

BITs, Freedom of Expression, and the Impertinence of Aliens

Kluwer Arbitration Blog

March 3, 2010

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Please refer to this post as: Luke Eric Peterson, 'BITs, Freedom of Expression, and the Impertinence of Aliens', Kluwer Arbitration Blog, March 3 2010, <http://arbitrationblog.kluwerarbitration.com/2010/03/03/bits-freedom-of-expression-and-impertinent-aliens/>

I recently gave a talk at a Sydney Law School conference about the unexplored relationship between bilateral investment treaties and freedom of expression.

In a longer paper on BITs and human rights published last year I'd highlighted some potential tensions, including the need for states to balance the rights of citizens to speak and protest – including in opposition to certain controversial foreign investment projects – and the protections owed to foreign investors, including full protection and security.

I've also highlighted in an earlier blog posting, the further tension between freedom of expression and arbitral confidentiality. And that's a topic which I'll revert to later this spring in some conference presentations which are in the works.

But, for this post, I wanted to highlight the potential for BITs to advance freedom of expression in certain contexts.

In a recent commentary for the Vale-Columbia Center, I hinted at this potential, but I wanted to elaborate a bit more on my thinking here and to do something which space did not permit in that earlier commentary: begin to think aloud about the *limits* of BIT protections for political expression of aliens. (And I want to tip my cap to Mark Kantor, with whom I've bounced around some earlier ideas – although not the ones discussed here – following the intellectual match-making efforts of Karl Sauvant at Columbia).

Hardly a week goes by without reports of governments somewhere shutting down media outlets, trying to censor their reports, or having a hand in – or turning a blind eye to – attacks on journalists.

We've seen a very public struggle between Google and China over censorship and cyber-security. Recently, we've seen Venezuela shut down a number of opposition television stations. And, last year, we saw Turkey slap a multi-Billion Dollar tax on a local broadcasting empire.

When confronted with censorship or harassment, media actors often turn to human rights law or constitutional protections for freedom of expression and the press.

However, when we are talking about *foreign*-owned media or reporters operating in other territories,

bilateral investment treaties may offer some notable protections.

Indeed, we've seen a number of BIT claims where foreigners have brought claims against governments for alleged harms inflicted on *media* enterprises.

In fact, one of the most famous set of BIT claims are the CME and Lauder claims against the Czech Republic ... which arose out of a struggle for control of a major TV broadcaster. Yet, while the CME/Lauder cases involved media companies, they did not deal with state censorship or mistreatment due to the broadcaster's editorial views or engagement in political expression.

But, there are other BIT arbitrations where states were alleged to have punished media companies for their views.

Most famously, there is the Pey Casado v. Chile case, which dealt with the expropriation of a left-leaning newspaper during the 1973 Pinochet coup. However, the expropriation claim was time-barred in that case, so arbitrators spent more of their time looking at whether Chile had denied justice to the claimants during their decades-long quest for compensation.

Apart from the Pey case, alleged harassment for political reasons was at the center of the Tokios Tokelés v. Ukraine arbitration.

Readers of this blog will know that the Tokios case is usually cited as a "treaty-shopping" case. However, the Tokios claim arose out of allegations that the authorities were harassing a publisher because of his printing of political materials, including a laudatory book about an opposition politician, Yulia Tymenskenko.

Although arbitrators ultimately ruled that Ukraine did not breach its treaty obligations, they had some interesting things to say about BITs and political expression.

In the Tokios Tokelés v. Ukraine case, an ICSID tribunal warned that a state would breach its obligation to provide fair and equitable treatment if the state targeted and harassed a *foreign*-owned publisher "for its impertinence in printing materials opposed to the" governing regime.

So, on the face of it, punishment of media actors for political reasons might breach BIT protections. And such treaty claims are straightforward in the sense that they don't rely on any importation of human rights law or non-BIT legal obligations which a state may have to provide for freedom of expression.

Arbitrators might simply rule that harassment or hindering of foreign-owned media outlets because of what they publish or broadcast is unfair, inequitable, or arbitrary.

But, there is a complicating factor that may come into play.

If you dig into the history of the international law for the protection of aliens, you find that publicists have long differed as to whether aliens enjoy the same rights as locals when it comes to freedom of expression, freedom of assembly or freedom of the press. And even when aliens are assumed to enjoy some speech rights, this did not necessarily entitle them to engage to the same extent as locals in overtly "political" activities, including attacking the government or its institutions via the media.

Yet, the Tokios Tokelés tribunal skirted over the question of any limits on the rights of aliens to participate in the political life of a host country; perhaps the tribunal did so because Ukraine did not raise these points in argument, or maybe arbitrators ignored this issue because no treaty breach was upheld in the Tokios case and the above-quoted holding of the tribunal about protecting political

“impertinence” was a throw-away line.

But, whatever the reasons for this issue not being discussed in the Tokios case, there is certainly an argument that states, at least as a matter of international law, enjoy more latitude in limiting the expression (and political engagement) of aliens on their territory.

Indeed, in deference to this long-standing position under international law, Article 16 of the European Convention on Human Rights makes explicit that the right of aliens to Freedom of Expression may be more limited than that of nationals of a particular state.

So, while I hope that BITs may advance freedom of expression, I also suspect that we will see some debate as to whether a *vague* BIT obligation to provide fair and equitable treatment – without any express according of freedom of expression rights to foreigners – is really meant to oblige states to permit aliens to engage fully in the political conversation and debate of their host country.

(Come to think of it, there might even be an argument that the *procedurally* clever decision of the Ukrainian publisher to use an off-shore entity to sue Ukraine in the Tokios Tokeles case ought to have weakened the *substantive* protections owed as a matter of international law, thanks to the transformation of a national into an alien.)

While BIT provisions are famously silent as to their protection of expressive activities, arbitrators might look to the broader circumstances which gave rise to a given foreign investment and any legitimate expectations which may have arose.

Where a foreign investor had a particular investment in a media outlet approved and licensed by the local authorities, it might be argued that there is a tacit (or even explicit) understanding that the foreign-owned outlet will be playing a role in the political sphere and public debate.

(Conversely, one thinks of the situation of Google in China, where it is reported that the US company agreed to very-detailed license terms, which may well have confirmed that draconian censorship is what one should legitimately expect in China).

However, given the more basic ambiguity as to the extent to which BIT protections should safeguard the expressive rights of aliens, it might be useful for investment treaties to hearken back to the days of older Treaties of Amity or Treaties of Friendship, Commerce, and Navigation (FCN), some of which set out express protections for news reporters operating on foreign soil (as well as exceptions which clarified the limits of such protections).

While BITs have clear potential to advance freedom of expression, most contemporary investment treaties are frustratingly silent as to whether aliens are to be granted full license to engage in a host country’s political conversation.

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