There is every reason for caution

Key findings from the Shrybman analysis of the legal opinion “Guidance for Municipalities” prepared for the Canadian Council for Public-Private Partnerships

In the opinion of noted trade expert, Steven Shrybman, “the C2P3 ‘guidance opinion’ is often inaccurate and at times simply wrong on key points. Moreover the manner in which ‘guidance’ is offered is often misleading, even when it is factually correct”.

In his analysis, Shrybman cites important, recent rulings that squarely refute much of the advice offered in the C2P3 opinion.

Even a properly drafted contract cannot eliminate the application of NAFTA with respect to expropriation.

A recent ruling by the International Centre for the Settlement of Investment Disputes, the senior-most authority concerning international investment disputes, (examining a dispute between a province in Argentina and a subsidiary of the water multinational Vivendi) makes it clear that it is not possible through contractual or other means to deny a foreign investor access to NAFTA dispute procedures.

So, in a dispute that arose because a municipal government canceled a P3 contract for non-performance by the private partner, a foreign investor could claim damages on the grounds that its investment had been expropriated.

Similarly, if the profitability of a contract were reduced as a result of environmental or public health regulations, the foreign investor would be free to launch a claim under NAFTA.

The foreign corporation has the right to choose the forum in which the dispute will be heard. A municipality has no such right.

While municipalities cannot be parties to a trade challenge or foreign investor claim, they can feel its sting.

Under NAFTA, the federal government is obliged to use its authority – including its spending powers – to ensure compliance by provincial and municipal governments.

While municipalities may not be named as parties to a claim, they will certainly feel the consequences of an adverse ruling. And they will not be able to defend themselves directly, relying instead on the federal government.

The ‘procurement’ exemption does not apply to P3 contracts.

While it is doubtful that a P3 contract providing services to the public would qualify as procurement, even if it did, it would not be excluded from NAFTA investment disciplines.

Concerns about the risk of investor claims and trade challenges are well founded.

There are several clear precedents where rulings on trade challenges could be seen to constrain municipal decision-making. The most dramatic of these was a ruling by the Supreme Court of British Columbia in the Metalclad case, involving a Mexican municipality and a US corporation, in which “expropriation” is interpreted so broadly as to include “interference with the use of a property” that reduces its profitability. This was seen to include “a legitimate rezoning by a municipality”.

For further information, see the attached analysis or visit cupe.ca.

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