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Who Are the Protagonists in Investment Treaty Arbitration?

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Procedural orders rarely become the subject of blog posts, much less the impetus for concerted action among states anxious to control the strategic space on which investment treaty arbitrations unfold. However, a series of orders in Detroit International Bridge Company v. Canada generated controversy when the tribunal steadfastly excluded representatives of the United States from attending hearings on jurisdiction. Viewed from one perspective, the incident reflects an element of farce. But it also provides a trenchant and timely reminder of continuing differences regarding the structure of investment treaty arbitration, and the roles assigned to disputing parties, tribunals, and non-disputing states parties.

For those unfamiliar with the case, Detroit International Bridge Company (DIBC) is a United States corporation based in the State of Michigan. Directly and indirectly through its Canadian subsidiary, DIBC owns and operates the Ambassador Bridge, which represents the largest commercial land crossing between the United States and Canada.

According to DIBC, Canada has for many years expressed hostility to DIBC's possession of the exclusive and perpetual right to operate the Ambassador Bridge. As a result, Canada has prevented DIBC from building a new span on the bridge, has refused to improve highway connections to the bridge, and has supported the development of a plan to build a competing, Canadian-owned bridge in close proximity. In so doing, Canada allegedly violated NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment).

A tribunal was constituted consisting of Hon. Michael Chertoff, Yves Derains (chair), and Vaughan Lowe, Q.C. Four days before a jurisdictional hearing in March 2014, the United States inquired about the possibility of sending representatives to attend the proceedings. Invoking the tribunal's confidentiality order, which called for hearings in camera, DIBC objected to the presence of Department of State attorneys at the jurisdictional hearing.

In a decision encompassing only three operative paragraphs, the tribunal began by acknowledging that NAFTA Article 1128 authorizes non-disputing NAFTA Parties to

"make submissions" to tribunals on questions involving the interpretation of the NAFTA. However, the text does not establish a clear right of physical participation in hearings. The tribunal next observed that its confidentiality order and Article 28(3) of the UNCITRAL Arbitration Rules both provide for hearings to be conducted "in camera." Based on those reasons, the tribunal declined to permit representatives of the United States to attend the hearing on jurisdiction.

Almost immediately, the United States applied for reconsideration on the grounds that the tribunal's previous decision (1) contradicted the NAFTA, (2) departed from the unanimous practice of other NAFTA Chapter 11 tribunals, and (3) prejudiced the treaty rights of non-disputing NAFTA Parties to make submissions on interpretive questions. In this context, the United States observed that new interpretive questions might arise during hearings, or existing issues might be placed in a different context. Therefore, the tribunal's order threatened to deprive the United States of an important aspect of its right to make "submissions" under Article 1128.

In a more fully reasoned decision, rendered days later, the tribunal affirmed its original decision to exclude U.S. representatives from the jurisdictional hearing. As before, the tribunal invoked its confidentiality order, which provides for hearings "in camera." The tribunal further reiterated that the NAFTA does not refer to the "participation" of non-disputing NAFTA Parties in hearings. In addition those previously stated reasons, the tribunal observed that DIBC is engaged in litigation against the United States government in U.S. courts, and that the judicial proceedings played a role in the controversy surrounding the tribunal's own jurisdiction. Under these circumstances, DIBC had "understandable" grounds for objecting to the presence of U.S. representatives.

Further elaborating the grounds for its decision, the tribunal noted that the United States had already made written submissions to the tribunal, expressed its desire to attend the jurisdictional hearings on very short notice, and even then did not indicate any wish to make its own oral submissions to the tribunal.

In closing, however, the tribunal recognized the possibility that the United States might offer a "compelling reason" to review transcripts following the jurisdictional hearing. Under these circumstances, the tribunal observed that "nothing prevents" the United States from requesting access to transcripts and, possibly, the opportunity to make further written or oral submissions at a "special meeting" of the tribunal.

A few weeks later, Canada filed an application requesting the tribunal to amend its confidentiality and procedural orders to allow U.S. participation in hearings. Prefacing its submission with the diplomatic suggestion that the timing of the United States' request may not have given the tribunal the "opportunity for a thorough consideration of this issue," Canada recalled that NAFTA Article 1128 confers on non-disputing NAFTA Parties the right to make submissions on questions of treaty interpretation, which includes the right of oral submissions and, thus, implies the right of attendance at hearings. In addition, Canada cited numerous cases in which tribunals had permitted non-disputing NAFTA Parties to attend hearings otherwise declared to be in camera.

In declining to amend its confidentiality and procedural orders, the tribunal noted that the status quo did not impair the United States' right to make submissions, particularly because the tribunal's Procedural Order No. 7 authorized the United States to seek access to hearing transcripts, as well as the opportunity to make further written and oral submissions on topics of treaty interpretation. While recognizing the large body of case law permitting the attendance of non-disputing NAFTA Parties at hearings, the tribunal distinguished those cases on the grounds that DIBC is "engaged in domestic litigation" with the United States, "which is closely related to the issues discussed in this arbitration." To preserve DIBC's freedom to "debate its case," the tribunal decided to maintain the exclusion of U.S. representatives from hearings.

In due course, the United States and Mexico requested the tribunal's leave to obtain transcripts of the jurisdictional hearings. After expressing the view that it required transcripts for effective exercise of its right to make submissions on questions of treaty interpretation, the United States also recalled that all three NAFTA Parties had confirmed their understanding that the NAFTA permits non-disputing States Parties to attend hearings. In its view, that "common, concordant, and consistent" position of States Parties qualified as "the authentic interpretation of the treaty," binding on tribunals constituted under NAFTA's investment chapter. The episode finally closed with a tersely reasoned order, in which the tribunal granted the United States' and Mexico's requests for access to transcripts of the jurisdictional hearing.

At one level, the drama surrounding the exclusion of the United States from jurisdictional hearings reflects an element of farce. Possibly annoyed with the timing and tone of the United States' request to attend jurisdictional hearings, the tribunal dug in its heels and said "no." Faced with an intense, coordinated challenge by all three NAFTA Parties, the tribunal remained firm, both maintaining the exclusion and indicating that the United States would have to provide "compelling" reasons even to review transcripts. However, after receiving an unadorned request for transcripts that went no further than the arguments previously stated in briefs, the tribunal yielded without finding any "compelling" reasons or providing written explanations for the apparent change in course. The juxtaposition of behaviors leaves one wondering why the tribunal devoted so much energy to resisting, only to give the United States the lion's share of what it desired: the opportunity to monitor the treatment of interpretive questions at oral hearings.

At another level, the drama serves as a trenchant reminder of continuing differences regarding the structure of investment treaty arbitration, and the roles assigned to disputing parties, tribunals, and non-disputing states parties. According to one view, the proceedings unfold in a decentralized framework that lacks textual and institutional centers of gravity, a context that emphasizes the resolution of individual disputes and, thus, the tribunal's commitment to the disputing parties as the sole protagonists. According to a second view, NAFTA Chapter 11 proceedings unfold in a more centralized regime, where a single treaty provides a textual center of gravity and where the States Parties form an institutional center of gravity for a series of otherwise unconnected disputes. In this context, the relationships between centers of gravity and the disputes receive greater emphasis, with the result that tribunals must also recognize the States Parties as the owners of the regime and, thus, at least supporting players in every dispute. According to a third view, the proceedings unfold

on a broader plane sometimes described as the "system" of investment treaty arbitration, where thousands of treaties leave no textual center of gravity and where tribunals consciously undertake the task of elaborating "coherent" norms, thereby transforming themselves into an institutional center of gravity formed by transnational judicial dialogue. In this context, the tribunals themselves become the protagonists, a view that tends to encourage majestic statements about "duties" to the "system," sweeping elaborations of norms (such as fair and equitable treatment) made without appreciation of context, and other expressions of hubris.

In DIBC v. Canada, the tribunal evidently started from the premise that its mandate involved the resolution of a particular dispute between two parties, who represented the sole protagonists. As a result, it may have viewed the United States as an interloper presumptuously seeking to insert itself. By contrast, the United States appears to have started from the premise that the NAFTA Parties own the treaty regime for Chapter 11, with the result that the States Parties figure into every dispute at least as supporting players. This collision of fundamental but unstated assumptions about the structure of investment treaty arbitration occurred in a procedural context that did not permit reflection and dialogue, but required swift and decisive action on the eve of hearings. Ultimately, the release of opposing forces in a confined space produced a regrettable explosion that cast none of the stakeholders in a favorable light.

Without expressing any opinion on the proper view, one may simply encourage stakeholders to reflect on the structure of investment treaty arbitration at the outset of the proceedings, to identify their own assumptions, to recognize the possibility that other stakeholders may hold different views, and to initiate a dialogue when it remains possible to avoid the confrontations that impair the orderly development of the proceedings, the regime, or the "system," if such a thing exists.

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