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Bilcon of Delaware et. al v. Canada: A Story About Legitimate Expectations and Broken Promises

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It comes as no surprise to those familiar with investment treaty law to see the concept of legitimate expectations continuously refined by case law. One of the facets of legitimate expectations, which is most often the topic of intensive debate in the investment treaty arbitration arena, is the analysis of the extent to which representations of the host State are capable of arousing legitimate expectations. International arbitral tribunals have generally confirmed that representations by the host State may, under certain conditions, generate legitimate expectations that are protected under the fair and equitable treatment standard.

For example, the often-quoted and largely-accepted award in *Waste Management, Inc. v. United Mexican States*, confirmed the general idea that the representations made by the host State are relevant for the assessment of a potential breach of the fair and equitable treatment standard: “[i]n applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant” (¶ 98). Similarly, when analyzing the concept of legitimate expectations, the tribunal in *Parkerings-Compagniet AS v. Republic of Lithuania* held that “[t]he expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment.” (¶ 82), while the tribunal in *Sempra Energy International v. the Argentine Republic* highlighted the need to ensure protection of the investor’s legitimate expectations especially “when the investment has been attracted and induced by means of assurances and representations” (¶ 298).

This is not to say that any kind of representation, assurance, promise or guarantee from the host State can trigger legitimate expectations that fall under the protection of the fair and equitable treatment standard. Rather, such encouragement must be specific and unambiguous in the sense that the host State must channel its incentives towards a specific investor to perform a specific investment. For example, in *Metalclad Corporation v. the United Mexican States* the tribunal held that the repeated promises of “federal officials” that the administrative authorities would grant a specific construction permit, which would have allowed Metalclad to complete the construction of its waste landfill in Guadalcazar, Mexico, entitled the investor to legitimately expect that its investment would go through: “Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, [...] Metalclad was merely acting prudently and in the full expectation that the permit would be granted.” (¶ 89).

The allegedly-misleading representations by the host State was one of the main points of focus of the tribunal in *Bilcon of Delaware Inc. et al v. Canada* in its recent award on jurisdiction and liability of 17 March 2015.

Bilcon of Delaware Inc., a member of the Clayton Group controlled by Mr. William Ralph Clayton, and his three sons, Messrs. William Richard Clayton, Douglas Clayton and Daniel Clayton, had planned to invest in Nova Scotia by developing a quarry and marine terminal at Whites Point quarry, in Digby County, Nova Scotia.

The decision to invest was to a large extent, as alleged by the investors, influenced by the fact that Nova Scotia had a publicly-stated policy of encouraging investment in the mining industry, as well as by the repeated encouragements from various state officials, who were aware of Bilcon's interest to develop the mining project at Whites Point and who actively supported Bilcon's intention to invest in the project.

The perfect picture painted by the authorities quickly started to dismantle once the investors applied for an environmental permit to build the prospective quarry. After several years during which the investors' repeated attempts to reach common grounds with the regulatory authorities failed, the project was referred to a Joint Review Panel (JRP), which was entrusted with determining the environmental impact of the quarry. The JRP did not recommend the implementation of the project on account of potential environmental risks and inconsistency with "community core values".

The investors alleged that there was "*inappropriate political interference in the regulatory process*" and that although they had made every possible effort to address each and every environmental-law concern by submitting a substantial Environmental Impact Statement of over 3000 pages, approval was still refused. Such refusal, the investors argued, was politically motivated. Even more, they alleged that the JRP-assessment hearing denied Bilcon a reasonable opportunity to present its case and particularly focused on the so-called "*community core values*", a factor that did not fall within the scope of an environmental impact assessment under the laws of federal Canada or Nova Scotia.

After extensive analysis regarding the proper interpretation of NAFTA Article 1105, the majority of the arbitral tribunal chaired by Judge Bruno Simma concluded, over a prominent dissent, that Canada's conduct was in breach of the international minimum standard of fair treatment placing particular focus on the investors' reasonable expectations generated by the host State's repeated encouragements.

Specifically, the tribunal made reference to several aspects such as: (i) the fact that the official public policy of Nova Scotia was to welcome and strongly support investment in mining; (ii) the fact that Nova Scotia's technical officials met with the investors' representatives and encouraged them to invest and establish marine quarries in the region; (iii) the fact that the Nova Scotia's Minister for natural resources specifically confirmed his support for the White Point quarry; and (iv) the fact that Canada's officials led the investors to believe that any potential environmental-law concerns could be addressed through a fair process whereby they would be given the opportunity to find ways to mitigate or prevent any potential environmental impact by adjusting their project design.

Although the tribunal's finding regarding the breach of the international minimum standard of

treatment focused to a significant extent on the arbitrary actions of the JRP, including on its endorsement of the “community core values” concept, the spotlight was also on the encouragements and broken promises of state officials. In this regard, the majority concluded:

“The basis of liability under Chapter Eleven is that, after all the specific encouragement the Investors and their investment had received from government to pursue the project, and after all the resources placed in preparing and presenting their environmental assessment case, the Investors and their investment were not afforded a fair opportunity to have the specifics of that case considered, assessed and decided in accordance with applicable laws.” (¶ 603)

Professor Donald McRae dissented from the majority’s view on the violation of NAFTA Article 1105 and held that the actions of the JRP were, in fact, not arbitrary. Professor McRae took issue with the majority’s treatment of “community core values”, which, in his opinion, equated a potential breach of Canadian law to a breach of the international minimum standard of treatment. In taking this view, the dissent concluded that the conduct of state officials is irrelevant for the purpose of assessing Canada’s breach of article 1105 since this could have not triggered a “legitimate” expectation that the project would be approved regardless of its compliance with local law. Rather, the dissent notes, the only expectation could have been that Bilcon would have Canadian law applied properly to it.

Undoubtedly, the dissent is correct to point out that potential violations of domestic law cannot be equated to violations of the NAFTA investment-protection standards. In fact, the members of the tribunal unanimously agreed that there is a rather high standard for finding a breach of NAFTA Article 1105, which calls for a finding of arbitrary conduct on behalf of the host State, as set out in *Waste Management*.

A significant part of this standard is the analysis of the legitimate expectations triggered by the representations made by the host State. The dissenting opinion, however, discards *ab initio* such representations as being irrelevant for the purpose of assessing the violation of NAFTA Article 1105. In doing so, the dissent omits to factor in the process leading up to the JRP and the conduct of the state officials before this point in the assessment of the prospective investment. It is such particular conduct and the repeated assurances from various technical and political officials that the project would pass any environmental-law hurdles which made it reasonable for the investors to expect that the White Point quarry would soon become reality.

Evidently this could have not created any expectation as to the final result of the assessment conducted by the JRP, as correctly noted by Prof. McRae. Nonetheless, one may not simply turn a blind eye to the fact that the assurances and encouragements came from Canada’s *political* and *technical* officials, who presumably had an understanding of the relevant legal framework and the environmental implications of the project, thus making it reasonable for the investors to assume that their investment would eventually see the light of day. These circumstances cannot be simply dismissed as irrelevant without a thorough analysis of the implications such may have in the assessment of the breach of the minimum standard of treatment.

In any event, leaving aside the disagreement between the members of the tribunal as to the manner in which the JRP conducted its assessment, *Bilcon of Delaware Inc. et al v. Canada* confirms that

host State representations, assurances or promises aimed at persuading a specific investor to make an investment commitment may give rise to reasonable expectations that can result in, or at least serve as starting point for a breach of the international minimum standard of treatment if the State does not live up to its word.

These findings are all the more important considering the abundance of investment treaty disputes related to the mining sector. There are more than 130 cases registered with ICSID alone that deal with oil, gas and mining disputes and broken promises by host State officials is a recurring issue. While one may understand the desire of capital importing states to attract foreign investments, this does not excuse arbitrary conduct of domestic authorities nor does it excuse the State from observing its international obligations regarding the protection of legitimate expectations. Certainly, a lesson to be learnt from past experience is that encouragements to invest by state officials should not be taken lightly especially when environmental-law concerns are at stake.

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