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How Investment Agreements Can Protect Free Media

NEW YORK – At the beginning of this year, Al Jazeera sued the Egyptian government for $150 million. The Qatar-based news channel presented its case before the World Bank's International Centre for Settlement of Investment Disputes in Washington, DC. But much more is at stake than a simple commercial disagreement in which Al Jazeera is attempting to enforce Egypt's obligations under a bilateral investment treaty with Qatar.

In its suit, Al Jazeera alleges that its offices were closed, its transmissions and broadcasts were jammed, its license canceled, its local branch liquidated in a compulsory procedure, and its journalists subjected to harassment, arrest, and detention for political reasons. The station is making the case that these infringements on freedom of expression mean that Egypt is in violation of its obligations under international human-rights treaties.

The significance of Al Jazeera's suit for advancing freedom of expression is potentially transformative, and it deserves wide attention. If successful, the case will demonstrate how existing international law can be used to enforce the global norms that are essential for the free flow of information, even though human-rights treaties lack a direct mechanism for enforcement.

Freedom of expression historically has been regarded as a domestic concern. But modern communication technologies and the unprecedented forces of globalization are blurring the distinction between what is national and what is international, creating an interconnected world that is not bound by traditional borders.

Not surprisingly, governments that perceive the creation of a global public forum as a threat to their authority are seeking to impose restrictive policies to interfere with freedom of expression. As censorship anywhere risks becoming censorship everywhere, global norms must be developed and enforced to protect the worldwide discussion and collective action needed to address the issues of our time.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognize the right to freedom of expression and information "regardless of frontiers." These provisions provide broadly accepted starting points from which to work. And yet, because they are not formally enforceable, they often have little practical impact.

By contrast, international trade and investment regimes provide robust enforcement mechanisms. The points at which global communications intersect with international trade and investment – for example, when media businesses distribute content and operate offices in foreign countries – provide opportunities for employing these enforcement mechanisms to protect freedom of expression.

Under the World Trade Organization's General Agreement on Trade in Services, violations of commitments to most-favored-nation (MFN) treatment, market access, and national treatment can be enforced through actions brought against the offending government by an affected company's home country. A few cases in this forum have touched on freedom of expression, most notably with respect to the distribution of audio-visual material. Recently, broad Internet censorship was identified as a trade barrier.

But WTO law has limitations – and has yet to be fully tested in this respect. Only governments can initiate disputes in the WTO, and remedies are applied only prospectively. To avoid facing retaliation, the offending government is required either to change its behavior or to offer offsetting concessions. It is not required to provide compensation for past harm.

The international investment regime employed by Al Jazeera in its case against Egypt is potentially more effective. This body of law consists of more than 3,000 treaties offering protection against a wide variety of wrongs by host governments, including breaches of MFN, "fair and equitable treatment," "denial of justice," "full protection and security," "arbitrary arrest or abuse," and expropriation.

In pressing its claims under this regime, Al Jazeera is showing how media investors might be able to use the mechanisms of international investment law to stop host countries from interfering with independent reporting, while helping to establish global norms regarding freedom of expression.

Unlike trade agreements, most investment treaties provide foreign investors – including media enterprises and non-profit organizations – the right to press their claims directly before international arbitral tribunals. Internationally enforceable remedies include compensation payments, for both ordinary and moral damages, and, where appropriate, interim injunctive relief pending final resolution of a dispute.

Not all governments agree that freedom of speech and of the press should be protected as fundamental checks on power. And yet our worldwide financial system demands greater openness and access to information.

International trade and investment regimes offer opportunities to protect the media from efforts to suppress it. But more needs to be done to develop robust global norms protecting freedom of expression.