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Bilateral Investment Treaty Protections And Not-For-Profits: Practically, Is It Worth It?

Lisa Bench Nieuwveld (Conway & Partners) · Thursday, August 26th, 2010

It is rather interesting to read in the news about how some governments have chosen to “fund” their own government. One government went so far as to simply clear out the checking accounts of small businesses and not-for-profit organizations (“NGOs”). Another government, not necessarily seeking funding but presumably disagreeing with the purpose and/or presence of the affected NGO went and seized all of its property and no longer allowed it to remain in its territory.

I am sure that many possible motivators exist for governments to go after organizations not seeking profit but instead seeking to pursue some social or other mission within its borders. Then I was left wondering – would these organizations benefit from investment treaty protections? Obvious hurdles would exist based on jurisdictional reasons, such as whether their investment in the foreign country satisfies the definitions found in investment treaties. In other words, do their investments need to be for a commercial purpose versus just contributing to the economical development of the foreign country at question? Another issue of concern is whether the definition of “national” encompasses organizations which are not-for-profit. Are these also “companies”?

I found a rather interesting article on the matter co-authored by Luke Eric Peterson and Nick Gallus. I found their analysis both thorough and clear with respect to the jurisdictional hurdles in question. What I found interesting, however, was a lack of discussion on the all important practical questions – is it worth it? What would really be the damages and how much of these damages would justify the expense involved in arbitrating the claim?

I see an obvious difference with human rights claims. Then it can simply be a matter of principle and stopping governments from harming basic rights, etc of people. However, when it comes to looking more to the monetary aspect of an NGO’s presence in a foreign country – would the investment (if found as one under the relevant treaty and/or ICSID rules) be large enough to arbitrate? The article does mention NGOs acting as investors in order to receive returns that may be invested back into the NGO and help it further its cause. Should such an investment reach a substantial level (not looking, of course, at the cause and state action aspects also necessary to violate a treaty and at the specific clauses which may be involved) as to justify the rising costs of arbitration. Therefore, it is likely a possible good route for NGO’s to consider in the sense of an added protection, but practically speaking is it realistic?

Another practical consideration not mentioned is the relationships between the NGOs and the governments themselves. It is logical to assume that should a foreign government directly target an

NGO, the relationship is already looking bad. Does that automatically mean, however, that the NGO won't seek to improve its relationship? But what about those actions which qualify for possible treaty protection but do not target a specific organization? Would the NGO want to "rock the boat" with the government any further than necessary? Examples of such actions are what are referred to frequently in reports issued by The International Center for Not-For-Profit Law. It frequently refers to governments changing laws which control how, when and from whom an NGO may receive funding. This type of action may arguably lead to damages in the form of loss funding, etc. Of course, an entirely separate analysis is required to even determine whether past damages precedence would include these, but before even getting that far an NGO may simply not want to further affect its own direct relationship (and hopefully some influence) with the government.

I find the topic fascinating and the article which Luke Eric Peterson and Nick Gallus wrote excellent and thorough with respect to the jurisdictional legal areas. What I am wondering is, would NGOs truly seek this path?

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