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Research Report

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International investment law and media disputes: a complement to WTO law

by

Luke Eric Peterson*

The recent high-stakes dispute between Google and China over censorship and cyber-security has spawned renewed discussion of the international trade law protections that internet and media companies may enjoy.¹ Less recognized, however, is a perhaps more powerful legal tool in the arsenal of internet and media companies engaging in cross-border investments, namely international investment law.²

A vast architecture of international treaties has been established to protect flows of foreign direct investment (FDI) from discriminatory or arbitrary treatment, (uncompensated) expropriation, and other forms of mistreatment by host country governments. Legal disputes under these investment protection treaties are on the rise, with foreign investors often taking advantage of dispute settlement mechanisms that permit them to sue a host government for cash damages in case of alleged breach of treaty obligations.

Moreover, a small but growing number of international arbitrations taking place between foreign investors and governments arise out of disputes over the treatment of media enterprises. These cases offer tantalizing hints as to the broad potential impact of investment protection treaties to advance freedom of expression and freedom of the media – as well as some hints as to the limitations of these international investment pacts.

Uses of BITs by media organizations

Where media actors are wholly or partially foreign-owned, there may be scope to challenge a wide range of government actions as breaches of investment protection treaties. Such treaties provide specific legal protections for failure by the host state to compensate for direct or indirect expropriations or for breach of international investment law standards such as “fair & equitable treatment,” “full protection & security” or “national treatment.” Similar legal protections are also found in a growing number of Free Trade

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¹ “Clinton urges global response to internet attacks”, *New York Times*, January 22, 2010, at: <http://www.nytimes.com/2010/01/22/world/asia/22diplo.html?emc=eta1>.

² See, however, the work of Columbia University President Lee C. Bollinger for a discussion of the protections afforded by international human rights, trade and investment law. Lee C. Bollinger, *Uninhibited, Robust, and Wide-Open: a Free Press for a New Century* (New York: Oxford University Press, 2010).

Agreements, including the North American FTA (NAFTA), Central American FTA (CAFTA) and numerous bilateral FTAs (US-Peru, US-Singapore, etc.).

While not directly aimed at the protection of expressive rights, those standards may protect foreigners and foreign-controlled organizations from government actions designed to limit freedom of expression. For example, if a host state shuts down a foreign-controlled media company in reaction to the company's broadcasting of a speech by an opposition leader, a foreign owner might argue that these actions constitute expropriation or breach of other international investment law protections such as "fair & equitable treatment." Similarly, if a state refuses to provide a foreign-owned media operation with protection from a mob reacting violently to news reporting by that company, the foreign owners might argue that the state has breached its obligation to provide "full protection & security" to the investment.

Foreign-owners of newspapers, radio stations, television outlets, and publishing houses have already begun to sue host countries on the international playing field for alleged mistreatment.³ Although most of these disputes are commercially-oriented and relate to tax, licensing or regulatory matters,⁴ others have touched on politically-motivated expropriations of media outlets during military coups or alleged discrimination against publishers who publish political opposition literature.⁵

Challenges and opportunities

The growing potential for media enterprises to rely on the protections of international investment treaties is likely to prompt debate as to the limits of such protections, and the discretion afforded to governments to regulate expression so as to uphold public morals, national security or other state interests. In a related vein, we may see further debate as to the relationship and overlap of investor protection law and human rights law.

Already, international arbitrators have consulted human rights law for inspiration and guidance when dealing with certain investment disputes that touch upon questions of due process or denial of justice. It seems likely that, as arbitrators are asked to grapple with disputes arising out of alleged censorship or crack-downs on the media, they may look at how such matters are handled by human rights courts, and perhaps national courts such as the Supreme Court of the United States, even if the rulings of such bodies are not decisive for international arbitrators. In particular, arbitrators may look for guidance to the approach of human rights adjudicators with respect to permissible limits on freedom of expression, for reasons of national security, public safety or other considerations. While not strictly binding in the context of investment treaty disputes, human rights law may provide useful analogies or insights.

Although there are clear signs that media organizations may enjoy some protection under international investment treaties, these agreements are not a panacea for the range of challenges posed to freedom of expression. Not only are the protections of such treaties limited to *foreign* investors, the structure of such agreements – including the provision of costly international arbitration – mean that they are of most use in disputes where large sums of money are at stake.⁶

³ Newspapers: Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2; Radio: Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18; Television: CME v. Czech Republic (UNCITRAL rules arbitration), Ronald Lauder v. Czech Republic (UNCITRAL rules arbitration), and European Media Ventures v. Czech Republic (UNCITRAL rules arbitration); Publishing: Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18

⁴ Media licensing disputes under investment treaties can bear close resemblance to claims lodged under human rights adjudicative mechanisms. Compare, the investment treaty arbitration, Joseph Charles Lemire v. Ukraine, where Ukraine was held liable for certain breaches in relation to its handling of radio licensing applications, and an ECHR case where similar broadcast licensing actions were framed as breaches of human rights law: Meltex Ltd and Mesrop Movsesyan v. Armenia, Application No. 32283/04, Judgment of June 17, 2008.

⁵ See Pey Casado v. Chile and Tokios Tokeles v. Ukraine, Op.Cit.

⁶ While effective as a bulwark against expropriation or arbitrary license cancellations, these international investment agreements may offer less value in situations where media repression is targeted at particular journalists or their reporting methods. See for example the recent battle at the ECHR between the *Financial Times* and the United Kingdom over the protection of confidential journalist sources which appears to be a battle over a principle, rather than over large sums of damages incurred by the media organization.

Indeed, in an unfortunate twist, arbitration of disputes between media companies and governments can sometimes play out in confidence – away from the prying eyes of journalists and the public - thanks to the confidentiality that is the default position under certain arbitration rules. Thus, whatever its potential value to media enterprises, it should be noted that the international law protecting foreign investment could have broader impacts upon freedom of expression that need to be closely monitored. Foreign investments outside of the media sector, particularly in extractives or energy sectors, can be controversial and lead to serious conflict, particularly in developing countries. Multinational enterprises sometimes bring pressure to bear upon host countries to crack down on local activists or campaigners. At times, foreign investors may argue that governments are legally obliged to provide “full protection and security” against local critics or campaigners. In such cases, arbitrators will need to ensure that the security-interests of foreign-owned investments are not permitted to undermine basic norms of free dissent and expression.

Conclusion

There are growing signs that investment treaty protections – while rarely discussed in media or human rights law circles - may be surprisingly useful in some cases of repression or censorship of foreign-owned media. While there is growing debate as to the uses of World Trade Organization agreements to combat certain forms of state repression of media actors, less attention has been paid to the potential of international investment law to combat certain forms of state censorship and repression. With the US Department of State now signaling that internet freedom should be advanced through US foreign policy, it remains to be seen whether the US negotiating position on international investment treaties will shift so as to embrace this foreign policy objective. Ongoing investment treaty talks between the US and China could provide the obvious forum for this issue to be raised and debated.

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