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INTRODUCTORY NOTE TO
UNITED PARCEL SERVICE OF AMERICA, INC. V.
GOVERNMENT OF CANADA
BY DAVID A. GANTZ*
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Award on the Merits
NAFTA, Chapter 1

Introduction

The long-awaited UPS v. Canada award (“UPS-Merits”) is most notable for its detailed analysis of the extent to which the guarantees afforded to foreign investors under Section A of Chapter 11 are applicable to the actions of state enterprises and monopolies under Articles 1502 and 1503. The award also incorporates a rare interpretation of the scope of NAFTA’s “cultural industries” exception in the investment rather than in the trade context.¹ Both the majority opinion and the dissent also add useful analysis to the interpretation of the “national treatment” requirement of Article 1102 and the concept of “in like circumstances” embodied in that article.

United Parcel Service and its Canadian subsidiary had alleged various violations of NAFTA, Chapter 11, and claimed damages of at least \$160 million, plus interest and costs.² The essence of the UPS claim was that Canada Post Corporation (“Canada Post”), a Crown corporation wholly owned by the Government of Canada, was abusing its monopoly power in competition with UPS in Canada. UPS alleged specifically that Canada permitted Canada Post to abuse the authority delegated to it to maintain or provide a designated monopoly, in violation of NAFTA, Chapter 15. UPS did not attack the postal monopoly. Rather, it contended, *inter alia*, that Canada Post was cross-subsidizing various non-monopoly courier and parcel services in competition with UPS, thus violating NAFTA’s guarantees to foreign investors of national treatment (Article 1102), most-favored-nation treatment (Article 1103) and fair and equitable treatment (Article 1105) as those obligations applied to Canada and to Canada Post by virtue of Chapter 15.

Among the specific violations alleged by UPS were special customs treatment of Canada Post’s non-monopoly courier and package imports; unfair pricing policies; preferential access to Canada Post infrastructure as, for example, selling courier and package services through post offices; and the provision of Canadian government subsidies to Canada Post (and only Canada Post) for the delivery of periodicals.³

Certain of the jurisdictional issues raised by both parties were decided in a separate Award on Jurisdiction rendered in 2002,⁴ while others were joined to the merits. That decision was notable for a discussion of customary international law and how such rules are established, in which the Tribunal concluded that there is no rule of customary international law that prohibits or regulates anticompetitive behavior.⁵

Majority Award

The Tribunal ultimately rejects all of UPS’ alleged violations of Chapter 11, after addressing each in turn. However, given that Chapter 11 relates only to governmental action, or certain actions of state enterprises or government monopolies, it first addresses questions of Section A applicability. Article 1502(3) requires the NAFTA governments to ensure generally that a government monopoly (such as Canada Post) act “in a manner that is not inconsistent with the Party’s obligations under this Agreement *wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service . . .*”⁶ Article 1503(2) also explicitly requires that the NAFTA Parties ensure through regulatory control or “application of other measures” that any state enterprise acts in a manner consistent with the Party’s obligations under Chapter 11, again for any governmental authority delegated by the Party. In other words, the Canadian Government is responsible for assuring that Canada Post act consistently with Chapter 11, but *only* with regard to delegated authority. The Tribunal concludes that Canada Post’s practice of allowing its Purolator subsidiary

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to take advantage of Canada Post's infrastructure was not such a delegation, and is thus not actionable under Chapter 11.⁷

Canada had defended its government subsidies for the delivery of periodicals (available to Canada Post but not to UPS or other possible competitors) as a public policy function related to Canada Post's "universal service obligation" based in part on cultural heritage, including the "cultural industries" exception in NAFTA, Article 2106. The Tribunal essentially agrees, in part because UPS is clearly not interested in delivering magazines to the full range of Canadian customers. Rather, UPS Canada's service is primarily limited to serving large retail customers and shopping malls. According to the Tribunal, the Canadian "Publications Assistance Program" qualifies as a "measure" covered by Article 2106. The Tribunal notes that many other nations including the United States subsidize periodicals through their postal services in generally the same manner.⁸ The Tribunal also reasons that the subsidy is not a breach of the national treatment requirement of Article 1102 because Canada Post and UPS were not "in like circumstances" because of this lack of willingness to deliver periodicals to all customers.⁹

The Tribunal acknowledges that Canada provides differing "treatment" to both Canada Post and UPS with regard to customs clearances. However, the Tribunal concludes that Canada's Courier "Low Value Shipment" program (applicable to UPS and other courier imports) and customs international mail processing systems (applicable only to mail imports by Canada Post), are similarly not "in like circumstances" so as to trigger an Article 1102 violation. According to the Tribunal, there are well-recognized differences between courier parcel services and postal services as "different flows of goods with different characteristics."¹⁰ These different characteristics are recognized by and covered under different treaties, not only for Canada but in many other countries.¹¹ Nor, according to the Tribunal, is there discrimination based on the fact that Canada Post (like the U.S. Postal Service) is permitted to collect duties directly on behalf of customs, while UPS and other courier services are not.¹²

The Tribunal makes short work of UPS' contention that Canada has violated the Article 1105 "fair and equitable treatment" requirement. There is no customary international law on competition.¹³ The Tribunal also rejects the UPS "MFN" argument in which UPS had argued that 16 of Canada's bilateral investment treaties ("BITs") provided more favorable "fair and equitable treatment" language than NAFTA article 1105, as modified by the "Interpretation."¹⁴ (Unlike NAFTA Article 1105, in the other BITs "fair and equitable treatment" is not restricted to violations of customary international law.¹⁵) The Tribunal concludes that UPS had not identified any breaches of fair and equitable treatment that would have violated any of the 16 BITs, let alone the language of NAFTA Article 1105.¹⁶

The Dissent

The dissenting opinion ["UPS-Dissent"] by former Boston University Law Dean and U.S. International Trade Commission Commissioner Ronald A. Cass concludes that "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."¹⁷ Dean Cass finds violations (in essence, discriminatory treatment) with regard to Canada's customs treatment of UPS vis-à-vis Canada Post; the preference afforded to Canada Post under the periodicals subsidies; and Canada's failure under Articles 1502(3) and 1503(2) to supervise Canada Post so as to prevent Canada Post from affording its Purolator subsidiary preferential access to Canada Post's monopoly infrastructure.¹⁸ The services provided closely resemble each other, to the point where in his view the majority decision dramatically and improperly circumscribes the national treatment obligation set out in Article 1102.¹⁹ NAFTA Party responsibility attaches when the enterprise (Canada Post) exercises "any regulatory, administrative, or other governmental authority" as with these "coercive, unilateral impositions of government power over other enterprises of individuals."²⁰ Dean Cass also rejects the majority's conclusion that the NAFTA procurement exclusion and cultural industries exceptions are applicable, based on the proof that Canada proffered.²¹

Comments

Some NAFTA critics see the majority decision as rejecting efforts by UPS to expand to the? scope of investor-state litigation which, if successful, allegedly would have led to further cases against public services, and discouraged other public policy initiatives in Canada, such as public auto insurance, public supply of pharmaceuticals, and various health and environmental protection measures.²² For them the decision is thus a generally positive development. However, given the thoughtful dissenting opinion, and the narrowness of much of the majority opinion

(implicitly recognizing the merit of some of the UPS claims even while holding that they did not constitute Chapter 11 violations), one should probably be hesitant to treat this award as evidencing a major limitation on the rights of private investors.²³ The Government of Canada itself, while welcoming the Award as dispelling allegations of Canadian discrimination, explicitly recognized and endorsed the continuing importance of NAFTA's Chapter 11 investor protections.²⁴

ENDNOTES

- 1 No such exception appears in the WTO Agreements; see Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted Jul. 30, 1997 (holding that Canada's differing tax treatment of local and U.S. periodicals violated GATT, art. III:2).
- 2 Notice of Arbitration, Apr. 19, 2000, available at <<http://naftaclaims.com/Disputes/Canada/UPS/UPSNoticeOfArbitration.pdf>>.
- 3 *Id.*; see also Canadian Government News Release and Backgrounder, *Canada Welcomes Favourable Decision on UPS Legal Challenge*, Jun. 13, 2007, available at <http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&publication_id=385211&Mode=print>.
- 4 *United Parcel Service of America Inc. v. Government of Canada (Award on Jurisdiction)*, Nov. 22, 2002, available at <<http://www.international.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf>> (last visited Sep. 28, 2007) [hereinafter "UPS-Jurisdiction"].
- 5 *Id.*, paras. 83-87, 92.
- 6 NAFTA, art. 1502(3); emphasis supplied.
- 7 UPS-Merits, paras. 62, 78.
- 8 *Id.*, para. 148.
- 9 *Id.*, paras. 173, 181.
- 10 ¹⁰ *Id.*, para. 93.
- 11 *Id.*, paras. 102, 103. The Tribunal noted that Canadian customs procedures comply with Universal Postal Convention and Kyoto Convention. *Id.*, paras. 118, 119.
- 12 Thus, the Procurement exception to NAFTA obligations in art. 1108(7)(a) is applicable.
- 13 Referring to UPS-Jurisdiction, para. 92.
- 14 *Id.*, para. 182; see NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, Jul. 31, 2001, available at <<http://www.international.gc.ca/tna-nac/NAFTA-Interpr-en.asp>>.
- 15 NAFTA art. 1105 provides that "Each Party shall accord to investment of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The *Notes of Interpretation* effectively redefine (or clarify that) "international law" as used in Chapter 11 means "customary international law." Thus, fair and equitable treatment is required under NAFTA only to the extent that it is required by customary international law.
- 16 UPS-Merits, paras. 183-184, 186-187.
- 17 UPS-Dissent, para. 204.
- 18 *Id.*, para. 2, 205.
- 19 *Id.*, paras. 22, 53.
- 20 *Id.* paras. 172-173.
- 21 *Id.*, paras. 80, 148, 150.
- 22 Steven Shrybman, *Briefing Paper: United Parcel Service (UPS) v. Canada*, Jul. 2007, available at <http://www.policyalternatives.ca/documents/National_Office_Pubs/2007/NAFTA_and_UPS.pdf> (prepared for the Canadian Centre for Policy Alternatives).
- 23 NAFTA, art. 1136(1) provides that "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." Notwithstanding that invocation, NAFTA tribunals and the parties appearing before them commonly discuss earlier awards when they are considered relevant either by the arbitrators or the parties.
- 24 Canadian Government Press Release and Backgrounder, *op. cit.*