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The Bilcon Award

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Once again Canada has lost an important investor/state arbitration under Chapter 11 of NAFTA (for a post on Canada's last reversal (Mobil and Murphy), also characterized by a strong dissent, see Regulatory Concussion). The Clayton family and Bilcon Inc (US investors, the claimants) were hoping to develop a quarry in Digby Neck, Nova Scotia. The project was sent to a joint federal/provincial environmental review panel (JRP) by both levels of government. The JRP recommended rejection and both governments accepted that recommendation, and thus the project died. The claimants took the view that the JRP process was badly flawed. They were of the opinion that the panel had recommended rejection on the basis that the project would be inconsistent with "community core values" and furthermore that the panel had deliberately failed to identify any mitigation measures that might make the project acceptable. However, instead of seeking judicial review of the JRP in the Federal Court the claimants commenced this NAFTA arbitration. They have been rewarded with a majority decision in their favour. The majority (Judge Bruno Simma and Professor Bryan Schwartz) found that Canada had breached both Article 1105 (minimum standard of treatment (MST) - even as constrained by the Interpretation Note (2001) issued by NAFTA contracting parties here) and Article 1102 (national treatment standard). The matter will now go back to the tribunal for it to assess damages. Professor Donald McRae delivered a strong dissent contending that the majority had turned what was nothing more than a possible breach of domestic law into an international wrong. I have nothing to add to McRae's excellent critique (and see also Meinhard Doelle's post on the decision); my purpose here is to review some of the implications of the Award from a number of different perspectives.

Project Proponents

This award sends the following message to a project proponent who is a foreign investor and who is disappointed by an adverse regulatory decision which is arguably in breach of domestic law: don't bother suing or seeking judicial review in the domestic courts – go straight to arbitration. Consider the advantages. Get yourself a couple of experts to opine that the decision maker acted contrary to domestic law and present a MST claim to a NAFTA panel. There is no need to mess with difficult and bothersome questions of standard of review and deference to administrative decision makers in the Federal Court. And you can get yourself damages for any

losses that you might have suffered without having to establish malicious intent on the part of the administrative decision-maker.

ENGOs

But if you're an ENGO (environmental non-governmental organization) that believes that the JRP or other administrative decision maker erred in law by, for example, failing to take seriously project impacts on species at risk, or perhaps arbitrarily excluding upstream environmental impacts – then too bad. There is no international forum within which to litigate a minimum standard of treatment for the environment. You will be stuck with domestic law and the Federal Court and you will have to deal with standard of review questions and the likely inevitability of reasonableness as that standard. No choice of forum for you.

Governments

Beware the rogue panel! Be extra careful and conservative in selecting panel members. Take no risks. And if by chance, and notwithstanding all the care that you have taken, the JRP misspeaks itself or uses non-sanctioned language to characterize its decision, then take care to send the matter back to the Panel to have it couch its decision in more familiar terms.

Legal Advisor to a Panel

Take a course in international investment law to complement what you already know about administrative law and environmental law and about proofing the panel's decision from judicial review.

With implications such as these it is hardly surprising that bilateral and multilateral investment treaties (BITs and MITs) and their arbitral panels (which are difficult to bring to heel outside the International Centre for the Settlement of Investment Disputes (ICSID) annulment procedure which would not be available in this case, see here) get such a bad press.

I will leave the last words to Professor McRae (dissent at paras 50 – 51):

> In effect, what occurred in this case was that an environmental review panel concluded that the socio-economic effects of a project were sufficiently negative that notwithstanding the existence of some positive benefits of the project, it should recommend against the project. In doing so, the Panel used terminology with which the Claimant argued it was not familiar to describe established and well-understood socioeconomic and environmental effects. The Panel also decided not to recommend mitigation measures, because it believed that the overall effect of the project could not be mitigated. On that basis, the majority has concluded that Canada is liable in damages under NAFTA.

This result may be disturbing to many. In this day and age, the idea of an environmental review panel putting more weight on the human environment and on community values than on scientific and technical feasibility, and concluding that these community values were not outweighed by what the panel regarded as modest economic benefits over 50 years, does not appear at all unusual. Neither such a result nor the process by which it was reached in this case could ever be said to "offend judicial propriety". Once again, a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection.