

# Kluwer Arbitration Blog

## GTH v. Canada may sound familiar to media entities

Catherine H. Gibson · Monday, June 20th, 2016

On June 6, 2016, the ICSID Secretary General registered a [request for arbitration in Global Telecom Holding \(GTH\) v. Canada](#). Although the text of the arbitral claim is not yet public, it appears likely that the dispute relates to [GTH's involvement](#) (or attempted involvement) in Canada's wireless telecommunications sector.

This claim may be historic for a number of reasons – as the first non-NAFTA claim against Canada, and as a claim against a developed country filed by a developing-country investor. The subject matter of the suit, however, may prove familiar to those following international claims filed against Canada. In recent years, Canada's treatment of foreign entities in media-related sectors has given rise to a number of formal and informal claims against the government. These disputes may reflect the special status that Canada accords its “cultural industries” – which appears in tension at times with Canada's other international commitments.

An early dispute along these lines arose just a few years after the [U.S.-Canada Free Trade Agreement](#) was concluded in 1987. In June 1994, Canada's broadcast regulatory agency de-listed U.S. channel Country Music Television (CMT), preventing it from continuing its Canadian operations. This decision was made after a new country music channel – a Canadian entity – had received a license to operate in Canada. CMT petitioned the U.S. government for action in response to the revocation of its ability to operate in Canada. The U.S. government [initiated an investigation](#) of CMT's allegations, and through this investigation [determined](#) that Canada's actions with respect to CMT had been unreasonable and discriminatory, and constituted a burden on U.S. commerce. As the U.S. government noted in its [1996 National Trade Estimates Report](#), the commercial parties ultimately resolved the issue among themselves, but the U.S. government remained concerned about the “discriminatory” broadcasting policies that remained in place in Canada.

A few years later, Canada faced a formal international claim filed by the United States at the World Trade Organization. In [Canada – Periodicals](#), the United States alleged that Canada had violated the national treatment obligation of the General Agreement on Tariffs and Trade through its discriminatory taxation of “split-run” publications, publications with Canadian regional editions and advertising aimed at the Canadian market. The WTO Appellate Body ultimately found that Canada had violated its national treatment obligation and noted that Canada “admitted that the objective and structure of the tax [was] to insulate Canadian magazines from competition in the advertising sector, thus leaving significant Canadian advertising revenues for the production of editorial material created for the Canadian market.”

Similar issues were presented more recently in the [United Parcel Service of America \(UPS\) v. Canada](#) dispute, filed under NAFTA in 2000. That dispute concerned, *inter alia*, Canada's Publications Assistance Program, which provided subsidies to eligible Canadian publications. These subsidies were provided through individual accounts at Canada Post, and were to be used by those publications against the cost of Canada Post's publication and mail services. The claimant alleged that Canada's actions violated the national treatment and most-favored national treatment provisions of NAFTA, as well as the guarantee of fair and equitable treatment. The tribunal ultimately dismissed these claims, however, in part based on the cultural industries exemption provision contained in NAFTA.

Versions of Canada's cultural industries exemption are included in a number of Canada's investment and trade agreements, including [NAFTA](#), the [Trans-Pacific Partnership \(TPP\)](#), as well as the [Canada-Egypt BIT](#). Generally, this exemption relates to "natural persons or enterprises engaged in":

- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
- (b) the production, distribution, sale or exhibition of film or video recordings;
- (c) the production, distribution, sale or exhibition of audio or video music recordings;
- (d) the publication, distribution, sale or exhibition of music in print or machine readable form; or
- (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

These provisions generally state that cultural industries are "exempt" from the obligations of the agreement – and this exemption was one reason that UPS's claims against Canada were dismissed. In reaching that decision, the tribunal characterized the NAFTA cultural industries exemption as "admittedly broad" and indeed "expansive" as it covered the distribution of publications, as well as publications themselves.

It is worth noting, however, that not all of Canada's cultural industries provisions are the same. The NAFTA provision, for example, permits the United States to retaliate if Canada seeks to invoke the cultural industries exemption. Canada's cultural industries exemption in TPP has certain exclusions, including for measures restricting access to online audio-visual content.

It remains to be seen whether GTH's claim against Canada will fall within this pattern of prior claims against Canada involving media-related entities, and whether Canada will (or should) raise arguments based on cultural industries provisions. Regardless, however, it appears that foreign media operating or seeking to operate in Canada may face difficulties – and the cultural industries exemption in Canada's investment agreements may be litigated again in future investment and trade disputes.


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