CORPORATE RIGHTS IN TRADE AGREEMENTS

Attacking the Environment and Community Values

On March 17, 2015, a private trade tribunal ruled that Canada violated rules in the North American Free Trade Agreement (NAFTA) because of an environmental impact assessment that led Canada to reject a company's controversial mining project from moving forward in an important cultural and ecological area in Nova Scotia.[1]

U.S. company Bilcon used "investor-state dispute settlement" (ISDS) rules in NAFTA—which empower foreign corporations to sue governments in private trade tribunals over policies that corporations allege frustrate their business expectations[2]—to attack Nova Scotia's decision that the proposed open-pit mining project was too damaging for the local community and the environment to proceed. Bilcon is currently seeking at least $300 million in compensation from Canadian taxpayers.

Sadly, corporations using trade rules to sue governments over environmental safeguards is nothing new, and the U.S. hopes to expand these corporate rights in the proposed Trans-Pacific Partnership (TPP).[3] However, even with a high bar of existing outrageous cases,[4] this case is particularly appalling in that it challenges a government's ability to undertake meaningful environmental impact assessments and to make decisions based on those assessments.

Below are important facts of the *Clayton/Bilcon v. Government of Canada*[5] case.

THE PROPOSED PROJECT

In 2002, Bilcon, a U.S. company, wanted to use "blasting" activities to extract basalt, a rock used for construction, in Nova Scotia and ship it to the U.S. Its desired extraction site was the Bay of Fundy, an area rich with biodiversity and scenic beauty. Following Canadian law, a panel of environmental experts undertook an environmental impact assessment to "address the potential effects of this project on the environment and on the community" before recommending whether the government should approve the project.[6]

The results of the environmental impact assessment were alarming. Among many other issues, the experts found that increased blasting from the quarry and shipping from the proposed site could threaten several marine species including the endangered North Atlantic Right Whale.[7] (The World Wildlife Fund reports that only about 350 of these whales remain, and ship impacts threaten those survivors.[8]) The experts also warned that the blasting could impact migratory behavior of the endangered Inner Bay of Fundy Atlantic Salmon, potentially reducing the ability of the last 250 of these salmon to reproduce.[9]

Many local residents (and the Sierra Club of Canada)[10] were vehemently opposed to the construction of this quarry and marine terminal, which Bilcon wanted to build in an area renowned for its breath-taking coastlines and marine wildlife.[11] Commercial fishers feared impacts to fish habitats. Indigenous communities anticipated the degradation of traditional hunting areas.[12] Bilcon representatives, meanwhile, made no meaningful efforts to engage the community regarding the project, gloating about it as a done deal, ignoring community concerns, and suing a local newspaper over negative comments it made about Bilcon.[13]

ABOVE PHOTO: NORTH ATLANTIC RIGHT WHALE. CREDIT: GEORGIA DEPARTMENT OF NATURAL RESOURCES, PERMIT 15488

Ultimately the environmental impact assessment concluded that the project would be too destructive to move forward, and its environmental experts recommended that the government reject the application. The Canadian government summarized their assessment by stating that the mining project threatened "core values that reflect [the community's] sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment."[14] The panel of experts did not recommend measures that the company could take to mediate these impacts, determining that the project's impacts would be so severe that they could not be mitigated. In 2007, the provincial and federal governments relied on this assessment to reject Bilcon's mining proposal, citing the project's unacceptable risk to the environment and the community.[15]

THE COMPLAINT

Bilcon was not pleased with the rejection of its project. In 2008 it announced that it would use rules in NAFTA to sue Canada for $188 million "as compensation for the damages." Bilcon argued that it had been unjustly "forced into the most expansive, expensive and time-consuming environmental assessment," and that Nova Scotia's recommended rejection was based on "non-legal documents and concepts."[16]

At the heart of this complaint was the environmental impact assessment that determined the project would threaten "community core values." The company contested the legitimacy of "community core values," on the basis that "this notion has no basis in the Constitution of Canada, the administrative law framework, the environmental legislation or any other relevant law."[17] In other words, a U.S. company argued that Nova Scotia did not have the right under Canadian law to consider a community's values and their concerns about the environment in determining whether a project should take place in their own backyard. Bilcon argued that in considering these community values, the environmental review "relied upon arbitrary, biased, capricious, and irrelevant considerations" that amounted to a violation of rules in NAFTA including the guarantee of a "minimum standard of treatment" for foreign investors.[18]

THE OUTCOME

After several years of litigation, Bilcon won the case in March 2015, when two of the three lawyers in the trade tribunal took issue with the environmental experts' consideration of "community core values" as an "overriding factor" in their assessment of Bilcon's project. The two lawyers decided this approach was "arbitrary" and frustrated Bilcon's expectations about how the approval decision would be made. On this basis, they determined that the environmental impact assessment violated Canada's NAFTA obligation to afford Bilcon a "minimum standard of treatment."[19]

Bilcon won the case despite the fact that the third lawyer in the case, Donald McRae, disagreed strongly with this decision, decrying it as "a remarkable step backwards in environmental protection."[20] McRae stressed two extremely worrying consequences of his two colleagues' ruling. First, it challenged governments' ability to implement environmental safeguards in a way that takes into account impacts on a community, their values, and their will. The arbitrator cautioned that "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…"

ATLANTIC SALMON

Second, McRae called this ruling a "significant intrusion into domestic jurisdiction," because two ISDS lawyers (unaccountable to any domestic legal system) interpreted Canadian law and deemed the conclusions of a government-appointed environmental review panel as contrary to that law, and now will order Canada to compensate Bilcon even though no such right to compensation exists under Canadian law. McRae stressed, "If the majority view in this case is to be accepted, then the proper application of Canadian law by an environmental review panel will be in the hands of a

NAFTA... tribunal, importing a damages remedy that is not available under Canadian law."[21]

In other words, the tribunal's ruling suggests not only that governments can run afoul of trade rules if they take community rights and values into account in environmental impact assessments, but also that foreign corporations should have the right to bypass domestic courts and sue governments for millions or even billions[22] of dollars before extrajudicial tribunals if they don't agree with how governments are interpreting their own laws.

"THE DEFINITION OF INSANITY..."

With cases like Bilcon, it's baffling to think that the U.S., Canada, and a host of other counties would want to make themselves increasingly vulnerable to corporate attacks by empowering thousands of new firms to launch ISDS cases against countries' environmental protections. Yet these and other governments continue to push for an expansion of investor-state dispute settlement in the TPP despite stark evidence that the environment and communities' core "values" would literally be under attack.

ENDNOTES

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