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Influencing investment disputes from the outside

by
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Non-disputing third parties (NDTPs) often try to shape investor-state arbitrations by asking to submit "friends of the court" (or "*amicus curiae*") briefs. This *Perspective* identifies three areas of activism in addition to the formal process of submitting a "brief" in the primary dispute: pursuing parallel strategies, engaging with consent-based processes and embracing external assistance.

First, consider the parallel strategy pursued by non-governmental organizations (NGOs) in the case of *Aguas del Tunari v. Bolivia*.[1] In addition to organizing a "Cochabamba water revolt" against water services privatization, they arranged an "International Citizens' Petition" to the World Bank, gathering signatures from more than 300 civil society organizations and public leaders. This petition requested that the arbitral tribunal visit Cochabamba to receive public testimony. Although it declined the request, the Tribunal did affirm its power to interview third parties on its own motion.

NGOs also employed a media strategy to arouse public scrutiny and, in this manner, increased public relations costs for the claimant. They discovered that Bechtel (the owner of Aguas del Tunari) was in negotiations for a water contract with San Francisco's City Council. As a result of civil society mobilization, the Council passed a resolution commending efforts in Bolivia to oppose privatization.[2] Bechtel ultimately dropped its claim.

The European Commission (EC) exemplifies another creative approach toward activism adjacent to primary disputes. EC strategy extends to the post-award annulment stage and proceedings in national courts. Other NDTPs should also consider whether they can intervene in national courts that have more progressive *amicus* or permissive joinder rules.

Second, NDTP practitioners can engage with consent-based processes to influence rule formation. For example, starting in 2007, two NGOs that repeatedly petition tribunals to submit third-party briefs—the International Institute for Sustainable Development (IISD) and the Center for International Environmental Law (CIEL)—lobbied the UNCITRAL Working Group II on Arbitration and Conciliation to develop provisions

on transparency and third-party participation. The Working Group was in the process of updating the 1976 arbitration rules, which did not provide for liberal NDTP participation. Certain countries and NGOs representing the status quo (more than eighteen arbitration interest groups in total) forcefully resisted the NGOs' efforts, twice resulting in a denial of their observer status. However, IISD and CIEL eventually garnered support from the EC (another NDTP practitioner active at UNCITRAL), as well as certain country delegations (notably Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States). Their efforts culminated in the UNCITRAL Rules on Transparency[3] and the Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration.[4]

NDTPs should continue to engage with consent-based processes open to NGO input and should also seek to influence the incorporation of liberal NDTP procedures in international investment agreements (IIAs). The latter can be accomplished in the case of countries revising their model treaties and negotiating new IIAs, and by persuading governments to sign the Mauritius Convention, thereby ensuring the retroactive application of the transparency and participation rules to existing treaties.

Finally, NDTPs—when they do wish to submit briefs—can be resourceful in seeking to fund their participation. In at least two cases, law school clinics (in the United States, France and Canada) have helped to research and prepare briefs in consultation with local groups. Since the earliest NDTP efforts, law professors have lent their expertise to third-party petitions and briefs. Finally, private philanthropic organizations—including the Charles Stewart Mott Foundation, the Ford Foundation and the Lannan Foundation—have supported NDTP participation in investor-state disputes.

At the same time, NDTPs must understand that arbitral tribunals are becoming sensitive to third parties with deep pockets or external funding, and may ask them to fund portions of arbitral proceedings beyond their own submissions. In a recent decision permitting NDTP participation, the arbitral tribunal in *Philip Morris v. Uruguay*[5] reserved the right to order that certain costs (incurred by disputing parties in responding to NDTP briefs) be paid by the NDTP petitioners. It was unclear on what basis the tribunal would be able to do this, but imposing costs on NDTPs would force them to re-evaluate the benefits of intervention. On the other hand, cost orders against NDTPs would blur the distinction between disputing parties and third parties, justifying the latter's demands for increased procedural rights alongside more substantive participation.

In sum, potential NDTPs should consider multiple avenues for voicing concerns and should choose the type of participation that is best suited to their needs. The more knowledge third parties have about the creative activism that is often connected to formal brief requests, the more they are likely to succeed in expressing the dynamic and diverse interests of global society.

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[1] *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3.

[2] City of San Francisco, "Resolution commending Oscar Olivera and La Coordinadora for their successful efforts to combat water privatization in Bolivia," Resolution No. 355-01 (approved May 11, 2001).

[3] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

[4] Available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

[5] *Philip Morris Brands Sàrl v. Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3, para. 31 (Feb. 17, 2015).

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