

NAFTA RULING AGAINST UPS MAY CURB INVESTOR SUITS VS. STATE-RUN FIRMS

An international dispute settlement ruling against claims by United Postal Service (UPS) that it received unfair treatment by Canada's national postal system has dampened the prospects that private companies can successfully challenge government-owned corporations under the Chapter 11 investor-state arbitration clause of the North American Free Trade Agreement (NAFTA), according to legal sources.

On June 13, an International Centre for Settlement of Investment Disputes (ICSID) tribunal ruled that activity by Canada Post, the state-owned corporation that delivers Canadian mail and operates a courier service that competes with UPS, was commercial, not governmental in nature and not directed by the government. As such, Canada Post is not subject, as the government would be, to the national treatment provision of the trade pact, according to a June 13 release by the Canadian government describing the ruling.

The tribunal also ruled that there were differences between postal traffic and courier traffic that meant that UPS and Canada Post were not in "like circumstances," the release said. The panel said the Canadian Heritage Publications Assistance Program, which UPS had charged provides subsidies to publications to use the Canadian postal system, "fell within the scope of NAFTA's cultural exemption," according to the release.

Lawrence Herman, an attorney for Cassels Brock & Blackwell LLP in Toronto, said the decision, taken in conjunction with several other lost challenges by investors in recent years, makes clear that winning a future investor state case will be "an uphill battle for the investor." He predicted that the number of Chapter 11 cases in general is likely to be reduced. If UPS had succeeded, Herman said, it would have prompted many new cases against other state-owned enterprises, such as garbage collectors or port authorities.

Canadian Member of Parliament Peter Julian agreed with Herman's assessment, but worried that the decision would apply only to pre-existing services by state-owned enterprises. Any flux in the scope of the services provided could lead to new cases, he said.

Sources said that prior decisions of ICSID panels are given considerable weight in future decisions, even though each panel is technically separate from others and there is no doctrine of binding legal precedent in the tribunal system.

Sack Goldblatt Mitchell attorney Steven Shrybman, who represented the Canada Union of Postal Workers (CUPW) in the case, said the tribunal's decision to broadly interpret NAFTA's cultural exemption clause has given Canada latitude on how to implement programs under that exemption and could have a bearing on future cases. It ruled that subsidies given to publishers of books and magazines for postal costs with Canada Post were given to assist cultural industries and therefore fell within the scope of NAFTA's cultural exemption.

On UPS claims that Canada Post received preferential treatment from the Canadian customs department, sources said that the tribunal ruled Canada Post and UPS were not in "like circumstances," which is required for a company to be covered under the non-discriminatory treatment provisions in NAFTA and under WTO rules. As Canada's national postal carrier, Canada Post is regulated under international agreements governing post offices, one legal source said.

Under NAFTA, there is no appeal to the tribunal's ruling, though under extraordinary circumstances, such as a violation of procedure or fair trial, a party could seek another ruling, Herman said. Courts very rarely entertain this option, he said.

UPS is "disappointed" with the ruling, according to UPS Canada's vice president of communications, Greg Kane. He pointed out that one member of the three-person tribunal panel issued a dissenting opinion, though the particulars of that opinion are not yet known. The public version of the tribunal's opinion has yet to be released, and UPS is still reviewing the document, Kane said.

Kane emphasized that the ruling did not address the merits of UPS' claims and only ruled that a NAFTA case was not the proper vehicle for them. Customs scrutiny over collection of duties on its packages coming into Canada has not changed during the course of the case, Kane said. UPS will continue to look for opportunities to push for fair competition in the Canadian market, he said.

Meanwhile, the CUPW and the Council of Canadians have sought grounds to appeal to the Supreme Court a case that challenges the constitutionality of NAFTA's Chapter 11, Shrybman said. The case, which Canada's Court of Appeals has ruled against, charges that the executive branch, by negotiating NAFTA and giving investor-state cases

to a tribunal, derogates the authority reserved for higher courts under Canada's constitution.

Deborah Bourque, CUPW national president, said CUPW took issue with the secret nature of the tribunal system during the UPS case and was eventually given the right to observe hearings via video and file written submissions on some points. However, this allowance was still insufficient and CUPW has included some arguments against the closed nature of the tribunals in their complaint. "Canadians don't have the right to be heard when their jobs in public services are being threatened," she said.

Julian said he has introduced legislation that would call for the re-negotiation of Chapter 11, as well as other environmental and labor provisions in NAFTA. Julian said he is working in conjunction with Rep. Marcy Kaptur (D-OH) in the U.S. and Mexican policymakers on the issue.