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The Bilcon vs Canadian Govt. Case

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Bilcon Case Leads To Broad Alarm Over ISDS Reach Into Domestic Law

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Last month's ruling against Canada in an investor-state dispute brought under the North American Free Trade Agreement (NAFTA) is stoking fear among both critics and supporters of investor-state arbitration that the case could dramatically expand the ability of tribunals to weigh in on domestic legal issues in a way governments never before envisioned.

The NAFTA tribunal's March 17 award in favor of Bilcon, a Delaware-based investor seeking to establish a mining quarry and marine terminal in Nova Scotia, found that the Canadian government had failed to provide the "minimum standard of treatment" under Article 1105 of NAFTA. It also found Canada had discriminated against the investor in violation of the national treatment obligation contained in Article 1102.

Both of the findings have become controversial, but critics have primarily taken aim at the way the majority of the split tribunal came to its Article 1105 finding. Specifically, these critics -- which include the dissenting arbitrator in the three-person NAFTA panel -- say the tribunal majority essentially equated a violation of domestic law with a breach of the minimum standard of treatment. That effectively expands the boundaries of what can be successfully challenged as a breach of the minimum standard, they argue.

The majority reasoned that the minimum standard had been breached after finding that an environmental review panel ultimately rejected the Bilcon investment on the grounds that it ran against "core community values." The tribunal majority ruled that this criteria was not within the mandate of the review panel under Canadian law.

This finding, critics say, also adds force to the argument that investor-state dispute settlement (ISDS) panels can be used to elevate the rights of foreign investors and provide them with a remedy for that is unavailable to their domestic counterparts. For investors who successfully challenge a government measure as illegal domestically, the award is to have the measure reversed, not a monetary payout, they note. Bilcon is demanding $300 million in damages, although the amount of the award has not yet been decided.

But this interpretation of the ruling is not universally shared. Barry Appleton, the attorney for Bilcon in the case, argued that the basis for determining a breach of Article 1105 was not a violation of domestic law but rather the extraordinary degree of unfairness to which Bilcon had been subjected.

In an interview, Appleton also argued that standard used by the tribunal was consistent with past investor-state rulings and therefore did not expand the scope of Article 1105. In addition, the majority went out of its way in its award to explicitly note that past tribunals have found that a breach of domestic law is not sufficient to prove a breach of the Article 1105 standard, and seemed to endorse this notion.

"There have been different abstract formulations of the kind of conduct that constitutes a breach of the international minimum standard. Yet all authorities agree that the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard," the majority writes at paragraph 436 of its decision.

But despite those comments, the panel goes on to find that in this specific case, the environmental review panel's decision to go outside its mandate as established under Canadian law violated the minimum standard of treatment. It reached that conclusion by applying the test for the minimum of standard of treatment drawn from a NAFTA investor-state case against Mexico in the early 2000s known as *Waste Management*.

This standard defines a breach as conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic," or that "is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety." Essentially, the tribunal's majority found that the Canadian panel -- called the Joint Review Panel (JRP) -- acted arbitrarily by exceeding its mandate under Canadian law.

The Bilcon decision comes amid increased public debate over ISDS in the United States spurred in part by a leaked text last month of the Trans-Pacific Partnership (TPP) chapter on investment, and as the European Union deliberates ways to reform its ISDS approach in the context of the Transatlantic Trade and Investment Partnership talks.

The ruling quickly drew the attention of House Ways & Means Committee Ranking Member Sander Levin (D-MI), who in a March 27 blog post cited the Bilcon award as proof that the U.S. needs to push for greater limits on the definition of the"minimum standard of treatment" in the context of the TPP investment chapter. He added that, to date, U.S. negotiators have been unwilling to do so.

Levin's post specifically noted that in a famous ISDS case against the United States known as *Glamis Gold*, the U.S. government explicitly rejected the notion that "illegality or lack of authority under domestic law" is sufficient to prove a breach of the minimum standard.

Donald McRae, the dissenting arbitrator and a law professor at the University of Ottawa, expressed fear that the Bilcon ruling could make this kind of remedy more readily available in the future (see related story).

"By treating this potential violation of Canadian law itself as itself a violation of NAFTA Article 1105 the majority has in effect introduced the potential for getting damages for what is a breach of Canadian law, where Canadian law does not provide a damages claim for such a breach," McRae wrote.

"That is not what NAFTA was intended to do," he added. "You cannot get a remedy under NAFTA Chapter 11 for breach of Canadian law; you can only get a NAFTA remedy for a breach of NAFTA."

But Appleton pushed back against this interpretation, saying that the actions of the environmental review panel are just the kind of "arbitrary" and unfair conduct that ISDS panels have routinely found is in breach of the minimum standard of treatment.

"What [the majority] found here was that Bilcon thought they were coming in for a process that was about scientific and environmental standards, because that's what the law said and that's what the terms of reference said. And then [Canada] did something that had nothing to do with that," Appleton said. "It's is a fundamental breach of fairness, which is an international standard."

At one point in its award, the majority does seem to indicate that what it saw as a violation of the minimum standard of treatment was not just the action by the JRP, but the sum of all actions by the Canadian government. It points repeatedly to the encouragement that Bilcon received by Canadian officials to pursue the investment, and contrast that with the fact that the provincial and federal government ultimately forced Bilcon to enter an environmental review process that is atypical and rigorous, and rejected the project based on the JRP's findings.

"Viewing the actions of Canada as a whole, it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a 'no go' zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits," they wrote.

Appleton argued that other parts of the award had more precedent-setting value. For example, he pointed to the arbitrators' rejection of Canada's attempt to disavow the environmental review panel that scrutinized the Bilcon project as a body that was not part of the government.

The NAFTA panel found that it was an organ of Canada, and that in any case, the adoption of its recommendation to reject the Bilcon project represented a government measure.

This decision on what can be attributed to the government is significant, Appleton said, as governments -- including in countries like China -- establish non-government entities that are still state-controlled. The Bilcon decision shows that actions by such entities that violate investment rules cannot simply be wiped "off the balance sheet," he said.

Critics of the ruling argued there is inconsistency between what the majority says about the relationship to domestic law and Article 1105, and what it ultimately ruled: that the JRP's failure to carry out its mandate as "defined by the applicable law" -- and Canada's adoption of its recommendations -- was arbitrary within the meaning of the*Waste Management* standard.

Simon Lester, a trade policy analyst at the Cato Institute, said he believed the majority's award illustrates the reach of the minimum standard of treatment obligations as it is typically structured in U.S. investment agreements. He also expressed worry that if interpreted the way the tribunal did, the obligation could extend to cover all manner of government actions. "If this is a violation, then there are thousands of violations out there," Lester said.

Howard Mann, senior international law adviser to the International Institute for Sustainable Development, said in a separate interview he expects the Canadian government will likely submit the award to judicial review, which -- if successful -- could lead to the annulment of the award.

Canada could not simply argue against the merits of the decision through this type of procedure, Mann noted, saying arbitrators have in effect a legal right to make errors of law under the ISDS system. There is no appeal mechanism under NAFTA's investment chapter.

But Canada would be able to argue in a judicial review that the panel made incorrect assumptions about Canadian law that biased its determinations and materially affected its ultimate decision, or that the panel had exceeded its authority, Mann explained. Any such proceeding would go through a Canadian court, as Toronto was fixed as the place of arbitration in the proceedings. -- *Ben Hancock*

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Comment re Bilcon vs. Canadian Government

Eyes wide shut on ISDS

The Hill
By Lisa Sachs and Lise Johnson
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Recent agreement among congressional leaders on a "fast-track" bill may have been a victory for the Obama administration's trade agenda. However, members of congress should take a look at the recent Bilconcase, decided by a NAFTA tribunal, to understand what they are signing up for.

The administration has been pushing for the inclusion of investor-state dispute settlement (ISDS) provisions in international treaties such as the Transatlantic Trade and Investment Partnership agreement with the EU, and the Trans-Pacific Partnership (TPP) agreement with eleven other countries along the Pacific. The ISDS provision allows foreign companies to sue their "host" governments though a specialized international arbitration mechanism that often grants protections exceeding those available in domestic courts. The arbitrators can order host countries to pay millions or even billions of dollars to foreign investors when government measures harm companies' profits; and the fact that measures were taken in good faith and in the public interest is no defense to a government facing ISDS claims.

While the Obama administration has sought to downplay concerns about ISDS, the decision in Bilcon v. Canadahighlights its very real problems.

The basic story in Bilcon is this: a company sought to develop a mining and marine terminal project in Canada, but it had to obtain approval from provincial and federal authorities. As part of that process, the company had to submit an environmental impact study (EIS) addressing the project's potential impacts on the natural and human environment.

A panel of experts was appointed to review the EIS, collect public comments, and then issue a non-binding recommendation as to whether the officials should approve the project. Ultimately, the expert panel recommended that the project not proceed, citing among other things the project's inconsistency with "core community values." The relevant federal and provincial officials then rejected the project, on the basis of that recommendation.
Bilcon could have followed procedure and appealed the decision in Canada's domestic courts. But the company, seeing an opportunity to circumvent the domestic process, sued Canada under the NAFTA's ISDS process instead.
That strategy proved successful. The majority of the arbitrators opined that the advisory panel's consideration of "core community values" went beyond the panel's duty to consider impacts on the "human environment" taking into account the local "economy, life style, social traditions, or quality of life." The arbitrators then proclaimed that the government's decision to reject Bilcon's proposed project based on the experts' recommendation was a violation of the NAFTA.

In fact, the arbitrators got the international law standard wrong.

The parties to the NAFTA—the United States, Canada and Mexico—have all repeatedly clarified that ISDS is not meant to be a court of appeals sitting in judgment of domestic administrative or judicial decisions. Yet in Bilcon, the majority of the arbitrators gave only lip service to the NAFTA states' positions.
And there's not much Canada can do about it. Under ISDS, governments cannot overturn arbitral decisions for getting the law or facts wrong. Governments – and their taxpayers – remain on the hook for wrongfully decided ISDS awards.

But let's suppose for a second that the arbitrators got it right—that the officials' rejection of the project based on their understanding of Canadian law did amount to a violation of NAFTA's international law standards. If that is the case, the threat that ISDS poses to domestic and democratic legal systems is even more pronounced.
For one, it signals to aggrieved companies that they can opt-out of domestic systems and seek more advantageous outcomes from international arbitrators.

Moreover, it shows that ISDS stymies crucial evolution in domestic law. Under the tribunal's reasoning, a breach of international law arises when government officials interpret vague concepts such as the "human environment" or "socio-economic" impacts using principles or terms not expressly found in earlier decisions. Yet, particularly in common-law jurisdictions such as the US's, law develops in large part through new interpretations, adapting to changing circumstances and times. If this evolving process were indeed a breach of international law, the US should expect to face significant liability to foreign companies, especially as ISDS is included in new treaties with capital-exporting countries.

As the dissenting arbitrator in Bilconstated, the decision represents "a remarkable step backwards in environmental protection." But while it may have been the wrong outcome, it came at the right time. With fast track legislation now on the table, it is time for a frank acknowledgement of the threats ISDS poses to development and application of law as we know it in a domestic, democratic system.

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