

Key ISDS Environmental cases

Ethyl v Canada - Settled

Following the banning of MMT, a gasoline additive, on the basis that it had the potential to cause harm to public health, US fuel additive company Ethyl Corporation launched an attack against the Canadian government, claiming expropriation under NAFTA. The Canadian government settled out of court, compensating Ethyl for USD\$13 million, but also reversed the ban on the chemical and issued a statement asserting that Ethyl's product was safe as long as proper safety instructions were followed.

Reference: Public Citizen, Ethyl Corporation v.s. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards, <https://www.citizen.org/our-work/globalization-and-trade/ethyl-briefing-paper>

St Mary's v Canada - Settled

A proposed quarry was prevented by the local minister following mass community rejection the project. The quarry was found to have had the potential to harm groundwater that fed wetlands and streams, vital for surrounding agricultural land, as well as long term effects on local drinking water supply. Following a democratic consultation process with the local community that received hundreds of formal objections to the proposal, the provincial government of Ontario prohibited the use of land for the quarry. US company St Mary's then filed a claim for \$250million in lost future profits, effectively forcing the government to pay up in order to protect a valued community area.

Reference: St Mary's v Canada, <https://www.italaw.com/sites/default/files/case-documents/italaw8369.pdf>

Dow Agrosiences v Canada - Settled

The American company filed a case against the province of Quebec's ban of pesticide 2,4-D. The cosmetic use of the pesticide was banned due to potential risks to public health. The case was eventually settled before proceeding to tribunal, with Dow Agrosience withdrawing its request without any monetary compensation. One of the terms of settlement was the Government of Quebec issuing a statement that products containing 2,4-D do not pose an unacceptable risk to human health or the environment provided that the instructions on their label are followed. One legal commentator suggested that Dow's claim 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 impacts on Dow's sales in Quebec'. Indeed, the relatively small amount of compensation claimed suggests that the US company launched the case in an attempt to influence how other provinces and districts legitimately use their municipal powers to protect the health of their population and the environment.

References: Van Harten, G 2009, Reforming the NAFTA Investment Regime and Cooper, K et al 2013, Seeking a Regulatory Chill in Canada: The Dow Agrosiences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code, Golden Gate U. Envtl.

Lone Pine v Canada - Pending

In June 2011, after extensive consultation and debate, the provincial Government of Quebec placed a fracking moratorium on drilling beneath the St. Lawrence River in order to properly study the environmental risks associated with the controversial technique. Soon after, Lone Pine Resources, an oil and gas developer, filed for arbitration against Canada under Chapter 11 of NAFTA. While being a

Canadian-based company, Lone Pine was able to sue the Government of Canada through its US affiliate, accessing NAFTA's chapter 11 and suing its own government under the provision that they had not been given 'fair and equitable treatment' as a foreign investor, demanding over USD\$100 million in compensation. In the ongoing claim, Lone Pine claims that the temporary ban on fracking impeded on their 'right to mine', claiming actions taken by the government of Quebec were tantamount to expropriation, and that 'no valid public purpose' exists for the moratorium, despite the clearly rational grounds presented by the government of the need for further research into the extractive method.

References: [Lone Pine Resources Inc v Canada https://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf) p 4 and [Lone Pine Resources Inc v Canada, p 16](#)

Bilcon vs Canada Company won

May 9, 2018 The US [Bilcon company](#) won millions of dollars of compensation from Canada because its application for a quarry development was refused by a local government for environmental reasons.

A [Federal Court](#) ruling in favour of US company Bilcon, which is seeking \$500 million in damages from Canada, has prompted environmental groups to renew their calls for Canada to scrap ISDS in the NAFTA renegotiation talks with the United States and Mexico.

Bilcon's proposed quarry in an environmentally sensitive area in Nova Scotia was rejected in 2007 on the basis of a recommendation by a joint federal-provincial government environmental assessment panel.

Bilcon then used ISDS provisions in NAFTA to sue the Canadian government, and in 2016 [won its case](#) before the ISDS tribunal, which has yet to determine the amount to be paid in compensation. Two of the three-person tribunal found that Canada violated its own federal and provincial environmental assessment laws and did not accord procedural fairness to Bilcon.

The then Canadian Conservative government asked Federal Court to set aside the tribunal's decision, arguing that the tribunal made its decision on matters about Canadian environmental law beyond the scope of the original Bilcon claim and is in conflict with the public policy of Canada.

On May 2, 2018 the Judge stated "I accept that the majority's Award raises significant policy concerns. These include its effect on the ability of NAFTA Parties to regulate environmental matters within their jurisdiction, the ability of NAFTA tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment processes, and the potential "chill" in the environmental assessment process that could result from the majority's decision." She then concluded that nothing could be done because the ability of courts to review arbitration awards is remarkably constrained under federal arbitration law.

[The Lawyers' Daily](#) reported that University of Ottawa law professor Amir Attaran, co-counsel for the intervener Ecojustice, said "as environmentalists, our worst fears have been confirmed that NAFTA can override Canada's right to protect its own environment... the NAFTA tribunal in this case went outside its realm of expertise to rule on a matter of Canadian law, and now Canadian taxpayers are on the hook for half a billion dollars to a single company."

Lisa Mitchell, a lawyer and executive director of intervener East Coast Environmental Law, said the Bilcon case demonstrates why Canada should seek to throw out ISDS during current NAFTA negotiations.

John Babcock, spokesperson for the now Liberal Canadian government, told the Lawyer's Daily that the government is reviewing the judge's 70-page decision. "Canada is also awaiting the tribunal's award on quantum of damages, which will likely not be issued before the end of 2018," he said.

Westmoreland vs Canada pending

22 November 2018: The US [Westmoreland coal mining company](#) is suing the Canadian government because the state of Alberta decided to phase out coal-powered energy.

Investment Arbitration Reporter has [reported](#) this week that US company Westmoreland Coal has filed a claim against the Canadian Government under the North American Free Trade Agreement (NAFTA), because they anticipate profit loss when the province of Alberta phases out coal generated electricity.

Canada and the US agreed in October 2018 to [eliminate foreign Investor rights to sue governments \(ISDS\)](#) from the revised version of NAFTA, known as the US-Canada-Mexico-Agreement, but the new deal will not be implemented until all three countries have ratified it through their domestic processes.

Alberta's left-leaning provincial government elected in 2015 aims to phase out coal-fired energy by 2030. This is part of stronger strategy to tackle climate than the previous Conservative government, which contemplated a 50 year lifespan of coal-fired plants when the company bought the coal mines in 2013-14.

Westmoreland claims it has been denied National Treatment and the Minimum Standard of Treatment under NAFTA rules. They claim they will lose \$441 million CAD or more due to early mine closures and rehabilitation of land required.

December 2018: Academic Kyla Tienhaara argues in [The Conversation](#) that fossil fuels have no future but companies are using ISDS to sue governments as they act to reduce carbon emissions.