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United Parcel Service (UPS) v. Canada

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In a decision dated May 24, 2007, the Tribunal convened to decide an investor-state claim by United Parcel Service of America (UPS) against the Government of Canada, dismissed all claims made by that US-based multinational courier company.

The Tribunal's award marks an important watershed in the development of treaty-based arbitration, which has allowed a growing number private investors and corporations recourse against governmental and judicial actions that are otherwise entirely lawful and proper. The UPS claim was unprecedented in several respects, and sought to substantially expand the sphere of investor-state litigation under the North American Free Trade Agreement (NAFTA). Had it succeeded, similar cases, particularly involving public services, would have likely followed.

The case is also significant for according *amicus* standing to three interveners: the Canadian Union of Postal Workers, the Council of Canadians, and the US Chamber of Commerce.

The UPS case was precedent-setting in several important respects. It was the first investor-state claim to argue that delivery of public sector services, in this case by Canada Post, represented unfair competition for private companies providing similar services. The case was also the first of its type to target a cultural program, the Cultural Assistance Program, which supports Canadian publishers. It was the first as well to seek damages relating to a breach of worker rights under an ILO convention—not to the benefit of the workers directly harmed, but rather to compensate UPS for having to respect worker rights when Canada Post was relieved of this obligation.

Fortunately, the UPS claims were rejected on all fronts. Because of the standing of the members of the Tribunal, and the well-reasoned decision they rendered, the case is likely to significantly damped the enthusiasm some companies might have had to bring similar claims.

Just as importantly, the litigation chill imposed by the case will, at least to some extent, now thaw. As those who are familiar with the regime of treaty-based investor rights will know, the threat of investor-state litigation has discouraged a number of important public policy initiatives, from public auto insurance and pharmacare, to various health and environmental protection measures. In this regard, NAFTA based investor rights probably work best when they can be asserted behind closed doors—in meetings between lobbyists and public officials, or within government—when trade officials explain the limits imposed by NAFTA to their colleagues in ministries of environment, health and public works. The resounding failure of the UPS claim is likely to ameliorate this corrosive influence of NAFTA investment rules.

The following provides a brief overview of the key issues resolved by the Tribunal. Several procedural arguments and objections, largely by Canada, were also addressed by the Tribunal but these are not reviewed here.

UPS claims fell into two distinct categories. The first concerned the business practices of Canada Post, which UPS alleged were anti-competitive and treated UPS in a discriminatory manner. These included complaints relating to Purolator's (a wholly owned subsidiary of Canada Post) access to Canada Post's infrastructure, Canada Post's alleged misuse of its monopoly infrastructure, and Canada Post's decision regarding a possible contract with Fritz Starber after that company was acquired by UPS.

The other category of complaints had to do with various government policies, practices and laws relating to Canada Post. These claims targeted Canadian customs practices; the Publication Assistance Program (a cultural program to assist Canadian magazine publishers), and the fact that rural mail carriers are denied the rights accorded to other workers under the *Canada Labour Code*.

This paper provides a brief overview of the key issues resolved by the Tribunal.

Complaints Relating to the Business Practices of Canada Post

Under NAFTA, Chapter 11 authorizes certain claims to be made concerning the activities and conduct of crown corporations (in NAFTA terminology, state enterprises) and certain monopolies. However the scope of such claims must relate to the exercise by such corporate entities of "regulatory, administrative or governmental authority that the Party has delegated to it". Thus under Chapter 11 (Articles 1116 and 1117) an investor may file claims relating to two, but only two, sub-rules set out in Chapter 15 – 1502(3)(a) and 1503(2). The subject of Chapter 15 is competition policy, and the activities of state enterprises and monopolies such as Canada Post.

While the scope for state-to-state claims is quite broad under Chapter 15, foreign investors may challenge the activities and conduct of state enterprises and monopolies only where these represent the exercise of delegated government authority under the two provisions noted. The reason for these provisions is apparent, for without them NAFTA parties could evade their obligations under Chapter 11 by simply delegating government decision-making to a state enterprise, such as Canada Post.

But the UPS claim sought to ignore these limitations by challenging the activities and conduct of Canada Post which have nothing to do with the exercise of delegated government authority, such as Canada Post's decisions concerning the use of and access to its infrastructure.

This attempt by UPS to expand the application of NAFTA based investor rights was first turned back when, earlier in the proceedings, Canada successfully objected to this transparent attempt to expand Chapter 11 claims. In its final decision, the Tribunal rejected UPS efforts to reframe this argument as one that would hold Canada Post to account as a "Party" to Chapter 11. The Tribunal reasoned that the specific wording of Chapters 11 and 15 superceded the general theory of international law upon which UPS relied.

The Tribunal concluded:

> ...the Tribunal concludes that the decisions of Canada Post relating to the use of its infrastructure by Purolator and by its own competitive services are not made in the exercise of "governmental authority" either in terms of article 1502(3)(a) or article 1503(2) or (assuming it to be relevant) in terms of the rules of customary international law reflected in article 5 of the ILC text. They are rather to be seen as commercial activities. It accordingly follows that this part of the claim made by UPS in respect of the actions of Canada Post fails.

Measures of the Government of Canada

In addition to arguments concerning the activities of Canada Post, UPS also assailed a number of federal government measures that arguably fell within the scope of NAFTA investment rules. The first of these involved the unique customs treatment accorded the products of Canada Post, which UPS argued gave the Crown Corporation an unfair advantage. Under NAFTA Article 1102, Canada is obliged to provide most favourable treatment to foreign investors who are "in like circumstances" with its own investors. UPS argued that its Canadian customs regulations failed to meet this standard.

In holding that Canada Post and UPS are not, in fact, "in like circumstances" the Tribunal notes that:

> The distinctions between postal traffic and courier shipments are recognized not only in Canada but by Customs experts in the United States, the United Kingdom, the World Customs Organization and the UPU.

and further on, that:

> The Tribunal has received convincing evidence that Canada, like all member countries of the UPU and the World Customs Organization, distinguishes between courier and postal traffic on the basis that postal administrations and expert consignment operators have different objects, mandates and transport and deliver goods in different ways and under different circumstances.

For these reasons, the 1102 argument was rejected.

The other customs-related argument made by UPS concerned the Postal Imports Agreement (PIA) which was negotiated in 1992 between Canada Customs and Canada Post for the performance of certain non-core Customs functions. That attack was rejected by the Tribunal on the grounds that the contract at issue is exempt under the procurement exception to Chapter 11.

In addition to its complaints about customs measures, UPS also assailed the Publication Assistance Program (PAP) which Canada defended as a falling under the cultural industries exception of NAFTA. In rejecting this UPS claim, the Tribunal emphasized the public policy functions of Canada Post, including its universal service obligations. About these functions the Tribunal offered the following comments:

> The primary public policy function of Canada's postal service is to provide an accessible, affordable, inbound and outbound postal service to all addresses in Canada in a timely fashion. This concept of postal service is known, in Canada as elsewhere, as the "universal service obligation". The fulfilment of the universal service obligation has been a domestic policy imperative in Canada since the *Post Office Act* of 1867.

Nevertheless, UPS argued that under the PAP, Canada Post receives preferential treatment because publishers must use Canada Post to receive federal assistance under the Program. This, it argued, has nothing to do with protecting cultural industries, and falls therefore outside the scope of the cultural industries exception.

In rejecting this argument, the Tribunal refused to draw the distinction UPS urged it to make between the objectives of the cultural program and the manner in which it is carried out. In doing so, the Tribunal noted the breadth of the cultural industries exemption and the considerable price that Canada paid for it:

> …the ***quid pro quo*** for acceptance of such an exemption was the granting of a ***unilateral right*** of ***retaliation*** allowing a party to take measures of equivalent commercial effect in response to measures connected to cultural industries that, but for the exemption, would be in violation of NAFTA. As Canada submits: "[f]or the Tribunal to now introduce limitations to the scope of this cultural exemption would disturb the balance that was agreed to by the part[ies]." [emphasis added]

In other words, the exception for Canadian culture under NAFTA actually singles cultural measures out for more harsh treatment than they would otherwise be accorded, with one exception—and that has to do with investor-state claims. Here we see that dynamic at play to fend off the UPS claim.

Finally, UPS sought to invoke Article 1105 of NAFTA, concerning the *Minimum Standard of Treatment* that NAFTA requires the Parties to accord foreign investors. These claims related to the collective bargaining rights of Canada Post's employees in respect of the application of labour law, and pension entitlements of Canada Post employees. Both claims were the subject of extensive submissions by the *amicus* brief filed on behalf of the Canadian Union of Postal Workers and the Council of Canadians.

Of these claims, the 1105 argument relating to the denial of collective bargaining rights to certain Canada Post employees was the most audacious insofar as it claimed relief for what, in essence, was a breach of an ILO convention. In this regard, UPS argued that Canada is giving preferential treatment to Canada Post by exempting rural route mail couriers from the application of the *Canada Labour Code*. Canada's response was to justify discriminatory treatment of these workers by pointing to its universal service

obligation. It is hard to know which argument was more offensive: the UPS claim that it is the aggrieved party when workers are denied their fundamental rights, or Canada's contention that a public service mandate and collective bargaining are incompatible.

However, it appears that very little attention was paid to these arguments by either party, and the Tribunal dismissed all 1105 arguments without giving them more than passing reference. It may be that UPS thought better than to proceed with these claims in light of the extensive attention they received in our *amicus* intervention.

The Dissenting Opinion

A lengthy dissenting opinion was filed by the UPS nominee to the Tribunal, Dean Ronald Cass, of the Boston University School of Law. It is beyond the scope of these submissions to review his dissenting views, save to say that he departs from the majority view on virtually every point of the case, including the extent of Canada's cultural safeguard. As Dean Cass ultimately concludes: "UPS has introduced ample and persuasive evidence that Canada has not adequately regulated Canada Post to assure that its actions are consistent with Canada's obligations under Article 1102 of NAFTA", and comes to a similar conclusion with respect to the provisions of Chapter 15, which may be invoked in support of foreign investor claims.

In Conclusion

The introduction to this brief assessment describes the significance of the rejection of this UPS claim, not only for postal services, but for all other public sector services that may compete directly or indirectly in the market place with those provided by private companies. An important weapon that might have been used to promote privatization and deregulation and discourage expansion of public services has certainly been blunted.

But it is probably appropriate to end on a cautionary note. We know from ample experience that the pro-privatization, pro-deregulation thrust of trade liberalization policies is formidable, and remains a force to reckon with. Moreover, UPS has not yet exhausted its options under NAFTA, and may yet seek judicial review of the arbitral award.

More likely is an effort by UPS to engage the interest of the US administration to take up its challenge in formal state-to-state proceedings. The NAFTA Tribunal did not conclude that there was no underlying merit to UPS claims — but rather that key NAFTA rules concerning competition cannot be invoked under Chapter 11 dispute procedures. A state-to-state claim would not have face this hurdle, and it is reasonable to expect that UPS will now be making this argument to US trade officials.

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