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INTERNATIONAL LAWYERS

Toronto *Washington DC*

CONFIDENTIAL

NOTICE OF ARBITRATION
UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON
and
BILCON OF DELAWARE, INC.

Investors

v.

GOVERNMENT OF CANADA

Party

May 26, 2008

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1. Pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Rules of Arbitration and Articles 1116 and 1120 of the North American Free Trade Agreement ("NAFTA"), the Investors, **WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON and BILCON OF DELAWARE**, initiate recourse to arbitration under the UNCITRAL Rules of Arbitration (Resolution 31/98 Adopted by the General Assembly on December 15, 1976).

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

2. Pursuant to Article 1120(1)(c) of the NAFTA, the Investors hereby demand that the dispute between them and the Government of Canada ("Canada") be referred to arbitration under the UNCITRAL Arbitration Rules.

3. Pursuant to Article 1119 of the NAFTA, the Investors delivered a Notice of Intent to Submit a Claim to Arbitration to Canada on February 5, 2008, more than ninety days prior to the submission of this claim.

4. Pursuant to Article 1121 of the NAFTA, the Investors consent to arbitration in accordance with the procedures set out in the NAFTA. The Investors hereby waive their right to initiate or continue before any administrative tribunal or any court, or any other dispute settlement procedures, any proceedings with respect to the measures outlined herein, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages, before an administrative tribunal or court under the laws of Canada. The Investors' executed consents and waivers are attached to this Notice of Arbitration. The Investment, Bilcon of Nova Scotia, has also executed a waiver as required by NAFTA Article 1121(1)(b).[1]

B. NAMES AND ADDRESSES OF THE PARTIES

5. The Investors are:

William Ralph Clayton
P.O. Box 3015
Lakewood, NJ, 08701

William Richard Clayton
P.O. Box 3015
Lakewood, NJ, 08701

[1] Consent and Waiver of William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, attached as Exhibit 1. The waiver of Bilcon of Nova Scotia is attached as Exhibit 2.

Douglas Clayton
P.O. Box 3015
Lakewood, NJ, 08701

Daniel Clayton
P.O. Box 3015
Lakewood, NJ, 08701

Bilcon of Delaware, Inc.
1355 Campus Parkway
Monmouth Shores Corporate Park
Neptune, NJ, 07753

6. The Government of Canada is a Party to this arbitration. It is represented by:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Canada

C. ARBITRATION CLAUSE OR SEPARATE ARBITRATION AGREEMENT INVOKED

7. The Investors invoke Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1120 and 1122 of the NAFTA, as authority for this arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions concerning the settlement of disputes between a Party and an investor of another Party.[2]

D. CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

8. The dispute is in relation to the Investors' investment in Canada and the damages that have arisen out of Canada's breach of its obligations under Section A of Chapter 11 of the NAFTA.

[2] The provisions of NAFTA Chapter 11 are set out in Exhibit 3.

E. GENERAL NATURE OF THE CLAIM

9. This arbitration claim is about the need for Canada and its subnational governments to fairly administer and follow their environmental and investment laws and regulations to ensure a high standard of environmental protection. Canada's environmental regulatory regime has been applied to the Investors in an arbitrary, unfair and discriminatory manner.

10. This claim arises out of the unfair, arbitrary and discriminatory application of certain government measures related to the permitting of a basalt quarry and marine terminal at Whites Point in Digby County, Nova Scotia.

11. Canada and the Province of Nova Scotia require that proponents of certain industrial projects undergo environmental assessments before they can begin constructing and operating those projects. The type of environmental assessment that is undertaken depends on a number of factors, including the size and scope of the project and the type of environmental impact the project may have. In the case of the Investors, the type of environmental assessment undertaken with respect to the Whites Point Quarry and/or Marine Terminal Project (the "Investments") – as well as the administration and conduct of the environmental assessment – was arbitrary, discriminatory, and fundamentally unfair.

12. The Investors allege that Canada has breached its obligations under Section A of Chapter 11 of the NAFTA, including but not limited to the following provisions:

    a. Article 1102 - National Treatment
    b. Article 1105 - International Law Standards of Treatment
    c. Article 1103 - Most Favored Nation Treatment

13. The measures at issue in this claim comprise a continuous course of conduct that is inconsistent with Canada's obligations owed to the Investors under Section A of Chapter 11. Almost all the measures have first arisen within the last three years. Some of the measures started more than three years prior to the submission of this Notice of Arbitration and have formed an integral part of Canada's continuous breach. The environmental assessment process was unusually lengthy and did not come to an end until the last of the relevant governmental authorities finally rejected the project. The Nova Scotia Minister of Environment and Labour rejected the Investor's application on November 20, 2007. Canada took steps tantamount to rejection of the Investments proposal in December 2007. These specific measures, as well as others that have arisen within three years of the submission of this claim, all fit within the continuous course of internationally wrongful actions undertaken by Canada and Nova Scotia that continue to this day.

I. William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Are Investors of the United States

14. William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton (collectively referred to as "the Claytons") and Bilcon of Delaware, Inc. ("Bilcon") are Investors of the United States of America pursuant to NAFTA Article 1139. The Claytons are individual Investors, while Bilcon of Delaware is a limited liability company incorporated under the laws of the State of Delaware.

II. The Investors Own Investments in Canada

15. The Investors own and control investments in Canada that fall within the definition of "investment" in NAFTA Article 1139. These investments include:

    a. Shares in a subsidiary company named Bilcon of Nova Scotia, which is an unlimited liability company incorporated under the laws of Nova Scotia, within the meaning of NAFTA Articles 1139(b).

    b. A lease agreement entered into via Bilcon of Nova Scotia for the property on which the quarry and marine terminal was to be developed, which constitute investments within the meaning of NAFTA Article 1139(g).

    The purpose of these Investments was to construct and operate a basalt quarry and marine terminal for the shipment of aggregate to the US market.

III. Canada's Measures Relating to the Investors' Investments

16. This claim arises out of measures adopted and maintained by the federal government of Canada and the province of Nova Scotia. Approvals from both governments were sought by the Investors.[3]

17. There are two fundamental steps in any environmental assessment in Canada, which include:

    a. An environmental assessment is triggered in accordance with the relevant laws and regulations.

    b. Once engaged, the relevant governmental authorities administer and implement the environmental assessment in accordance with the appropriate laws and regulations.

[3] Pursuant to the definitions set out in NAFTA Article 201, a "measure" includes "any law, regulation, procedure, requirement or practice."

18. The Investors do not dispute the fact that a federal or provincial environmental assessment was required in this case. This arbitration directly relates to specific governmental measures that relate to the conduct, management, operation of the Investments, and the administration and implementation of the environmental assessment of the Investments.

Measures by the Government of Nova Scotia

19. A quarry in the Province of Nova Scotia that is less than 4 hectares in size is not required to undergo an environmental assessment under Nova Scotia law. However, Nova Scotia law triggers an environmental assessment for a quarry that is greater than 4 hectares, and classifies it as a "class one undertaking". Class one undertakings are subject to particular laws, rules and procedures, which require the project proponent to submit certain preliminary information to governmental authorities prior to the environmental assessment being carried out.

20. Once triggered, the administration of environmental assessments in Nova Scotia is highly discretionary. The manner in which this discretion was exercised was inconsistent with other projects, arbitrary, unfair and unpredictable.

21. The administration of the environmental assessment required of the Investors involved at least the following organs of the government of Nova Scotia:

    a. The Nova Scotia Department of Environment and Labour ("NSEL"), which is responsible for the Nova Scotia *Environment Act*, and the regulations and guidelines thereunder, including the Nova Scotia *Environmental Assessment Regulations* and the *Pit and Quarry Guidelines*.

    b. The Nova Scotia Department of Natural Resources ("NSDNR") which is responsible for the *Wildlife Act*, among other legislation.

    c. The Nova Scotia Department of Transportation and Public Works ("NSDTPW"), now called the Department of Transportation and Infrastructure Renewal, which is responsible for the *Public Highways Act*.

    d. The Nova Scotia Department of Tourism, Culture and Heritage, which is responsible for the Nova Scotia *Cemeteries Protection Act*.

Measures by the Government of Canada

22. A proposed work or undertaking in Canadian waters may result in the harmful alteration, disruption or destruction of fish habitat, or the destruction of fish, and may be required to undergo an environmental assessment in accordance with federal law.

23. As in the Nova Scotia regime, once a project is engaged in the federal system, the resulting environmental assessment process is highly discretionary. In particular, it does not specify:

    a. What and who defines the project that engaged the federal environmental assessment;

    b. Whether the "project" that triggers a federal environmental assessment is of the same nature and scope as the "project" which is in fact subject to that environmental assessment; and

    c. Whether the type of environmental assessment is determined before or after a final project description is established.

    This can, and did cause these environmental assessments in this case to be conducted in an arbitrary, unfair and unpredictable way, and inconsistently from other projects in like circumstances.

24. The successful completion of a federal environmental assessment is a precondition to the receipt of permitting approval *vis-a-vis* particular aspects of the project from various federal government organs. It is not a separate and unrelated process.

25. The administration of the environmental assessment required of the Investments involved at least the following organs of the government of Canada:

    a. The Canadian Environmental Assessment Agency, which is responsible for the *Canadian Environmental Assessment Act* ("*CEAA*"), and the laws, regulations, rules, procedures and guidelines pursuant thereto.

    b. Environment Canada, which is responsible for, *inter alia*, the *Species at Risk Act* and *Migratory Birds Act*. The *CEAA* and its associated regulations lay out the types of environmental assessments a project can undergo, the conditions that determine the type of environmental assessment to be used, and the requirements of each environmental assessment process itself.

    c. Fisheries and Oceans Canada ("DFO"), which is responsible for, *inter alia*, the administration of the *Fisheries Act*. The *Fisheries Act* prohibits the destruction of fish by any means other than fishing, as well as the harmful alteration, disruption or destruction of fish habitat.

    d. Transport Canada ("TC"), which is responsible for granting approvals under the *Navigable Waters Protection Act* when a project is proposed to be built or placed in, on, over, under, through or across any navigable water.

e. Natural Resources Canada, which is responsible for, *inter alia*, the *Explosives Act* and the regulations thereunder, including the *Amonium Nitrate and Fuel Oil Order* and the *Explosives Regulations*.

f. Health Canada, which is jointly responsible for the *Canadian Environmental Protection Act*, and the regulations thereunder.

26. If engaged, the *CEAA* provides for four types of environmental assessment:

(i) screenings;
(ii) comprehensive studies;
(iii) mediations; and
(iv) panel reviews.

Screening studies are the least onerous, and panel reviews are the most onerous.

27. Under the federal environmental assessment process, the Investments were arbitrarily sent to a panel review process. This is entirely inconsistent with other projects in like circumstances as well as projects with much larger footprints – as well as those that have been subjected to less onerous forms of environmental assessment. As a result, the Investments were arbitrarily and unfairly forced into the most expansive, expensive and time-consuming environmental assessment, while other similar projects have been subject to the most minimal, inexpensive and efficient environmental assessment.

Measures by the Joint Federal-Provincial Environmental Assessment Panel

28. When a project requires a decision from both the federal and provincial governments, those governments may choose to conduct the assessment through a joint review panel. Panel review members are selected by the governments. A joint panel review must follow applicable laws and its Terms of Reference. In this case, the Terms of Reference were set through an *Agreement Concerning the Establishment of a Joint Review Panel* (JPA).

29. Upon completing its review of the environmental assessment, the joint review panel was required to forward a report to the relevant federal and provincial Ministers. To address federal obligations, the report was obliged to include the joint review panel's recommendations on all factors set out in section 16 of the *CEAA*. On receipt of this report, the federal Minister and other federal decision-makers were required to, in accordance with the JPA, take a course of action consistent with the terms of section 37 of the *CEAA*. Under the *CEAA*, a federal decision-maker has two options, depending on specific circumstances set out in the Act:

(a) To make the federal decision(s) or issue the federal approval(s) required by the project; or

(b) Refuse to make any federal decision or issue any federal approval that would allow the project to proceed.

The federal minister, unlike the provincial Minister was subject to different legal obligations. The provincial Minister through the JPA, demanded different recommendations from the joint review panel, namely:

(i) Accept the recommendation of the joint review panel; or
(ii) Reject the recommendations of the joint review panel.

30. The legal framework of the *CEAA* places paramount importance on the following:

a. Whether, after mitigation is completed, a project is likely to have a significant adverse "environmental effect" (as defined); and

b. If so, whether the project is nonetheless justified in the circumstances.

For the first requirement to be met, a joint review panel must clearly set out or rely on procedures and guidelines that define what constitutes a "significant adverse environmental effect," as well as the analytical framework required to make such a determination.

31. In this case, the joint review panel patently failed to do the following:

a. First, it did not conduct itself in accordance with applicable laws, rules and procedures;

b. Second, where it purported to interpret and apply the applicable laws, rules and procedures, it misstated or incorrectly applied them; and

c. Third, instead of following the applicable laws, rules and procedures, the joint review panel place primacy on non-legal documents and concepts.

32. The federal response to the joint review panel report failed to pay due regard to the legal framework of the *CEAA*, and was therefore also fundamentally arbitrary and unfair.

IV. The Investors were Treated Less Favorably than Investors in Like Circumstances

33. The Investors were treated less favorably than Canadian investors in like circumstances in at least two respects:

a. The initial permit granted by NSEL for a 3.9 hectare quarry came with terms and conditions unlike those that were granted to similar quarries in the immediate area.

b. The type of environmental assessment that the Investors were required to carry out were more burdensome, unfair and arbitrary than the types of environmental assessments other Canadian investors with similar projects have had to undergo. While the Investments were subject to a joint panel review, other similar applications by Canadian Investments have only had to undergo much less burdensome environmental assessments

34. Canada's and Nova Scotia's treatment of the Investments was less favorable than that provided to other Canadian investors in like circumstances. This treatment is inconsistent with Canada's obligation owed to the Investors under NAFTA Article 1102.

V. The Investors were Treated in an Unfair, Arbitrary, and Discriminatory Manner

35. Canada and Nova Scotia treated the Investments in an unfair, arbitrary and discriminatory manner. This conduct includes, but is not limited to:

a. The Department of Fisheries and Oceans – which had the authority to grant approval of the blasting plan under the initial 3.9 hectare quarry permit – unilaterally expanded the terms and conditions of the quarry permit, unduly stalled test blasts on the initial quarry site once it was under environmental assessment review, established unreasonable conditions for fish habitat compensation, and set arbitrary and unfounded criteria for the approval of test blasts for the purposes of the environmental assessment.

b. The Nova Scotia Department of Transportation and Public Works failed to act reasonably in tendering offers from the Investors to purchase a public road that would have facilitated the expansion of the Investor's investment in the quarry. Its refusal was motivated by political bias against the project, rather than government policy or rational decision making criteria of any kind.

c. The process by which governmental authorities conducted the environmental assessment was *ad hoc*, non-transparent, and in numerous respects violated rules, regulations, procedures and guidelines governing environmental assessments. As a result, the process was confused and unduly time-consuming, taking well over 5 years to complete. The amount of time involved exceeded by a significant margin the maximum time involved for other such environmental assessments.

d. In coming to its decision the joint review panel disregarded the analytical decision-making framework that environmental review panels of this nature are required to follow. The joint review panel decision itself was based on criteria that are not properly included as part of environmental assessments. The Investors were given no prior notice that the joint review panel would be relying on these criteria.

36. Canada and Nova Scotia treated the Investments in an unfair, arbitrary and discriminatory manner. Canada also failed to provide full protection and security to the Investments. All these acts were inconsistent with Canada's obligations owed to the Investors under NAFTA Article 1105.

VI. Most Favored Nation Treatment

37. Under NAFTA Article 1103, Canada is required to accord the Investments treatment no less favorable than that available to Investments of investors from non-parties to the NAFTA. Canada has failed to do so in this case.

F. ISSUES RAISED

38. Did Canada take measures inconsistent with its obligations under Articles 1102, 1105, or 1103 of the NAFTA?

39. If the answer to the above question is yes, what is the quantum of compensation to be paid to the Investors as a result of the failure by Canada to comply with its obligations arising under Chapter 11 of the NAFTA?

G. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

40. The Investors claim:

a. Damages of not less than US $188 million as compensation for the damages caused by or arising out of Canada's measures that are contrary to its obligations contained in Part A of Chapter 11 of the NAFTA;

b. Costs associated with these proceedings, including all professional fees and disbursements;

c. Fees and expenses incurred to oppose the effect of the impugned measures;

d. Pre-award and post-award interest at a rate to be fixed by the Tribunal;

e. Tax consequences of the award to maintain the integrity of the award; and

f. Such further relief that counsel may advise and that this Tribunal may deem appropriate.

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