow-03.pdf.

[270] *Id.* ¶ 1.

[271] *Id.*

[272] *Id.* ¶ 2.

[273] *Id.*

[274] *Id.* ¶ 3.

[275] *Id.*

reality of the tri-level regulatory regime that exists in Canada to regulate pesticides,[276] as this was enumerated by the Supreme Court of Canada in *Hudson*.

The first principle includes the definition of "acceptable risk"[277] as it is stated in the federal Pest Control Products Act. It then specifies that the Government of Québec acknowledge the results of this determination of acceptable risk for 2,4-D in the 2008 PMRA re-evaluation decision, namely that the risk is acceptable if label directions are followed.[278] The second principle enumerates the nested authority of provinces to regulate pesticides in a manner more restrictive than the PMRA.[279] The third notes that, subject to applicable laws, municipalities may also apply a pesticide regulation that is more restrictive than the PMRA or the provincial government, in this case, the government of Québec.[280]

Both the federal government and Dow framed the settlement as a victory.[281] Canada's Minister of International Trade, described the settlement as confirming "the right of governments to regulate the use of pesticides," a right that "will not be compromised by Canada's participation in NAFTA or any other trade agreement."[282]

As a sign of its success, Dow saw the fact that Québec publicly acknowledged the PMRA risk assessment conclusion. "What was most important to Dow AgroSciences is that [Québec] clarify their perspective on 2,4-D."[283] In contrast, environmental groups saw the statement by Québec as saving face for Dow and supporting the view that Dow would not have won the case. CELA's Executive Director and counsel in the Supreme Court intervention in *Hudson* noted that "the Québec government has given nothing away legally with this agreement and existing or future municipal or provincial pesticide bans are unaffected."[284] She further noted, "I am extremely happy no money was

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[276] *Id.* ¶ 3(a)-(c).

[277] *Id.* ¶ 3(a).

[278] *Id.*

[279] *Id.* ¶ 3(b).

[280] *Id.* ¶ 3(c).

[281] Janet M. Eaton, *NAFTA Dispute Settlement over Québec Pesticide Ban Has Both Sides Claiming Victory While the Real Issue Still Remains—the Need To Ban NAFTA's Investor State Clause*, SIERRA CLUB OF CANADA, www.sierraclub.ca/en/trade-and-environment/nafta-dispute-settlement-over-quebec-pesticide-ban-has-both-sides-claiming-vic (May 5, 2011).

[282] Press Release, Foreign Affairs, Trade & Dev., Canada Welcomes Agreement with Dow AgroSciences (May 27, 2011), *available at* www.international.gc.ca/media_commerce/comm/news-communiques/2011/145.aspx?view=d.

[283] *NAFTA Pesticide Ban Challenge Settled Without Money,* CBC NEWS, www.cbc.ca/news/canada/prince-edward-island/story/2011/05/30/nafta-pesticide-ban-challenge-settled.html (last updated May 30, 2011).

[284] Press Release, Canadian Envtl. Law Ass'n, *supra* note 178.

paid in this settlement, not even a token amount, and the Supreme Court decision on the Hudson by-law and all municipal and provincial bans are still on firm legal footing."[285]

IV. CONCLUSION

The fight for cosmetic pesticide bans in Canada remains a grassroots movement in every sense of the phrase. It originated in parks, school grounds, and neighbourhoods among people who worked on political change with the level of government closest to them.[286] Even before the country's highest Court, the legal issues turned on whether local jurisdiction existed to take precautionary action in the face of uncertainty and risk as it was perceived at the local level.[287] Both the Supreme Court and ultimately the Settlement Agreement in the *Dow* case confirmed the nested legislative authority for local governments to act.[288]

In hindsight, early warnings were prescient about two issues addressed in this Article: the threat of key NAFTA provisions to public interest environmental law[289] and the need for precautionary responses in the face of widespread exposure to low levels of multiple toxic substances.[290] The wisdom of the latter continues to be confirmed by extensive and credible scientific evidence, notably, but not limited to, the multiple challenges of low-level exposure to endocrine disrupting chemicals.[291] Despite the scientific complexities, a common sense understanding of this fact is illustrated by longstanding and widespread support among the Canadian public for the logic of banning needless or "cosmetic" exposure to pesticides.[292] For the former, while some procedural safeguards now exist with varying degrees of successful implementation to improve public access to disputes before NAFTA tribunals, investors continue to have rights and tools that can potentially undermine domestic legislation and court rulings.[293]

The *Dow* claim, with its singular focus on 2,4-D, was unsuccessful[294] in repealing or amending Québec's popular provincial

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[285] *Id.*

[286] *See supra* Part II.A-B.

[287] *See* discussion *supra* Part II.C.2.

[288] *See* discussion *supra* Part II.C.2, III.F.

[289] JOHNSON & BEAULIEU, *supra* note 2; AUDLEY, *supra* note 2; Swenarchuk, *supra* note 2.

[290] COLBORN ET AL., *supra* note 21; *see also supra* Part III.E.

[291] WORLD HEALTH ORG. & UNITED NATIONS ENV'T PROGRAMME, *supra* note 23.

[292] *See* discussion *supra* Part II.A-E.

[293] *See* discussion *supra* Part III.A.1-4.

[294] *See* discussion *supra* Part III.B.F.

law[295] banning the use of certain pesticides, or in deterring other provinces such as Ontario from creating the most comprehensive cosmetic pesticide ban in North America.[296] Nevertheless, all sides in this debate claimed "success" in some form. Dow got a public acknowledgement from Québec of the federal government's risk assessment conclusions,[297] though no compensation.[298] Environmentalists held onto both the Québec law and the knowledge that NAFTA seemed unable to deter similar laws, grounded in the precautionary principle, from being enacted in other provinces.[299] The federal government described the result as confirming the right of governments to regulate the use of pesticides and the Québec government retained its pesticide ban.[300]

Despite varied perspectives on the outcome, the *Dow* case, and others like it, illustrates how NAFTA's Chapter 11 ISDS mechanisms can be, and have been, used to try and reverse, and arguably deter, similar domestic public interest measures.[301] Under Chapter 11, investor rights can trump public interest rights, chiefly on account of provisions concerning the legitimate expectations of investors in Articles 1105 and 1110, the singular trade focus in NAFTA overall, and the arbitral procedures with their lack of accompanying judicial safeguards.[302]

In the unlikely event that Chapter 11 were removed from NAFTA, it would be in keeping with recent steps taken in Australia where, in April 2011, the Australian government refused to enter into any further international investment agreements with developed countries containing ISDS provisions on the basis that they:

> [do] not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those

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[295] Pesticides Act, R.S.Q., c. P-9.3, r. 1 (Can.).

[296] *See* discussion *supra* Part II.D-E, G.

[297] Dow AgroSciences v. Gov't of Can., NAFTA/UNCITRAL, Settlement Agreement, ¶ 3(a)-(c) (May 25, 2011), *available at* www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/dow-03.pdf.

[298] *Id.* ¶ 2.

[299] *See* discussion *supra* Part III.F*; see also* Press Release, Canadian Envtl. Law Ass'n, *supra* note 178.

[300] Press Release, Foreign Affairs, Trade & Dev., *supra* note 282.

[301] MANN, *supra* note 111, at 37-46; Van Harten, *supra* note 124, at 43.

[302] *See* discussion *supra* Part III.A.1-4.

laws do not discriminate between domestic and foreign businesses.[303]

This recognition by the Australian government underscores the problem illustrated by the use of ISDS provisions under NAFTA, including the rich irony in the *Dow* case.[304] Such investor rights originated in ISDS mechanisms intended to protect investors from the vagaries of less developed legislative and judicial systems.[305] Yet, these same mechanisms can be used to undermine domestic public interest regulation that, in this case, was the result of many years of due process in Canadian lawmaking and the Canadian courts.[306] Moreover, the procedural mechanisms to protect these investor rights under Chapter 11 also deny the public the same rights to fully participate in the arbitration process.[307] The *Dow* case illustrates that Chapter 11 investor rights are misplaced within an investment agreement between nations that have equally sophisticated legislative and judicial systems.

[303] AUSTRALIAN GOV'T, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (Apr. 2011), *available at* pdf.aigroup.asn.au/trade/Gillard%20Trade%20Policy%20Statement.pdf.

[304] *See* discussion *supra* Part III.D.

[305] TIENHAARA, *supra* note 117, at 48.

[306] *See* discussion *supra* Part II.B-E, G.

[307] *See* discussion *supra* Part III.A.1, D.

Table 1: A Selection of NAFTA Investor Claims Relating to Canadian Public Interest Environmental and Health Measures[308]
January 1994–January 2013

Investor	**Articles**	**Basis of claim**	**Outcome**
Ethyl NoI: Apr. 14, 1997	1102 1106 1110	U.S. company challenged the federal environmental ban on the import and international trade of gasoline additive MMT. The ban was based on MMT's suspected neurotoxicity and its potential to interfere with car diagnostics.	Claimed US $250 million in damages. Settled with Ethyl for US $13 million.
S.D. Meyers NoI: July 22, 1998 NoA: Oct. 30, 1998	1102 1105 1106 1110	U.S. waste treatment company challenged a temporary federal ban of toxic PCB waste exports.	Claimed US $20 million in damages. S.D. Meyers awarded US $5 million by UNCITRAL panel for Canada's breach of Articles 1102 and 1105. Canada's appeal of the decision to the federal court was dismissed.
Sun Belt NoI: Dec. 2, 1998 NoA: Oct. 12, 1999	1102 1103 1105	U.S. water company challenged British Columbia's water protection legislation and bulk water export moratorium	Claimed US $10.5 billion. Arbitration never began.

[308] The information in this table has been primarily reproduced with the permission of the Canadian Centre for Policy Alternatives. CANADIAN CENTRE FOR POLICY ALTS., NAFTA CHAPTER 11 INVESTOR-STATE DISPUTES (Oct. 1, 2010), *available at* www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Dispute%20Table.pdf; *see also* PUBLIC CITIZEN, TABLE OF FOREIGN INVESTOR–STATE CASES AND CLAIMS UNDER NAFTA AND OTHER U.S. TRADE DEALS 6-13 (Mar. 2013), *available at* www.citizen.org/documents/investor-state-chart.pdf.

Chemtura Corp. NoI: Nov. 6, 2001 NoA: Feb. 10, 2005	1103 1105 1110	U.S. chemical company, Chemtura Corp. (previously Crompton Corp.), claim against voluntary agreement between manufacturers and the federal government to ban the sale and use of the pesticide lindane.	Claimed US $79 million in damages. Claim dismissed by UNCITRAL panel ordering the investor to pay the costs of the arbitration (US $688,000) and to pay fifty percent of Canada's costs in defending the claim (CAD $5.778 million).
V.G. Gallo NoI: Oct. 12, 2006 NoA: Mar. 30, 2007	1105 1110	Gallo alleged that proposed Ontario legislation affected his investment in a proposed landfill on the site of a decommissioned open-pit iron ore mine, Adams Mine.	Claimed CAD $355.1 million in damages UNCITRAL dismissed application for lack of jurisdiction. Tribunal awarded Canada US $450,000 in costs.
Clayton/Bilcon NoI: Feb. 5, 2008 NoA: May 26, 2008	1102 1103 1105	Bilcon is challenging a joint federal-provincial environmental assessment panel recommendation that reject a quarry and marine terminal in Nova Scotia because of adverse environmental impacts.	Claimed US $188 million in damages. Claim still pending.
Dow Chemical NoI: Aug. 25, 2008 NoA: Mar. 31, 2009	1105 1110	Dow AgroSciences challenged Québec's ban on the use of the pesticide 2,4-D.	Claimed US $2 million in damages. Settled at no cost.
Malbaie Rivers Outfitters Inc. NoI: Sep. 16, 2008	1102 1103 1105 1110	Malbaie challenged Québec's conservation measures of reducing fishing licenses and restricting access to certain fishing areas.	Claimed US $5 million in damages. Settled after payment of an undisclosed amount.

David Bishop NoI: Oct. 17, 2008	1102 1103 1104 1105 1110	Bishop challenged Québec's conservation measures of reducing the number of fishing licenses and restricting access to certain fishing areas.	Claimed US $1 million in damages. Claim still pending.
AbitibiBowater NoI: Apr. 23, 2009 NoA: Feb. 25, 2010	1102 1103 1105 1110	The Newfoundland Government enacted legislation to return to public control Abitibi's water and timber rights, and to expropriate certain lands and assets.	Claimed US $467.5 million in damages. Settled for US $130 million, the largest NAFTA related monetary settlement to date.
John R. Andre NoI: Mar. 19, 2010	1102 1103 1104 1105 1106 1110	Andre challenged conservation measures taken by the Northwest Territories to decrease the number of caribou that can be hunted.	Claimed US $5.6 million in damages. Claim still pending.
St. Mary's VCNA, LLC NoI: May 13, 2011 NoA: Sep. 14, 2011	1102 1103 1105 1110	St. Mary's challenged Ontario and municipal land use planning and licensing approval processes affecting St. Mary's proposals to develop agricultural land into an aggregate quarry.	Claimed US $275 million in damages. Settled after Province of Ontario paid US $15 million.
Lone Pine Resources Inc. NoI: Nov. 8, 2012	1105 1110	Lone Pine is challenging Québec's 2011 moratorium on shale fracturing ("fracking") in certain environmentally sensitive areas.	Claiming CAD $250 million in damages. Claim still pending.
Mesa Power Group LLC NoI: July 6, 2011 NoA: Oct. 4, 2011	1102 1103 1104 1105 1106	A Texas-based renewable energy development company challenged the Ontario Power Authority's changes to the rules for awarding contracts under the FIT Program.	Claiming US $775 million in damages. Claim still pending.

Windstream Energy NoI: Oct. 17, 2012 NoA: Jan. 28, 2013	1110 1105 1102	A U.S.-owned wind energy company is challenging Ontario's 2011 moratorium on offshore wind development partly based on a need for further scientific research to determine the impact on health and the environment.	Claiming US $475,230,000 in damages. Claim still pending.
Legend: NoI = Notice of Intent to File an Arbitration NoA = Notice of Arbitration Article 1110 = Expropriation and Compensation Article 1106 = Performance Requirements Article 1105 = Minimum Standard of Treatment Article 1104 = Standard of Treatment Article 1103 = Most Favored-Nation Treatment Article 1102 = National Treatment			