NEW SQUARE

Additional Protections for Freedom of Expression: Investment Arbitration

Justice for Free Expression in 2015 Conference
Columbia University, New York.

Can Yeginsu, Barrister

4 April 2016

Al Jazeera Media Network v. Arab Republic of Egypt

(ICSID Case No. ARB/16/1)

Al Jazeera demands $150 million in damages from Egypt...

The burned-out interior of an Al Jazeera studio in Cairo after an attack in November 2012 .

"Network registers complaint at World Bank arbitration court accusing Egypt of targeting its journalists and offices"

Al Jazeera, 28 January 2016

Complaints:

1. "Systematically and deliberately targeting the network in the aftermath of the 25 January uprising in 2011, which brought down former President Hosni Mubarak"

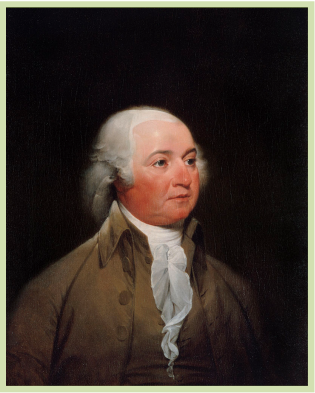
2. "Arrest of three Al Jazeera English journalists in 2013, eventually convicted of spreading false news and being members of a terror organisation."

Peter Greste, Mohamed Fahmy and Baher Mohamed were jailed in a trial criticised internationally.

Investment Arbitration

The resolution of foreign investment disputes

The protection of foreign investment is a well-established concept in public international law



John Adams

"There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to protection of its sovereign by all efforts in his power."

Recourse to such protection was beset with practical difficulties for the investor. Choice of two options:

- A claim in the local courts of the host state; or
- International diplomatic protection from home state.

The spread of investment treaties and arbitration

Today's investment protections are found principally in treaties:

- Bilateral investment treaties (over 2,500 in force worldwide);

- Multilateral agreements (e.g. Energy Charter Treaty, North American Free Trade Agreement, Central American Free Trade Agreement).

Purpose: to encourage and to protect investments made by nationals of each signatory State in the other.

Direct Recourse for Investors: Many of the treaties in force allow foreign investors to bring claims directly against the state (hosting the investment) before an arbitration tribunal. No need to exhaust domestic remedies; no need to rely on a contract between investor and state.

Investment Arbitration: Not a court process. Administered by arbitral institutions (own sets of rules), such as the International Centre for the Settlement of Investment Disputes. The ICSID Convention is ratified by 150 contracting states.

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Investment Arbitration

Protection standards for investments

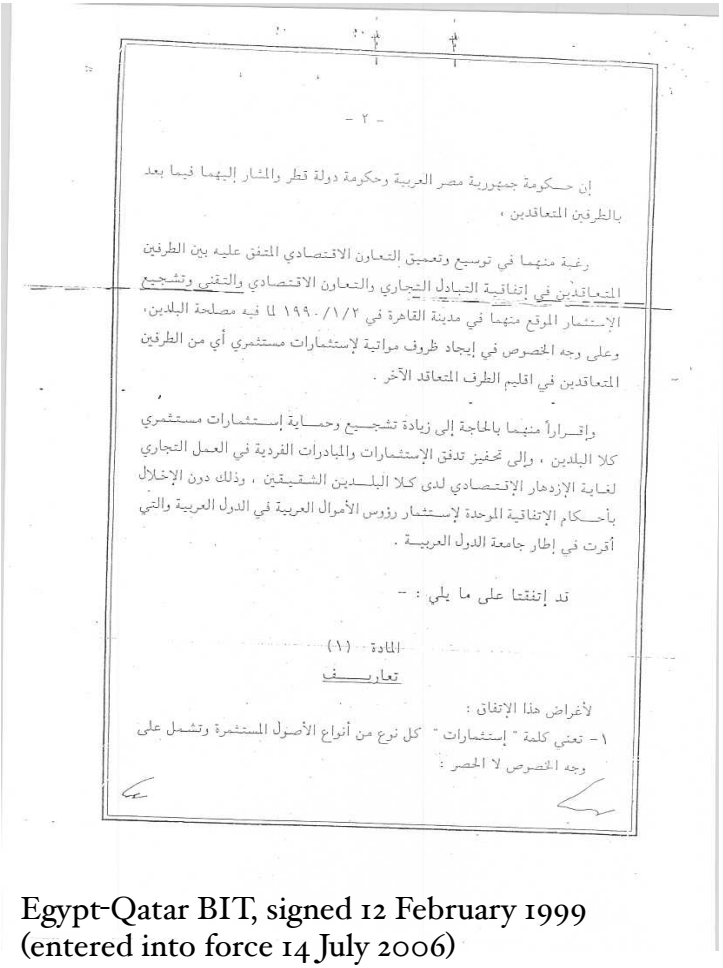
Investment protections come through a number of "standards"

The standards vary in scope depending on the specific wording of the applicable investment treaty...

- Prohibition of expropriation without compensation
- Fair and equitable treatment
- Full protection and security
- Prohibition of denial of justice
- National treatment

...and are interpreted by arbitral tribunals:

- Tribunals established on a case by case basis
- No doctrine of precedent
- Hearings in private
- Some awards publically available



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إن حكومة جمهورية مصر العربية وحكومة دولة قطر والمشار إليهما فيما بعد بالطرفين المتعاقدين ،

رغبة منهما في توسيع وتعميق التعاون الاقتصادي المتفق عليه بين الطرفين المتعاقدين في إتفاقية التبادل التجاري والتعاون الاقتصادي والتقني وتشجيع الإستثمار الموقع منهما في مدينة القاهرة في ١٩٩٠/١/٢ لما فيه مصلحة البلدين، وعلى وجه الخصوص في إيجاد ظروف مواتية لإستثمارات مستثمري أي من الطرفين المتعاقدين في اقليم الطرف المتعاقد الآخر .

وإقراراً منهما بالحاجة إلى زيادة تشجيع وحماية إستثمارات مستثمري كلا البلدين ، وإلى تحفيز تدفق الإستثمارات والمبادرات الفردية في العمل التجاري لغاية الإزدهار الإقتصادي لدى كلا البلدين الشقيقين ، وذلك دون الإخلال بأحكام الإتفاقية الموحدة لإستثمار رؤوس الأموال العربية في الدول العربية والتي أقرت في إطار جامعة الدول العربية .

قد إتفقتا على ما يلي : -

المادة (١)

تعاريف

لأغراض هذا الإتفاق :

١- تعني كلمة " إستثمارات " كل نوع من أنواع الأصول المستثمرة وتشمل على وجه الخصوص لا الحصر :

Egypt-Qatar BIT, signed 12 February 1999 (entered into force 14 July 2006)

Investment Arbitration

Wider Human Rights Considerations?

Arbitration and human rights: strange bedfellows...

- Arbitration as a method of alternative dispute resolution has its roots in private law: a way for commercial parties to resolve their disputes with minimal, if any, recourse to the courts. And in private.

- Arbitral tribunals are not courts; they are usually classified as private, not public, authorities.

- Human rights claims occupy the public law and/or public international law field and are decided by courts or quasi-courts; usually very far away from the determination of contractual rights of private parties.

...but in investment arbitration, sometimes necessary bedfellows...

1. In an investment arbitration, the tribunal is being asked to judge the host state's behaviour when exercising its sovereign rights – scrutiny is on the action or inaction of the state.

2. The protection standards are formulated at the highest level of generality. It is sometimes necessary to turn to international human rights standards to find applicable analogies with treaty protections. E.g. Article 1, Protocol 1 to the European Convention on Human Rights.

3. States are also subject to obligations arising out of international human rights treaties, which, for example, might conflict with investment treaty protections.

...and, so far, uneasy bedfellows.

1. Mondev International Ltd v. The United States of America, Case No. ARB(AF)/99/2: statutory immunities of certain state agencies before their own courts. Discussion of Article 6 of the European Convention on Human Rights. No theoretical analysis of, or justification for, recourse to human rights law.

2. Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Case No. ARB (AF)/00/2 : the decision of Mexico's environmental agency not to renew the permit of a Spanish investor to operate a landfill of hazardous waste. Detailed proportionality analysis by reference to rulings of the European Court of Human Rights and Inter-American Court of Human Rights. Basis: Article 38 of the Statute of the International Court of Justice. Proportionality analysis inconsistent with the settled approach in international human rights law.

3. Margin of appreciation doctrine:

    i. has a place in investment arbitration: Continental Casualty Company Continental Casualty Company v. The Argentine Republic, Case No. ARB/03/9 at §§180-181.

    ii. has no place in investment arbitration: Siemens A.G. v. The Argentine Republic, Case No. ARB/02/8 at §354.

4. Amicus curiae: Methanex v. United States, (NAFTA), 15 January 2001; Statement of NAFTA on Non-Disputing Party Participation, 7 October 2003; ICSID Arbitration Rule 37(2).

Investment Arbitration

Claims brought by media organisations to date

Al Jazeera is not the first media organisation to start an investment arbitration claim...

2001: Ronald Lauder v. Czech Republic, UNCITRAL: claimant complained that he was prevented by a Czech government body from acquiring a shareholding in a Czech broadcasting company. Tribunal: breach of treaty (arbitrary and discriminatory measures) but the claim failed on causation.

2003: CME v. Czech Republic, UNCITRAL: in effect a re-run of the Lauder arbitration but this time the claim did not fail on causation. The Czech Republic was ordered to compensate the claimant for the fair market value of its investment.

2007: Tokios Tokeles v. Ukraine, Case No. ARB/02/18: claimant owned printing and publishing companies in the Ukraine which it said were subject to criminal tax evasion investigations, asset seizures, and searches of premises – all of which were politically motivated. Tribunal: if the state's actions had been politically motivated it would have been in breach of its treaty obligations but no such motivation was found in this case.

2008: Victor Pey Casado and President Allende Foundation v. Republic of Chile, Case No. ARB/98/2: concerned the shutting down of the El Clarin newspaper by the Pinochet government in 1973. Other parties were compensated, but the claimant was denied compensation, in the Chilean courts. Tribunal: breach of the fair and equitable treatment standard and a denial of justice.

2011: Joseph C. Lemire v. Ukraine, Case No. ARB/06/18: claimant was a majority shareholder in a radio station which, unlike its competitors, was unable to obtain frequency licences to broadcast news-related radio programmes. Tribunal: breach of the fair and equitable treatment on the basis of a distortion of fair competition.

Investment Arbitration

A role in the protection of freedom of expression?

Yes: investment arbitration is an underused, and potentially powerful, means of giving effect to the right to freedom of expression

Not a forum for the development of freedom of expression jurisprudence under international human rights law.

Better view: a way of using international investment law to promote the right to freedom of expression.

Potentially powerful recourse in particular jurisdictions where traditional human rights claims have limited effect. E.g. Capital importing states.

Compensatory damages awarded will usually dwarf the "just satisfaction" awards of regional human rights courts.

Freedom of expression claims as property right claims? E.g. Meltex Ltd and Mesrop Movsesyan v. Armenia, App. No. 32283/04

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