Chemtura v Canada (NAFTA Chapter 11)

AREAS OF POLICY AFFECTED: public health (pesticides), environmental protection (pollution, biodiversity), agriculture (pesticide regulation), international trade (canola exports).

CASE SUMMARY: This was a lawsuit against Canada by the manufacturer of an agricultural pesticide, lindane. Lindane was banned or restricted in numerous countries from the 1970s. However, it was used widely in North American canola production until the late 1990s. The U.S. Environmental Protection Agency moved to ban lindane in 1998. Canadian farmers pressed the Canadian government to follow suit due to concerns about access to the U.S. market. Following an elaborate scientific review, the Canadian Pesticide Regulation Agency banned lindane in the early 2000s on health and environmental grounds. Chemtura lobbied against the bans in Canada and the U.S., challenged Canada's measures in the Federal Court of Canada, and then sued Canada under NAFTA Chapter 11.

The tribunal took jurisdiction over the claim but dismissed it, concluding that the regulatory process leading to the ban was fair and that the ban itself was reasonable. The tribunal noted widespread restrictions on lindane in other countries including the U.S. The tribunal made a costs order against the claimant.

COMMENT: The case has been cited by some proponents of investment arbitration as putting to rest concerns that NAFTA Chapter 11 impedes public health and the environmental regulation. Yet the award itself is troubling on this point. First, the tribunal, like the earlier *Glamis Gold v United States* tribunal, rejected submissions by Canada that tribunals should defer to good faith regulatory measures of governments.

Second, the tribunal noted repeatedly that lindane was banned in many other countries, making it unclear whether the ban would have been upheld had Canada been a regulatory first-mover in limiting the pesticide on health or environmental grounds.

Third, the tribunal declined to adopt the approach of the earlier *Glamis Gold* tribunal, which required the claimant to provide affirmative evidence of any alleged expansion of the NAFTA minimum standard of treatment beyond its established content in international custom. Canada, Mexico, and the U.S. have argued that claimants must satisfy this requirement. However, arbitrators in numerous NAFTA cases have rejected this position, thus facilitating investor claims.

Source: www.iiapp.org (February 2011), based on information in publicly-available awards and materials in known investment arbitrations (for texts of awards, see www.italaw.com). This report was produced by a research team coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada.