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**PRIVATE DISPUTES, PUBLIC ACTORS**  
*or*  
**How to find help where and when you may least expect it.**

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**I. Introduction**

- A. The three Great Lies:
  - 1. The check is in the mail.
  - 2. I was about to call you.
  - 3. I'm from the government; I'm here to help you.
- B. I am well aware that there are other variations on this theme, but this is a family show.
- C. Today's lesson: Great Lie #3 is sometimes true.

**II. Overview**

- A. In private international disputes, governments may be enlisted to play a helpful role.
- B. But, to make this work smoothly, you have to know:
  - 1. when to ask,
  - 2. whom to ask,
  - 3. and what to ask for.
- C. I am going to explore some of this territory, by outlining an argument, telling a few war stories, and trying to distill from them some guidelines of general applicability

**III. What kinds of disputes might invite this kind of help?**

- A. Any dispute implicating issues of public international law
- B. Any dispute in which there is an intergovernmental organization with oversight or monitoring responsibility:
  - 1. trade disputes, within the purview of the WTO
  - 2. maritime or shipping
  - 3. intellectual property
  - 4. environmental
- C. Any dispute in which the other party's nation of citizenship is a country to, from, or with which your own client's state of nationality is:
  - 1. closely linked for historical, cultural, or linguistic reasons
  - 2. a significant net exporter of capital
  - 3. a significant net importer of capital

4. a provider of foreign aid
  5. a recipient of foreign aid
  6. a major trading partner
- D. Any dispute actually or potentially covered by a BIT

#### **IV. How does it actually work?**

- A. First, learn your way around your own government: you will be amazed by what you thought you knew but did not know
1. trade- and investment-oriented agencies
  2. trade negotiators
  3. embassy staff tasked with export promotion
  4. justice department/ministry personnel
  5. agencies in the area of the subject matter of the dispute
- B. Do not limit your thinking to your own government
1. what other countries might have common interests, or might have experienced the same problem?
  2. think about coalition building: also a great way to generate new business!
  3. develop a plan around identifying and approaching the key actors, who will probably be very happy to see you
- C. Coach your government contacts in promoting your client's cause
1. what are the commercial interests at stake?
  2. what are the policy interests at stake?
  3. why is advocating for your client in the national interest?
  4. what are the consequences of a negative outcome?
- D. Think strategically: what is the end-game?
1. government participants may need to leave the game before it is over
  2. government officials will tell you when you are asking them for too much
  3. what might you or your client be asked to do in return?

#### **V. A real-life example: the Rice Wars** (not the ones involving the former Secretary of State)

- A. My client: I represented a major exporter of long-grain rice from the United States (and other places) to the European Union, where it has a substantial milling facility
- B. The issue:
1. at the end of the Uruguay Round, the EU agreed to place a cap on the landed (*i.e.*, duty-paid) price of rice imported from outside Europe
  2. this created a strange structure (with duty varying in inverse proportion to price), and a perverse incentive (to overstate, rather than understate) customs value
  3. the EU quickly realized that it had committed to something that would provide a great benefit to high-cost, high-quality producers
  4. so, instead of implementing its agreement, it first tried to renege altogether, and then established a system using reference prices, which was inconsistent with its commitment
  5. as a result, my client was being asked to pay import duties not subject to the reduction that was agreed to in the WTO Round

C. The strategy:

1. we began by going to the United States government, and especially USTR and USDA, to let them know that a promise made to the U.S. was not being honored
2. then, aware that raising another US-EC trade dispute might be counterproductive, we set about establishing a Coalition of Rice-Exporting Nations
3. these were the U.S., India, Pakistan, Thailand, and Uruguay: all expressed interest in participating
4. to ensure maximum response, we lobbied both government officials and the rice industry itself in each country, which naturally saw that it too would be affected

D. The response

1. the U.S. government was happy to take the lead, confident that it was not only defending the interests of an American company, but promoting the trade objectives of deserving developing countries as well
2. the U.S. invoked the dispute settlement procedures of the WTO
3. the EU backed down . . . or seemed to; it offered yet another scheme that it claimed was “substantial compliance” with its Uruguay Round offer
4. we demonstrated to the U.S. – as well as the “Coalition” members – that the proposal was a scam: it left tariffs in place that were outside the EU commitment
5. again, the U.S. initiated WTO proceedings, supported by the other participant nations
6. finally, the EU sued for peace, and a true settlement was negotiated at Commission offices in Brussels among representatives of the EU, the U.S. embassy, and the representatives of the private company that started it all (*i.e.*, us).

E. The lesson

1. government officials are generally willing to take up the cause of a business that is a substantial economic presence, and that creates jobs and pays taxes
2. other governments may well benefit from the outcome of the dispute favoring your client, and they should be asked to help to bring that result about
3. at the end of the day, dealing with government officials honestly and forthrightly will generate trust, and trust will allow you to promote your client’s cause as in the national interest

## VI. Why is there so much resistance to this idea?

- A. “I don’t want the Government sticking its nose into my client’s affairs.”
1. but it is up to you to determine how much information you want to share
  2. the point is to work from common interests, not as adversaries
- B. “The Government does not understand the issues.”
1. well then, fix it!
  2. government officials are often eager to learn, either to enhance their abilities to do their jobs, or to pad their resumes (hint: their motivation does not matter!)
- C. “The Government has no greater influence than my client does, and so has nothing to offer us.”
1. you are almost certainly wrong: there are many fora in which your government has much more clout than your private client

2. indeed, there are doors that your client cannot open, but that the government can

D. “Trying to win the Government over to help in a private dispute costs too much, takes too long, and is so frustrating that it drives me NUTS!”

1. this is an excuse for inaction and laziness

2. calm down, take a pill . . . and do your job; it is often frustrating to persuade the decision-maker, but that is what we lawyers are paid to do

E. “Asking for the Government’s help is very much like ‘lobbying,’ and ‘lobbying’ is something that true gentlemen (and ladies) just do not do.”

1. come on: this is 2010! on the planet Earth!

2. don’t you believe in the right to petition government for redress of grievances?

3. this is blindness, not purity: if you cannot do your job honestly, you should not be doing it at all

## **VII. Conclusion**

A. The point is that in private disputes, there may be public actors who can help you to promote the interests of your client

B. Your skill and value as a lawyer will be enhanced if you have a wider menu of approaches you are capable of offering to your clients

C. If all else fails, at least you will know that

1. “the check is in the mail,” and

2. “I was about to call you”

may also, just possibly, be true as well. And is that so bad?