

***Clayton/ Bilcon v Canada (NAFTA Chapter 11) (case pending; summary as of February 2011)***

AREAS OF POLICY AFFECTED: environmental protection (pollution, biodiversity, endangered species), resource management (fisheries, water), administration of justice (environmental assessment process).

CASE SUMMARY: This is a NAFTA Chapter 11 lawsuit against Canada for an environmental assessment that was carried out to protect the Bay of Fundy, a UNESCO-recognized Biosphere reserve. The Bay of Fundy and surrounding coastlines are an important habitat for plant and marine life, including whales, seals, porpoises, dolphins, and millions of birds. These include a number of endangered species or species of concern.

The claimants, U.S. investors in the cement industry, proposed to open a basalt quarry along the southwest coast of Nova Scotia. The quarry would have been the largest in the province. The plan required test blasting to collect information on the feasibility of the quarry. Canadian authorities required a permit for the blasting due to impacts on fish and wildlife. They also required an environmental assessment of the larger quarry.

An environmental assessment was conducted by three university professors who had expertise in oceanography, planning, and resource and environmental studies. It involved extensive public hearings and led to a recommendation to reject the proposed quarry for environmental and social reasons. The investors lobbied political decision-makers in Canada to reject this recommendation and allow the quarry to proceed. They were unsuccessful and the project was rejected.

The investors did not seek to review the decision in Canadian courts. Instead, they are claiming over \$100 million in damages under NAFTA Chapter 11. The case is pending as of February 2011.

ITAPP COMMENT: Given the sensitive environmental concerns and the thorough environmental assessment in this case, it is unlikely that the claim will succeed. If the claim fails, there is a significant prospect of an award of costs in favour of Canada. However, the fact of the claim could be used to influence political decision-makers in other regulatory and assessment processes. Also, tribunals rarely award full costs to a successful government and the cost of defending the claim typically runs into millions of dollars.

Source: [www.iiapp.org](http://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](http://www.italaw.com)). This report was produced by a research team coordinated by professor Gus Van Harten ([gvanharten@osgoode.yorku.ca](mailto:gvanharten@osgoode.yorku.ca)) of Osgoode Hall Law School of York University in Toronto, Canada. Please see the disclaimer and statement on terms of use available on [www.iiapp.org](http://www.iiapp.org). © Gus Van Harten 2011. *You may forward or re-publish the information in this report with attribution to [www.iiapp.org](http://www.iiapp.org).*