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AMENDED STATEMENT OF CLAIM 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

January 30, 2009
Amended: December 3, 2009

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1. Pursuant to Article 18 of the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") 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, INC.** hereby submit their Statement of Claim.

I. THE PARTIES

2. 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. Each of the Claytons are individual Investors, while Bilcon is a limited liability company incorporated under the laws of Delaware in the United States of America.[1]

3. The addresses for the Investors are as follows:

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

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

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

[1] Certificate of Incorporation of Bilcon of Delaware, Inc., April 15, 2002, set out as Exhibit 1.

4. The Respondent, the government of Canada ("Canada"), is a Party to the North American Free Trade Agreement ("NAFTA"). Canada has acted through measures adopted and maintained by the federal government, as well as by the government of the province of Nova Scotia ("Nova Scotia"). Pursuant to NAFTA Article 105, Canada has assumed international responsibility for the measures taken by Nova Scotia.

5. The address for Canada is as follows:

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

II. PROCEDURAL HISTORY OF DISPUTE AND JURISDICTION

A. The Procedural History of This Dispute

6. On February 5, 2008, the Investors served upon Canada a Notice of Intent to Submit a Claim to Arbitration ("Notice of Intent") in accordance with NAFTA Article 1119. The Notice of Intent was delivered to Canada more than 90 days before the submission of this Claim.

7. This Claim arises out of discrete measures which affected the Investors, as well as measures that constitute a continuing breach of Canada's NAFTA obligations. Each day that some measures continued to be applied caused new damage to the Claytons and Bilcon and resulted in a NAFTA violation. Pursuant to NAFTA Article 1116, this Claim is submitted less than three years from the date the Investors first acquired, or should have acquired, knowledge of the breach, and knowledge that the Investors had incurred loss or damage. Pursuant to NAFTA Article 1120, the Investors submit this Claim more than six months since the events giving rise to this Claim have taken place.

8. On May 26, 2008, the Investors filed their Notice of Arbitration in this Claim. The Investors agreed with Canada on August 5, 2008, to make the effective filing date of the Notice of Arbitration June 17, 2008.

B. The Jurisdiction of This Tribunal

9. Sections A and B of NAFTA Chapter 11 contain the arbitration agreement between the disputing parties, in accordance with Article 18(1) of the UNCITRAL Arbitration Rules.

10. In Section B of NAFTA Chapter 11, Canada has extended an offer to arbitrate any dispute regarding its obligations under Section A to any investor of another NAFTA Party. The Investors accept Canada's offer by filing this Statement of Claim.

11. The Claytons are individual US citizen Investors. Bilcon is a limited liability company incorporated under the laws of Delaware. The Investors own and control investments in Canada through their ownership and control of Bilcon of Nova Scotia, an unlimited liability company incorporated under the laws of the province of Nova Scotia,[2] and a lease agreement entered by Bilcon of Nova Scotia for the property on which a quarry and marine terminal were to be developed.

III. STATEMENT OF FACTS

12. This Claim arises out of measures adopted and maintained by Canada and Nova Scotia. Under NAFTA Article 201, a "measure" includes "any law, regulation, procedure, requirement or practice."

13. The measures in question were applied through the environmental assessment of the Investors' proposed quarry and marine terminal to be developed at Whites Point, Nova Scotia ("Project").

14. Quarries in the province of Nova Scotia that are less than 4 hectares in size are not required to undergo environmental assessments, and are granted operating permits by the Nova Scotia Ministry of Environment and Labour ("NSEL") with particular terms and conditions, most of which are standardized. Quarries greater than 4 hectares, on the other hand, are required to undergo environmental assessments in accordance with the Nova Scotia *Environment Act* and *Environmental Assessment Regulations*. In addition, the federal *Canadian Environmental Assessment Act* is triggered if the project requires a federal permit or approval.

[2] See Bilcon of Nova Scotia's Memorandum of Association (Exhibit 2); the Articles of Association (Exhibit 3); Solicitor's Declaration (Exhibit 4); and List of Officers and Directors (Exhibit 5).

16. There are four general types of environmental assessment under the *Canadian Environmental Assessment Act*: (i) screenings; (ii) comprehensive studies; (iii) mediations and (iv) panel reviews. While screening studies are the least onerous, panel reviews are the most involved. Where a project is sent to a panel review, and that project involves matters of both federal and provincial jurisdiction, then the federal and provincial governments may agree to enter into a co-ordinated federal and provincial environmental assessment process ("Joint Panel Review").

17. A Joint Panel Review is conducted by a panel ("Joint Panel") comprised of three individuals with expertise in the particular environmental areas of concern. In conducting its review, a Joint Panel must follow its Terms of Reference, and respect any applicable rules, policies, guidelines and procedures. The Terms of Reference are set through an *Agreement Concerning the Establishment of a Joint Review Panel.*

18. In April 2002, the Investor's predecessors in interest received a permit from NSEL to operate a 3.9 hectare basalt quarry at Whites Point, Nova Scotia.

19. In May 2002, the Investors, through Bilcon of Nova Scotia applied for a permit to expand the quarry and build a marine terminal.

20. In June 2003, the Minister of Fisheries and Oceans referred the Investors' proposed quarry and marine terminal at Whites Point to the federal Minister of the Environment for referral to a review panel under the *Canadian Environmental Assessment Act*. Shortly thereafter, the environmental assessment for the Project was referred to a Joint Panel Review.

21. On October 23, 2008, the Joint Panel issued the Joint Review Panel Report ("Final Report"). The Joint Panel recommended that the Project be rejected outright. The basis of the Joint Panel's decision was that the Project would have a significant adverse effect on the "core values" of the surrounding communities, and that this adverse effect could not be mitigated.

22. Upon issuing its Final Report, the Joint Panel was required to forward it to the relevant federal and provincial Ministers. To address federal obligations, the Final Report was obliged to include the Joint Panel's recommendations on all factors set out in section 16 of the *Canadian Environmental Assessment Act*.

23. On receipt of the Final Report, the federal Minister and other federal decision-makers were required to take a course of action consistent with the terms of section 37 of the *Canadian Environmental Assessment Act*. Under the *Canadian Environmental Assessment Act*, a federal decision-maker has two options, depending on specific

circumstances set out in the Act: (i) to make the federal decision(s) or issue the federal approval(s) required by the project; or (ii) to refuse to make any federal decision or issue any federal approval that would allow the project to proceed.

24. On receipt of the Final Report, the provincial Minister was subject to different legal obligations, namely to either (i) accept the recommendation of the Joint Panel; or (ii) reject the recommendations of the Joint Panel.

25. In November 2007, the Minister of NSEL rejected the Investor's project. The federal Governor General in Council rejected the Project in December 2007.

26. Over the course of the Investors' attempts to obtain approval for the Project, Canada subjected them to measures through at least the following organs:

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

b. Environment Canada, which is responsible for, *inter alia*, the *Canadian Environmental Assessment Act*, and the regulations thereunder, as well as the *Species at Risk Act*. The *Canadian Environmental Assessment Act* 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.

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, except under certain conditions that may be specified by the Minister of Fisheries and Oceans.

d. Transport Canada, 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 partly responsible for the *Canadian Environmental Protection Act*, and the regulations thereunder.

g. The Joint Panel responsible for conducting the Joint Panel Review of the Project. The Joint Panel was formed by agreement between Canada and Nova Scotia, and was charged with the task of conducting the environmental assessment and recommending to the federal Minister of Environment and the provincial Minister of NSEL whether to approve the Project.

27. In addition, Nova Scotia took measures through at least the following organs:

a. The 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*, and 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*.

e. The Joint Panel responsible for conducting the Joint Panel Review of the Project.

28. The governmental measures at issue in this claim all relate directly to the Investors' application for a permit to construct and operate a quarry and marine terminal at Whites Point, and the environmental assessment process this Project was required to undergo.

29. Although the array of measures to which Canada subjected the Investors and their investments may seem discrete and unconnected, taken together they comprise a contiguous whole which comprised the overall environmental review process. While some – though not all – of the measures started more than three years prior to the filing of this Claim, these measures must be seen as part of the larger process. The environmental assessment review process was unusually and unduly lengthy, and did not come to an end until the last of the relevant governmental authorities finally rejected the Project in December 2007.

30. To the extent that any of the measures to which Canada subjected the Investors started three years prior to the filing of this Claim, such measures nonetheless properly fall within the three year limitation period of NAFTA Article 1116(2), since Canada continued to subject the Investors to these measures into the limitation period.

IV. NAFTA OBLIGATIONS BREACHED BY CANADA

31. The Investors claim 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

A. National Treatment

32. NAFTA Article 1102 obliges the NAFTA Parties to treat investors from other NAFTA Parties and their investments as favorably as domestic investors and their investments. The analysis of the national treatment obligation can be segregated into three elements:

a. A determination that the foreign investors or investments are in like circumstances with local investors or investments;

b. A determination that the NAFTA Party treats the foreign investors or investments less favorably than it treats local investors or investments; and

c. A determination that the treatment is with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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

a. First, 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. Second, the type of environmental assessment that the proposed larger quarry and marine terminal were required to undergo was more onerous than the types of environmental assessments other Canadian investors with applications for large industrial projects have had to undergo. While the Project was subject to a Joint Panel Review, other applications by large Canadian owned quarries with marine terminals have had to undergo less onerous types of environmental assessment.

34. Each of the ways in which Canada and Nova Scotia treated the Investors and their Investments less favorably than other Canadian investors in like circumstances constitutes a violation of NAFTA Article 1102.

B. International Law Standard of Treatment

35. NAFTA Article 1105(1) sets out the international law standard of treatment that a NAFTA Party is obliged to accord investments and investors of another NAFTA Party.

36. Canada and Nova Scotia treated the Investors in an unfair, arbitrary and discriminatory manner in a number of respects. These include, but are not necessarily limited to, the following:

a. First, the DFO – which had the authority to grant approval of the Investors' 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 after the application had been expanded and put under environmental 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. Second, NSDTPW failed to act reasonably in tendering offers from the Investors to purchase a public road that would have facilitated the expanded quarry to move forward. NSDTPW refused to sell the road when it would have clearly been in its best interest to do so. This refusal was motivated by political bias against the Project, rather than government policy or rational decision making criteria of any kind.

c. Third, 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. By consequence, the overall process was highly irregular and unduly time-consuming. The amount of time the process took greatly exceeded the maximum time limit allowed for such environmental assessments.

d. Fourth, in coming to its decision the Joint Panel completely disregarded the analytical decision-making framework that environmental review panels of this nature are required to follow. The Joint 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 Panel would be relying upon such criteria.

e. The Minister of Nova Scotia Environment and Labour and Canada's Governor in Council rejected the Investors' project on the basis of the Joint Panel decision, on November 20, 2007, and December 13, 2007, respectively, continuing a course of arbitrariness, discrimination, procedural unfairness and a failure to provide national treatment. Neither the Minister of Nova Scotia Environment and Labour nor the Federal Minister of the Environment provided the Investors' an opportunity to be heard in relation to the Joint Panel process before they adopted the Joint Panel decision, despite the Investors' requests. Further, Canada's response to the Joint Panel decision was manifestly unfair, arbitrary and discriminatory and was inconsistent with the legal framework of the *Canadian Environmental Assessment Act.*

37. Each of the ways in which Canada and the province of Nova Scotia treated the Investors' Investments in such unfair, arbitrary and discriminatory ways constitutes a violation of NAFTA Article 1105.

C. Most Favored Nation Treatment

38. Under NAFTA Article 1103, Canada is required to accord the Investors and their Investments treatment no less favorable than that provided to foreign investors or investments under other international agreements to which Canada is a party. Canada has failed to meet this obligation.

V. DAMAGES

39. The effects of these measures on the Investors include, but are not limited to, the following:

a. The Investors have suffered in excess of US C-1(b)(i) in connection with expenses incurred over more than five years on their application for a permit to build and operate the quarry and marine terminal at Whites Point;

b. The Investors have been deprived of a vital source of basalt aggregate to supply their business operations in the United States. Due to the resulting loss of the supply of basalt, the Investors have experienced a major strategic disadvantage, as the supply of aggregate in the Investors' markets has become consolidated in ever-fewer hands over the course of the environmental assessment process. As a result of this strategic disadvantage, Bilcon may be forced to satisfy market demand at much greater cost.

VI. POINTS AT ISSUE

40. Has Canada taken measures inconsistent with its obligations under Articles 1102, 1105, or 1103 of the NAFTA?

41. 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 under Chapter 11 of the NAFTA?

VII. RELIEF SOUGHT

42. The Investors claim damages as follows:

a. Damages not less than US $101 million as compensation for the damages caused by or arising out of Canada's measures that are inconsistent with 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 mitigate the effect of the measures;

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

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

g. Such further relief that counsel may advise and that the Tribunal adjudicating this claim may deem appropriate.

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