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To: 'news@naftaclaims.com'
Subject: NAFTA News -- UPS Tribunal Issues Jurisdictional Award

The text of the award can be found at: www.naftalaw.org.

I have some initial observations about the UPS Tribunal's Award on Jurisdiction to provide below.

The award arises out of a motion by Canada to dismiss the claim in its entirety for failing to raise any valid breach of the applicable provisions of the NAFTA. The UPS claim involves allegations that Canada's state-owned enterprise, Canada Post, is using its statutory monopoly for operation of the postal service to compete unfairly in other fields of business -- particularly the express courier industry. Canada Post has long been the subject of criticism in Canada for its business practices, and was the subject of some rather scathing observations contained within the report of the last independent government commission to look into its business.

Both sides can claim victory with the tribunal's award. Canada can claim a rather pyrrhic victory because it was able to have portions of the claim struck. UPS can claim victory because none of the portions struck necessarily weaken its case. This decision is not like that of the Methanex Tribunal, which threw out a large chunk of the claim. This decision essentially says that UPS has asserted a claim which is justified, on a prima facie basis. The tribunal will now move to consider whether, based upon a thorough review of all of the evidence, UPS's claim should succeed.

From a jurisprudential standpoint, the Tribunal's award is largely unspectacular, although it does raise two troubling issues. First, the tribunal appears to have adopted a different approach to the question of whether it has jurisdiction than have past tribunals. The question of "jurisdiction" has been treated by every other tribunal strictly as a matter of competence (i.e. whether the tribunal has any right whatsoever to hear the claim, regardless of whether it has merit). The UPS Tribunal has instead concluded, without a merits hearing, that UPS's Article 1105 claim is entirely without merit, and therefore cannot proceed. This decision is completely at odds with the recent award of the Methanex tribunal, which (correctly) concluded that it had no authority (under either the NAFTA nor the UNCITRAL Arbitration Rules) to make such a determination - because such a determination goes to the "admissibility" of the claim, rather than the tribunal's very competence to hear it.

What the UPS Tribunal should have done was to express considerable doubt about the eventual success of the claim based upon Article 1105, but left it to the parties to provide full arguments about it. The departure of the UPS tribunal from the approach of past tribunals will only strengthen the resolve of NAFTA governments to vigorously attack even the most meritorious of claims at a preliminary stage, and thus raise the cost (and lower the effectiveness) of NAFTA Chapter 11 arbitrations as a remedy for bad regulatory conduct.

The other issue of concern which arises out of the UPS Tribunal's decision will probably only trouble the minds of international legal academics. In fact, if you are not an international legal scholar, you may simply want to skip to the last paragraph.

Because the UPS Tribunal decided to tackle the meaning of Article 1105 on a preliminary basis, rather than in a merits phase, we now have three tribunals adopting the same approach to the interpretation of Article 1105 since the NAFTA governments issued their controversial July 31 2002 Statement on its interpretation. All three tribunals (in: *Pope & Talbot v. Canada*; *Mondev v. USA*; and now *UPS v. Canada*) have concluded that Article 1105 requires NAFTA governments to treat investors in accordance with customary international law (rather than the broader concept of "international law" which can actually be found in the provision). However, all three tribunals have also concluded that customary international law imposes a burden on governmental conduct which is considerably more broad than that which the three NAFTA Tribunals would ever admit.

Accordingly, we can now say with sufficient confidence that the practical effects of the NAFTA governments' July 31 2001 statement have been quite negligible. Yes, Article 1105 only refers to customary international law standards, but no, that doesn't mean that governments can act with nearly as much impunity as they have heretofore argued.

The annoying angle for international legal scholars is that all three tribunals have engaged in an abbreviated form of analysis which has been called the "instant custom" approach. Rather than taking the considerable time and effort necessary to conclude whether customary international law actually exists, each tribunal has chosen a short-hand route instead. They have admittedly been forced into performing such slights-of-hand because of the rash and imprudent decision of the NAFTA governments to issue their July 2001 Statement, but legal clarity will be the victim for it.

The UPS tribunal could only adopt the "instant custom" approach because it chose not to hear more detailed arguments on Article 1105 in the merits phase. While the Tribunal was likely quite correct to conclude that there is no customary international law rule which would require a government to regulate against anti-competitive practices within its own territory, it completely failed to answer the question that UPS had asked. UPS asked whether it is against customary international law norms for a government to engage in the kind of discriminatory conduct which would be referred to as "anti-competitive" if it was being undertaken by a private corporation rather than an arm of the government. This distinction is important because, for the purposes of the NAFTA, Canada Post is an arm of the Canadian Government. Accordingly, this is really not a case where one private sector competitor brings a claim against the government for failing to protect it from the discriminatory practices of a private sector competitor. This is a case where the government had effectively failed to protect the investor from the discriminatory practices of another arm of the same government.

For UPS however, this Article 1105 issue really doesn't matter. To succeed in its case, UPS must prove that Canada failed to control Canada Post; that Canada Post accordingly acted in a manner that breached a NAFTA Chapter 11 provision; and that UPS suffered serious harm as a result. It makes no difference whether Canada's failure to control Canada Post resulted in

Canada Post doing something to UPS that would violate customary international law if Canada had been doing the act itself (and thus breach Article 1105), or if whatever Canada Post to UPS would constitute a breach of the NAFTA's national treatment provision (Article 1102) if Canada had been doing the act itself. UPS will win the same damages under either theory of liability.

Regards,

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