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Case Summaries: International Investment Law

The following summaries provide a brief factual background and describe the key findings of recent WTO panel and Appellate Body reports.

Bilcon et al. v. *Canada*

Decision(s) discussed	Award on Jurisdiction and Liability;[1] and Dissenting opinion by Professor D. McRae[2]
Date of Decision(s)	17 March 2015
Members of the tribunal	Judge B. Simma (Presiding Arbitrator); Professor D. McRae (Respondent's Appointee); Professor B. Schwartz (Claimant's Appointee).

Introduction

In *Bilcon et al.* v. *Canada*, a NAFTA Chapter 11 dispute, the tribunal's majority held Canada liable for breaches of NAFTA Articles 1102 (National Treatment) and 1105 (Minimum Standard of Treatment). Pr. D. McRae – Canada's appointed arbitrator – dissented from both findings.

The case has already been qualified as controversial especially because the divided decision on the merits appears to favor investor rights over environmental concerns.[3]

Factual Background

The claimant in the case was a US company which sought to expand a mining quarry and marine terminal project in Whites Point, a community in the province of Nova Scotia. To do so, Bilcon had to submit its project to an environmental assessment process (EA) reviewed by a joint federal–provincial environmental review panel (the JRP). The JRP issued a negative recommendation on the project, which both the Federal Government of Nova Scotia and the Canadian Federal Government decided to follow. As a result, Bilcon's project was cancelled.

Main Findings on the Merits

The essence of the parties' dispute revolved around the treatment the investors received during the EA and the manner in which the JRP took its decision. Of particular

1 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc.* v. *Government of Canada*, PCA Case No. 2009–04, Award on Jurisdiction and Liability, 17 March 2015 (hereinafter *Bilcon*–Award).

2 *Bilcon* v. *Canada*, Dissenting Opinion of Pr. Donald McRae, 17 March 2015 (hereinafter *Bilcon*–McRae's Dissent).

3 For a critic of the case, see L. Sachs and L. Johson 'Eyes wide shut on ISDS' (April 2015) *The Hill*, available at http://thehill.com/blogs/congress-blog/foreign-policy/239560-eyes-wide-shut-on-isds (accessed 1 September 2015).

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concern was the JRP's reference to the concept of 'community core values' which appeared to be the decisive consideration in assessing the project. Bilcon argued that the concept was nowhere to be found in the mandate given to the JRP and that the JRP therefore misapplied the regulatory federal and provincial frameworks governing environmental assessments. In Canada's view, the JRP's analysis and conclusions were appropriate and it was in fact Bilcon who was responsible for the inadequacies in its own environmental impact assessment.

NAFTA Article 1105 – Minimum Standard of Treatment

The investor argued that the JRP review process and its approval by Canada's authorities amount to a breach of Article 1105. The tribunal introduced its analysis on this claim with a broad overview on the scope and content of the minimum standard of treatment. Looking at the historical development of the standard and NAFTA Chapter 11 case law, the tribunal found that while there was a high threshold for the conduct of a host State to rise to the level of a NAFTA Article 1105 breach, there was no requirement that the challenged conduct reached the level of shocking or outrageous behavior.[4]

The tribunal split in the application of these considerations to the facts of the case. The majority found that Canada breached Article 1105 on the basis of the three following elements: (i) the investor had been repeatedly encouraged to pursue their activities in Nova Scotia and had reasons to believe they would obtain the necessary environmental permission to do so, (ii) the JRP approach and use of the concept of 'community core values' was unprecedented and not preceded by reasonable notice which made it impossible for the investor to know the case that it had to meet, and (iii) the JRP departed in fundamental ways from the standard of evaluation required by Canadians laws.[5]

NAFTA Article 1102 – National Treatment

The investor further alleged that the JRP's evaluation was less favorable than the treatment accorded to a number of domestic investors in like circumstances. To address this claim, the tribunal first attempted to define the appropriate comparator. In Canada's view, the only other investors that could be compared with Bilcon were those subject to the exact same review process and who had to deal with significant opposition within a local community. The majority refused this narrow interpretation.

According to the majority, because Article 1102 refers to situations where investors or investments find themselves in 'like circumstances [and] is not restricted as it is in some other trade-liberalizing agreements, such as those that refer to "like products"',[6] this provision shall be given 'a reasonably broad language'.[7] The majority further considered that when interpreting this language it had to take into account the objects of NAFTA, including the one mentioned in NAFTA Article 102(1)(c), i.e. 'to increase substantially investment opportunities in the territories of the parties'.[8] The majority finally

4 *Bilcon*–Award, paras. 433, 435, 440.
5 Ibid., para. 594.
6 Ibid., para. 692
7 Ibid.
8 Ibid.

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noted that cases of denial of national treatment must be decided in their own factual and regulatory context and that it was not necessary to consider, like the claimant suggested, all enterprises affected by the environmental assessment regulatory process.[9]

These considerations led the majority to focus on three comparison cases brought forward by the investors and which were related to domestic operators involved 'in quarry and marine terminal projects that had the potential to affect a local community'.[10] For the majority, these three domestic companies received the expected and legally mandated application of the standards required by Canadian environmental law during the environmental review process of their projects. This was not the case for Bilcon. In conclusion, therefore, the JRP's approach to Bilcon's project amounted to unequal and unfavorable treatment.[11]

Pr. D. McRae's Dissenting Opinion

Although McRae disagreed with the majority's disposition of both Articles 1105 and 1102 claims,[12] his opinion addressed exclusively the issue of the application of Article 1105. For him, the majority erred in considering that the use of the concept of 'community core values' by the JRP was not consistent with Canada environmental laws.

McRae concluded that the consequences of the majority's decision could be regrettable. In his view, the decision results in the complication of environmental review processes, it creates a regulatory chill on the operation of domestic review panels, and interferes with the ability of a State to apply its environmental law.[13]

Post-award Developments

Canada has initiated a procedure before its domestic courts to challenge the arbitral award on the grounds that it 'contains decisions on matters beyond the scope of the submission to arbitration' and that it contradicts Canada public policy.[14] To date, this procedure is still pending.

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9 Ibid., paras. 693–695.
10 Ibid., para. 696.
11 Ibid., para. 716.
12 *Bilcon*–McRae's Dissent, para. 53.
13 Ibid. 51.
14 Application to the Federal Court of Canada for Set Aside of the Award, Court File No.: T-1000-15, Notice of Application, 16 June 2015, paras. 15–16. Available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng (accessed 1 September 2015).

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