Kluwer Arbitration Blog

Is it Practical for Not-For-Profits to Rely on BITs?

Luke Eric Peterson (Investment Arbitration Reporter) · Friday, September 10th, 2010

In a recent post, Lisa Bench Nieuwveld raised an issue which has been discussed from time to time on this blog: the potential for not-for-profit activities to be protected under international investment treaties.

There is no doubt that not-for-profit organizations face a barrage of abuse and mistreatment at the hands of host countries, and that the existing international framework of human rights law and charity law is rather anemic in the face of such abuses.

In past research papers, myself and a colleague have mused about the jurisdictional and substantive issues which might arise when not-for-profits seek the protections of international investment treaties.

However, Lisa is right to ask, at the end of her recent post, whether many organizations would truly pursue this path?

To be sure, there are some obvious limiting factors, including the typical desire of not-for-profit organizations to remain in the host country so as to continue carrying out their charitable activities. Many such organizations are not as fickle as for-profit foreign investors who will choose to pull up stakes when economic conditions in a given host territory begin to sour. Indeed, for an NGO to exit a host country and engage in an international arbitration would be viewed by many charitable actors as a "loss" even before arbitrators were to weigh in on the merits of a claim.

There is also the question of damages. Assuming that some claimants were to pursue investment treaty claims, would there be any meaningful financial losses at the end of the road?

It should be recalled that not-for-profit activity is big business. In some of the more benighted countries, where for-profit investors are thin on the ground, not-for-profit activity can be responsible for a significant share of GDP.

If a host state seizes or destroys a network of hospitals, entrepreneur skills-training centres, or non-profit manufacturing operations, an expropriation claim could be for a sizable amount.

But, even in cases where financial losses do not run into the tens of Millions of Dollars, there may be other remedies which would be attractive to not-for-profit organizations. These include moral damages, interim measures, and also orders of specific performance.

I have some qualms about how these different types of relief are used in recent investment arbitrations. As yet, we have seen no convincing formula for calculating moral damages (or even an attempt to look at how such damages are calculated in other areas of international law). Similarly, if investment treaty tribunals plan to move from awarding financial compensation to ordering sovereign governments to suspend regulations or to enact certain measures, don't be surprised to see a deeper political backlash (including more searching questions about the composition and interests of such tribunals).

But, still, there is no question that a would-be claimant in 2010 can make a stab at moral damages, interim measures or some forms of specific performance.

I doubt that we will ever see a day where dozens of arbitrations between not-for-profit organizations and states are afoot under the rubric of investment treaties. However, that is not to say that not-for-profit organizations cannot use the threat of arbitration, and the binding legal commitments found in international investment treaties, as a useful weapon when they are confronted with abusive treatment in a host country.

Luke Eric Peterson
https://www.iareporter.com

This entry was posted on Friday, September 10th, 2010 at 1:31 pm and is filed under BIT, ICSID Convention, Investment Arbitration, Investment protection, Not-for-profit organizations (NGO)
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.