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Eyes wide shut on ISDS

By Lisa Sachs and Lise Johnson

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 *Bilcon* case, 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. Canada* highlights 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 *Bilcon* stated, 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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