Can evicted aid groups sue Sudan for breach of investment treaties?

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In recent weeks, there has been widespread condemnation of the Sudanese government's decision to expel 13 international aid agencies operating in Darfur.

The expulsions came, of course, as retaliation for the international arrest warrant issued against Sudanese President Omar Al-Baashir.

Most members of the UN Security Council have denounced the expulsions and warned that they are exacerbating the humanitarian crisis in Darfur.

Despite sustained diplomatic criticism of Sudan, there has been little discussion of the international law recourse available to not-for-profit organizations.

In one sense, this is not surprising given the paucity of tailor-made protections accorded to such groups.

As everyone knows, the expansion of global commerce in the 1990s was accompanied by a vertiginous rise in the number of treaties to protect trade and investment transactions.

Yet, the proliferation of non-governmental organizations and their increasing role as aid-providers in the developing world has not been matched by a similar impulse to cement into place legal protections for such activities.

This is unusual when one considers the tangible social and economic benefits which arise out of such not-for-profit activity.

These organizations may be performing elementary social and development functions – building and/or operating clinics, schools, community centres, basic water and sanitation infrastructure.

Indeed, quite apart from the intrinsic value of such activities, they can have their own sizable short-term economic footprint. Charities and aid organizations rent offices, procure local goods and services, pay taxes, and hire locals.

One major study by the Dean of non-profit-organization scholars, Lester Salomon of Johns Hopkins University, found that civil society organizations in a broad cross-section of host-countries "employ, on average, 4.4 percent of the economically active populations."

Economists such as Jeffrey Sachs have also pointed out that many of these basic aid and development activities are acknowledged building blocks for future economic growth and the attraction of significant foreign direct investment.

Yet, despite these substantial short-term and longer-term benefits for host countries, the overseas activities of civil society organizations often lack for tailor-made international law protections. This leaves such groups uniquely vulnerable to the types of capricious treatment seen most recently in Sudan, and also replicated in various parts of the globe.

Not-for-profit groups can sometimes lean upon human rights law – where it has teeth – and there have been occasional treaties designed specifically for not-for-profits, such as the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations.

However, the latter convention is of limited reach and scope, and merely accords national treatment to foreign organizations – a protection which is of little consolation if local groups operate with a government foot on their windpipe.

One idea which has been mooted by a colleague and myself is for not-for-profit groups to look to the extensive network of international treaties that protect foreign investment.

It's a rather counter-intuitive suggestion – not least as some organizations, to the

extent they've take note of bilateral investment treaties (BITs), have tended to criticize such agreements for their lack of balance and transparency.

However, without discounting the importance of some of these criticisms, it is possible that such treaties are somewhat less one-dimensional than sometimes thought. Rather, than being narrow tools for protecting for-profit corporate interests, they may also provide protection for non-profit activities – like the work of various humanitarian aid organizations toiling in the world's trouble-spots.

If potential claimants can sue under BITs, the substantive legal protections of such agreements could be a powerful tool for challenging arbitrary expulsions; seizure or destruction of assets (vehicles, computers, bank accounts, etc.); and even physical threats or abuse directed at personnel.

But, to enjoy such international treaty protections, not-for-profit organizations will need to clear some jurisdictional hurdles.

As most readers of this blog will know: there are several requirements for making a claim under such treaties.

First, you need to qualify as an investor.

That's the easy part. Many investment treaties expressly include non-for-profit organizations and associations as "investors" qualifying for treaty protection.

This stands to reason; non-profit organizations like the Ford Foundation or Harvard University may invest some of their endowment funds in overseas for-profit ventures – either directly or indirectly.

The second jurisdictional step requires that investors demonstrate that they've made an investment.

On rare occasions, treaties will make explicit that *not-for-profit* activities or ventures may qualify as investments. Both the NAFTA and the IISD Model Agreement on Investment (of which I was a co-author) take this approach.

More often, however, treaties are silent on this point – even as they may define investments in broad, non-exhaustive terms.

In a handful of instances, arbitrators have inferred a for-profit dimension – or at

least the expectation of some “return” – where investment treaties are silent.

For example, Prof. Brownlie, in a separate opinion on damages in the CME v. Czech Republic case seemed to take this approach – although jurisdictional issues were not strictly at issue by the time he became involved in that particular case.

Likewise, in the Sedelmayer v. Russian Federation case, there was some discussion as to whether certain personal property and effects of a German businessman could be considered as part of the investments protected under the Germany-Russia bilateral investment treaty.

More often, arbitrators have not discussed whether profit should be inferred as part of the definition of investment under investment treaties.

Things get more complicated when it comes to arbitrations conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID).

ICSID tribunals regularly consider whether a claim meets the jurisdictional requirements of a given investment treaty, as well as the requirements set forth in Article 25 (1) of the ICSID Convention.

However, that article simply stipulates that ICSID may have jurisdiction over any “legal dispute arising directly out of an investment”; famously, the Convention does not define what constitutes an “investment”.

Some arbitrators have declined to come up with their own definitions, while others have grappled with this question at considerable length.

In my next post, I’ll explore the different approaches of ICSID tribunals, and highlight the potential for certain not-for-profit activities to fall under the jurisdiction of ICSID.

As the only non-lawyer posting on this site, I’ll also look forward to some of the lawyers weighing in with their own views on all of this.