

**CAN INFRINGEMENTS ON FREEDOM OF EXPRESSION  
AMOUNT TO INVESTMENT TREATIES VIOLATIONS?  
REFLECTIONS ON THE AL JAZEERA V. EGYPT DISPUTE**

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#### ABSTRACT

*This Article delves into the Al Jazeera v. Egypt dispute and explains how investment treaties have the potential to serve the protection of freedom of expression. On the one hand, freedom of expression is a well-studied human right, which is essential for any society to be democratic, for the freedom of expression enables the free exchange of information and ideas, which allows citizens to form their own opinions on issues of public importance. On the other hand, investment treaties are also well-known, as treaties entered into by two states give certain protections to investors of the states in the alien state. However, these two rights were never understood as capable of converging and complementing each other. The ongoing dispute between Egypt and the media company Al Jazeera has triggered an international dispute, which raises legal questions of incredible complexity and involves, for the first time ever, the use of an international treaty, protecting foreign investment*

(economic rights), to assess the protection of freedom of expression (a political right). In fact, academics have tended to focus on the risk that investment treaties will, or may, jeopardize the protection of a number of non-economic rights (ranging from environmental rights to health policy rights and including human rights). This Article demonstrates that there is no inherent contradiction between international norms. In doing so, the Article identifies key legal issues and revisits the fundamental characteristics of international law, including arbitral jurisdiction, application of substantive standards, interface between domestic courts and international adjudication, and the choice between state-to-state disputes or investor-state dispute resolution.

## I. INTRODUCTION

Foreign investment plays an important role in the economic growth of countries, and to attract foreign investment, governments have been exploring and implementing various mechanisms to create investment climates favorable to foreign investment. One of the mechanisms is through entering into investment treaties with other countries. Investment treaties may be in the form of bilateral investment treaties<sup>1</sup> (between two states providing reciprocal rights and obligations), bilateral economic agreements incorporating investment sections (such as free trade agreements),<sup>2</sup> or multilateral treaties containing an investment-specific chapter (such as the North American Free Trade Agreement (NAFTA)<sup>3</sup> and the Energy Charter Treaty (ECT)).<sup>4</sup> The entering into of investment treaties by a country may provide an indication to foreign investors that there is a conducive investment environment in place in the country.<sup>5</sup> This is because the investment treaties contain a promise from the host countries that they will protect any foreign investment they have received from foreign investors. One of the protections extended to foreign

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1. M. Sornarajah, *State Responsibility and Bilateral Investment Treaties*, 20 J. WORLD TRADE L. 79 (1986).

2. See generally Razeen Sappideen & Ling Ling He, *Dispute Settlement Under Free Trade Agreements: The Proposed Australia-China Free Trade Agreement*, 12 J. WORLD INV. & TRADE 581, 581 (2011).

3. Teresa A. Gleason, *North American Free Trade Agreement*, 22 BARRISTER 23 (1995).

4. Olivia Q. Swaak-Goldman, *Energy Charter Treaty and Trade*, 30 J. WORLD TRADE 115 (1996).

5. See, e.g., Julien Chaisse & Christian Bellak, *Navigating the Expanding Universe of Investment Treaties--Creation and Use of Critical Index*, 18 J. INT'L ECON. L. 79 (2015); Liesbeth Colen et al., *Bilateral Investment Treaties and FDI: Does the Sector Matter?*, 83 WORLD DEV. 193 (2016); Peter Egger & Valeria Merlo, *The Impact of Bilateral Investment Treaties on FDI Dynamics*, 30 WORLD ECON. 1536 (2007).

investors under investment treaties is by way of providing rules on protection against expropriation.<sup>6</sup>

Many of Al Jazeera's journalists were harassed, and some were even arrested in the period following the overthrow by the Egyptian military of the government led by President Mohammed Morsi.<sup>7</sup> The news of the seven-year prison terms ordered by an Egyptian court for a number of Al Jazeera news reporters triggered a vocal international response.<sup>8</sup> International investment law is playing a role in this dispute. As early as September 2013, the Qatar-based company Al Jazeera formally complained about Egypt's measures and announced that it would seek legal redress against Egypt.<sup>9</sup> Subsequently, Al Jazeera served a formal

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6. See, e.g., Ursula Kriebaum, *Partial Expropriation*, 8 J. WORLD INV. & TRADE 69, 70 (2007).

7. See *Egypt Arrests Al-Jazeera Journalist over 'Provoking Sedition*, GUARDIAN (Dec. 25, 2016), <https://www.theguardian.com/world/2016/dec/25/egypt-arrests-al-jazeera-journalist-mahmoud-hussein-fake-news> [https://web.archive.org/web/20201213185957/https://www.theguardian.com/world/2016/dec/25/egypt-arrests-al-jazeera-journalist-mahmoud-hussein-fake-news]; David D. Kirkpatrick, *20 Al Jazeera Journalists Face Charges in Egypt*, N.Y. TIMES (Jan. 29, 2014), <https://www.nytimes.com/2014/01/30/world/middleeast/egypt.html> [https://web.archive.org/web/20201213185719/https://www.nytimes.com/2014/01/30/world/middleeast/egypt.html]; Ruth Margalit, *Sisi's Crusade: One Country's Legislative Assault on the Press*, COLUM. JOURNALISM REV. (Fall 2019), [https://www.cjr.org/special\\_report/sisi-crusade-egypt.php](https://www.cjr.org/special_report/sisi-crusade-egypt.php) [https://web.archive.org/web/20201213193407/https://www.cjr.org/special\_report/sisi-crusade-egypt.php]; Hugh Miles, *Egypt Crisis: Al-Jazeera Journalists Arrested in Cairo*, BBC NEWS (Dec. 30, 2013), <https://www.bbc.com/news/world-middle-east-25546389> [https://web.archive.org/web/20201213185721/https://www.bbc.com/news/world-middle-east-25546389]; Hugh Miles, *Why Is Egypt's Government Targeting Al-Jazeera?*, BBC NEWS (Dec. 30, 2013), <https://www.bbc.com/news/world-middle-east-25551518> [https://web.archive.org/web/20201213190110/https://www.bbc.com/news/world-middle-east-25551518]; Judith Lohner et al., *Mapping Structural Conditions of Journalism in Egypt* (June 2016) (working paper) (on file with Media Conflict and Democratisation).

8. See *Egypt Sentences Al-Jazeera English Journalists to Three Years in Prison*, FR. 24 (Aug. 29, 2015), <https://www.france24.com/en/20150829-egypt-sentences-jazeera-english-journalists-three-years-prison> [https://web.archive.org/web/20201213193428/https://www.france24.com/en/20150829-egypt-sentences-jazeera-english-journalists-three-years-prison]; Heather Murdock, *Egyptian Court Returns Al Jazeera Reporters to Prison*, VOICE AM. (Aug. 29, 2015), <https://www.voanews.com/middle-east/egyptian-court-returns-al-jazeera-reporters-prison> [https://web.archive.org/web/20201213193617/https://www.voanews.com/middle-east/egyptian-court-returns-al-jazeera-reporters-prison].

9. See Agreement Between the Government of the Arab Republic of Egypt and the Government of the State of Qatar for the Promotion and Protection of Mutual Investments, Egypt-Qatar, Dec. 2, 1999 [hereinafter Egypt-Qatar BIT] (see app. 2 for unofficial English translation). See also *Al Jazeera Files Claim for Damages Against Egypt*, AL JAZEERA (Jan. 28, 2016), <https://www.aljazeera.com/news/2016/1/28/al->

notice of dispute on Egypt in April 2014, citing breaches of the applicable investment treaty, the Qatar-Egypt bilateral investment treaty.<sup>10</sup> The procedural terms of this specific international treaty required that Al Jazeera refrain from a formal process of arbitration for a period of at least six months to enable the parties to discuss a settlement.<sup>11</sup> Egypt did not engage in such discussions. As a consequence, Al Jazeera submitted its formal arbitration request to secretary-general of the International Centre for Settlement of Investment Disputes (ICSID) in 2016.<sup>12</sup>

The factual circumstances of what can now be called the “Al Jazeera v. Egypt case” offer a scenario that reflects on the widely neglected (probably because it is counter-intuitive) hypothesis of the use of investment treaties to protect human rights.<sup>13</sup> In fact, this well may be the beginning of a series of many future disputes given the number of issues and restrictions faced by media organizations in many countries.<sup>14</sup> More generally, actual or potential human rights violations—when they affect foreign investors—could give rise to investment claims.<sup>15</sup> The

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jazeera-files-claim-for-damages-against-egypt  
[<https://web.archive.org/web/20201213193658/https://www.aljazeera.com/news/2016/1/28/al-jazeera-files-claim-for-damages-against-egypt>].

10. See Egypt-Qatar BIT, *supra* note 9.

11. Andrew Osborn, *Qatar’s Al Jazeera Files \$150 Million Damages Claim with Egypt*, REUTERS (Apr. 28, 2014), <https://www.reuters.com/article/uk-egypt-jazeera-claim/qatars-al-jazeera-files-150-million-damages-claim-with-egypt-idINKBN0DE1BV20140428>

[<https://web.archive.org/web/20201213194856/https://www.reuters.com/article/uk-egypt-jazeera-claim/qatars-al-jazeera-files-150-million-damages-claim-with-egypt-idINKBN0DE1BV20140428>].

12. For a detailed timeline of the dispute, see *infra* app. 2, at pp. 528–34.

13. See Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT’L L. 483 (2001) (arguing for a multilateral investment treaty that protects human rights).

14. See Michael J. Abramowitz, *Press Freedom’s Dark Horizon*, FREEDOM HOUSE (2017), <https://freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon>

[<https://web.archive.org/web/20201213194925/https://freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon>].

15. See Cristina Corduneanu-Huci & Alexander Hamilton, *Selective Control: The Political Economy of Censorship* (World Bank, Working Paper No. 8556, 2018). See also Jason Rezaian, Opinion, *Dictators and the Internet: A Love Story*, WASH. POST (Sept. 10, 2019), <https://www.washingtonpost.com/opinions/2019/09/10/dictators-internet-love-story/>

[<https://web.archive.org/web/20201213195441/https://www.washingtonpost.com/opinion/s/2019/09/10/dictators-internet-love-story/>]; Zen Soo, *Western Governments Pass Tipping Point on Online Censorship*, S. CHINA MORNING POST (May 18, 2019), <https://www.scmp.com/tech/policy/article/3010670/slow-act-western-social-media-platforms-now-face-government-pressure>

consequences are considerable. For instance, China's recent move to impose a security law on Hong Kong poses a risk to a number of freedoms, which could affect foreign business and, again, lead to investment claims.<sup>16</sup> In order to make the demonstration of the systemic importance of investment treaties, this Article delves into the "Al Jazeera v. Egypt case."

Egypt and Qatar (the home of Al Jazeera) are parties to (a) the Organization of Islamic States Agreement on Promotion, Protection and Guarantee of Investments,<sup>17</sup> (b) the Unified Agreement for the Investment of Arab Capital in the Arab States,<sup>18</sup> and (c) a bilateral investment agreement (BIT).<sup>19</sup> According to news reports, Al Jazeera operated a bureau in Egypt until December 2013 and continued to maintain the offices in Egypt until announcing to its staff that it would be closing the offices.<sup>20</sup> These circumstances are a reminder that

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[<https://web.archive.org/web/20201213195444/https://www.scmp.com/tech/policy/article/3010670/slow-act-western-social-media-platforms-now-face-government-pressure>].

16. In this respect, it was recently noted that:

[S]hould the national security law lead to an erosion in the "one country, two systems" model under which city is supposed to be governed until 2047, Hong Kong could also find itself on the receiving end of investor disputes and trade lawsuits, especially if the goalposts are moved for investors in the city. Hong Kong has [twenty] bilateral investment treaties, more than half of which were signed with developed nations in the run up to the handover from Britain to China in 1997, a means of assuaging fears of changing business conditions.

Finbarr Bermingham, *Hong Kong Warned WTO Challenge to Potential US Trade Sanctions Could Be 'Counterproductive'*, S. CHINA MORNING POST (May 29, 2020), <https://www.scmp.com/economy/china-economy/article/3086713/hong-kong-warned-wto-challenge-potential-us-trade-sanctions>

[<https://web.archive.org/web/20201213195956/https://www.scmp.com/economy/china-economy/article/3086713/hong-kong-warned-wto-challenge-potential-us-trade-sanctions>].

17. Agreement for Promotion, Protection and Guarantee of Investment among the Member States of The Organization of the Islamic Conference, June 5, 1981, <http://ww1.oic-oci.org/english/convention/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf> [<https://web.archive.org/web/20180727212013/http://ww1.oic-oci.org/english/convention/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf>].

18. Unified Agreement for the Investment of Arab Capital in the Arab States, Nov. 26, 1980, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download>

[<https://web.archive.org/web/20201213200131/https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download>].

19. See Egypt-Qatar BIT, *supra* note 9.

20. See Mohammad Sabry, *Did Al Jazeera Uphold Its Responsibility to Its Staff?*, TAHIRI INST. FOR MIDDLE E. POL'Y (Oct. 15, 2014), <https://timep.org/commentary/analysis/al-jazeera-responsibility/> [<https://web.archive.org/web/20201213200202/https://timep.org/commentary/analysis/al-jazeera-responsibility/>].

international investment agreements cover breaches of, inter alia, the international minimum standard of treatment, fair and equitable treatment, full protection and security, and indirect expropriation claims.<sup>21</sup>

According to the bilateral investment treaty signed between Doha and Cairo, investors from both sides should be afforded fair and equitable treatment by the governments of both countries. As the treaty obliges Egypt to provide Al Jazeera's investments with full protection and security, Al Jazeera considers the Egyptian authorities to be in violation of international law.<sup>22</sup>

Indeed, Al Jazeera in January 2016 took the first steps towards initiating a \$150,000,000 claim against Egypt for damages to its investment since 2013.<sup>23</sup>

The BIT claim document does not appear to be public, but such a claim might assert:

- (1) that Al Jazeera invested in Egypt,
- (2) that the Egyptian governmental conduct in allegedly improperly interfering with Al Jazeera activities, imprisoning Al Jazeera reporters and effectively shutting down Al Jazeera operations constitutes a breach of the international minimum standard of treatment, fair and equitable treatment, full protection and security, and an indirect expropriation without compensation,

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21. See generally ANDREA GATTINI ET AL., *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION* (2018); MARTINS PAPARINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* (2013); TODD WEILER, *THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION, AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT* (2013); David Collins, *Applying the Full Protection and Security Standard of International Investment Law to Digital Assets*, 12 J. WORLD INV. & TRADE 225 (2011); Nartmirun Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully[?] Protected and Secured From?*, 7 AM. UNIV. BUS. L. REV. 1 (2018).

22. *Al Jazeera Demands \$150m Damages from Egypt*, TASNIM NEWS AGENCY (Apr. 29, 2014), <https://www.tasnimnews.com/en/news/2014/04/29/353509/al-jazeera-demands-150m-damages-from-egypt> [<https://web.archive.org/save/https://www.tasnimnews.com/en/news/2014/04/29/353509/al-jazeera-demands-150m-damages-from-egypt>].

23. *Id.*

(3) that such unlawful conduct has injured the investment of Al Jazeera in Egypt, both by preventing ordinary business activities and by exposing the investment's managers and reporters to personal risk and harm,

(4) that interim injunctive measures are necessary during the arbitration proceedings to

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute<sup>24</sup>

(5) that final remedies are appropriate, such as (i) permanent injunctive relief, (ii) actual damages to put Al Jazeera back in the position in which it would have been if the allegedly unlawful conduct had not occurred, and (iii) moral damages.<sup>25</sup>

Al Jazeera's counsel described the basis for the \$150 million claim.<sup>26</sup> In a nutshell, Al Jazeera has invested at least \$90 million in operations in

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24. UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION 19 (2014), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> [<https://web.archive.org/web/20201124052454/https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>] [hereinafter UNCITRAL RULES ON ARBITRATION].

25. See *supra* Part I, ¶¶ 1–5.

26. See Shawn Donnan, *Al Jazeera Sues Egypt for \$150m After Crackdown on Journalists*, FIN. TIMES (Apr. 28, 2014), <https://www.ft.com/content/7ff2210c-cec0-11e3-ac8d-00144feabdc0> [<https://web.archive.org/web/20201213200719/https://www.ft.com/content/7ff2210c-cec0-11e3-ac8d-00144feabdc0>]; Roy Greenslade, *Al-Jazeera Takes Legal Action Against Egyptian Government*, GUARDIAN (Jan. 27, 2016), <https://www.theguardian.com/media/>

Egypt since it started broadcasting in the Arab world's largest country in 2001, according to company figures.<sup>27</sup> That stake has included infrastructure and running costs for its four channels, purchase of fixed assets, like broadcasting equipment, regulatory fees paid to the Egyptian state, and staff costs. In this respect, the \$150 million claim would also cover anticipated future losses arising from the effective shutdown of Al Jazeera's Egypt operations.<sup>28</sup>

This Article visits the five key issues raised by the new dispute in discussing the relationship between freedom of expression and investment protection, namely: what should be Egypt's argument regarding the arbitral jurisdiction? The following sections address more specific questions. Part II: Could it be argued that the conduct of the Egyptian government was in any event justified and not arbitrary or otherwise in breach of international obligations?;<sup>29</sup> Part III: How would one argue for application of the treaty and for the breach of fair and equitable treatment on the part of Egypt?;<sup>30</sup> Part IV: Why would the Egyptian governmental conduct constitute an indirect expropriation?;<sup>31</sup> Part V: Does the fact that Al Jazeera is resorting to an international investment arbitration, rather than some other forum, affect our thinking about the value of investment treaties?;<sup>32</sup> and finally, Part VI critically asks: should investment claims be handled state-to-state, say between the State of Qatar and the new Egyptian Government, instead of through usual investor-state arbitration?<sup>33</sup>

## II. THE QUESTION OF THE ICSID ARBITRAL TRIBUNAL'S JURISDICTION

Al Jazeera's claim is novel in that it conflates Egypt's obligation to protect its investment with the much-needed freedom of speech of its journalists. The first major legal question raised by the dispute is what Egypt's arguments regarding the arbitral jurisdiction should be.<sup>34</sup> More

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greenslade/2016/jan/27/al-jazeera-takes-legal-action-against-egyptian-government [https://web.archive.org/web/20201213200704/https://www.theguardian.com/media/greenslade/2016/jan/27/al-jazeera-takes-legal-action-against-egyptian-government].

27. See Osborn, *supra* note 11.

28. *Id.*

29. See *infra* Part I.

30. See *infra* Part II.

31. See *infra* Part III.

32. See *infra* Part IV.

33. See *infra* Part V.

34. See generally Cesare Cavallini, *On Arbitral Jurisdiction. How to Deal with the Complementarity Between Arbitral Tribunals and the Courts?*, 18 GLOBAL JURIST 15 (2018). See also ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES, §§ 10.01–10.129 (Katia Tannaca-Small, ed., 2d ed. 2018);

specifically, could it be argued that the conduct of Egypt's government was in any event justified and not arbitrary or otherwise in breach of international obligations? Is International Centre for Settlement of Investment Disputes (ICSID) a competent authority to hear human rights related disputes, regarding specifically in this case, the freedom of speech?

Logically, Egypt's argument on arbitral jurisdiction<sup>35</sup> should be that one of the claims by Al Jazeera is based on a court decision to imprison some of its reporters. The arbitral tribunal cannot be used as a forum to review decisions of competent courts of justice as this is not what they are intended to do. Egypt might, therefore, argue against the court's decision being reviewed before an arbitral tribunal, as it is incompetent to do so and lacks jurisdiction to review the court's decision.

Moreover, Egypt could argue that, though an investor has the opportunity to seek international redress for domestic judicial decisions, this should not be used by an investor as a venue for international review of domestic court decisions as though the arbitral forum is an appellate forum for such domestic court decisions. Fair and Equitable Treatment (FET) can be claimed on grounds of denial of justice only: if the domestic courts have refused to hear a matter; if there has been inordinate delay amounting to a denial of justice; or if justice is administered in an inadequate manner or in cases where there is a transparently malicious application of the law.<sup>36</sup>

#### *A. Some Potential Objections to Jurisdiction*

International investment agreements (IIAs) contain binding promises between two nations to provide various rights to foreign investors and protect international investments. These protections and rights will be

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Lucas Bastin & Aimee-Jane Lee, *Investment Arbitration-Lack of Jurisdiction Under Statute, Treaty, and ICSID Convention-Denunciation of ICSID Convention-Lack of Foreign Ownership or Control*, 109 AM. J. INT'L L., 858 (2015); Filippo Fontanelli, *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory*, 1 BRILL RES. PERSPECTIVES INT'L INV. L. & ARB. 1, (2007).

35. See generally Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of Consent*, 24 ARB. INT'L 199, 200 (2008).

36. In *Azinian v. United Mexican States*, the tribunal held that:

A denial of justice could be pleaded if the relevant courts refuse to entertain such a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way . . . . There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law.

ICSID Case No ARB(AF)/97/2, Award, ¶ 102-03 (Nov. 1, 1999).

ineffective unless there is a mechanism provided for enforcement of these rights.<sup>37</sup> Most IIAs<sup>38</sup> provide for “investor state dispute settlement” (ISDS)<sup>39</sup> by means of investor state arbitration.<sup>40</sup> The parties to the BIT agree in advance in writing in the BIT to submit any disputes “arising out of the BIT” to arbitration (either institutional or ad hoc),<sup>41</sup> and this gives the jurisdiction to the arbitral tribunal to decide the dispute submitted to it by the parties.<sup>42</sup> The tribunal can only decide upon the matters for which the parties have agreed in the BIT to submit to arbitration.<sup>43</sup> In the *Al Jazeera* case, the freedom of expression, as a factual matter, is at the core of the dispute associated with its investment of four channels in Egypt. That is to say, without the denial of freedom of speech, there might not be a dispute in the first place.

*1. Criminal Issue—The Subject Matter of the Dispute (Jurisdiction Ratione Materiae)*

The existence of a legal dispute concerning an investment is a jurisdictional prerequisite in investment arbitration.<sup>44</sup> Each of these elements—the existence of a dispute, the legal nature of the dispute, the directness of the dispute, and the existence of an investment—may raise jurisdictional questions.

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37. J. Pohl, K. Mashigo, & A. Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey 1* (2012) (OECD, Working Paper).

38. Linda C. Reif, *Canada and Foreign Direct Investment in Latin America and the Caribbean: Evolution of an International Investment Agreement Framework*, 13 INT’L TRADE & BUS. L. REV. 86 (2010).

39. Arseni Matveev, *Investor-State Dispute Settlement: The Evolving Balance Between Investor Protection and State Sovereignty*, 40 U.W. AUSTL. L. REV. 348 (2015).

40. Alec Stone Sweet, *Investor-State Arbitration: Proportionality’s New Frontier*, 4 L. & ETHICS HUM. RTS. 46 (2010). *See also* Augusto Reinisch, *The Scope of Investor-State Dispute Settlement in International Investment Agreements*, 21 ASIA PAC. L. REV. 3 (2013).

41. Christoph Schreuer, *Consent to Arbitration*, UNIVERSITÄT WIEN (Feb. 2007), [https://www.univie.ac.at/intlaw/con\\_arbitr\\_89.pdf](https://www.univie.ac.at/intlaw/con_arbitr_89.pdf) [[https://web.archive.org/web/20160705173616/http://www.univie.ac.at/intlaw/con\\_arbitr\\_89.pdf](https://web.archive.org/web/20160705173616/http://www.univie.ac.at/intlaw/con_arbitr_89.pdf)] (last visited Dec. 9, 2020).

42. *See* Sungjin Kang, *Jurisdictional Objections and Defenses (Ratione Personae, Ratione Materiae, and Ratione Temporis)*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1–30 (Julien Chaisse et al. eds., 2020). *See also* Richard D. Freer, *Arbitration*, in 13D FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3569 (3d ed. 2020).

43. *Id.*

44. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment . . .”).

*a. The Dispute*

The Permanent Court of International Justice (PCIJ) in one case has defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.”<sup>45</sup> In another case, the International Court of Justice (ICJ) referred to a dispute as “a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.”<sup>46</sup> However, the issue in the present case is a criminal offense, which is not about the conflicting obligations of the interests between parties but, rather, a breach of a criminal law against the public interest.

*b. The Legal Nature of the Dispute*

In a legal dispute, the parties argue about legal rights and obligations or the compensation owed to any involved parties arising as a consequence of an obligation breach. In the other words:

The expression “legal dispute” has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.<sup>47</sup>

Therefore, the nature of the claim of Al Jazeera is not legal but criminal.

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45. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment, 1924 P.C.I.J. (ser. B) No. 3, ¶ 19 (Aug. 30).

46. *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 65, 74 (Mar. 30).

47. INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES ¶ 26 (1965), <http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partB.htm> [<https://web.archive.org/web/20200216114834/http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partB.htm>] [hereinafter REPORT OF THE EXECUTIVE DIRECTORS]. See also Julien Chaisse, *The Issue of Treaty Shopping in International Law of Foreign Investment—Structuring (and Restructuring) of Investments to Gain Access to Investment Agreements*, 11 HASTINGS BUS. L. J. 225, 237 (2015).

*c. The Directness of the Dispute in Relation to the Investment*

To be admissible to the investment arbitration, the dispute must be in relation to the investment.<sup>48</sup> Apparently, this tribunal lacks jurisdiction, as the criminal offense is not an investment-related issue. It is instead about the state sovereignty<sup>49</sup> and public interest, which only the domestic courts have jurisdiction to hear and judge appeals of the criminal dispute.

*2. Criminal Issue—The Jurisdiction of Interim Injunctive Measures*

In the fourth claim of the hypothetical claim document above, the claimant, Al Jazeera, filed a request for interim injunctive measures during the arbitration proceeding, according to the ICSID Arbitration Rule 39,<sup>50</sup> for the respondent to refrain from criminal action. Based on the interim injunctive measures, the respondent could object to the jurisdiction for some reasons.

The first reason the respondent could object to the jurisdiction is that requests for interim measures in a criminal issue would limit the state's exercise of sovereign powers. In international law, most tribunals recognize and respect the fact that the sovereign authority of any state includes the right to prosecute and to convict a person for crimes committed in its territory.<sup>51</sup> Tribunals would usually not grant requests for interim measures in criminal proceedings<sup>52</sup> unless the criminal proceeding lacked good faith, which may threaten the procedural integrity of the arbitration.

For example, in *City Oriente v. Ecuador*,<sup>53</sup> the tribunal respected the Ecuadorian judiciary's right to institute a criminal proceeding; however, the tribunal found that the host state was using the criminal proceeding "as a means to coactively secure payment of the amounts allegedly owed by City Oriente pursuant to [the new Hydrocarbons Law]," which "affect[ed] the disputed rights, [and] aggravate[d] the dispute".<sup>54</sup> So, the

48. See ICSID Convention, *supra* note 44, art. 26.

49. See generally, Symposium, *Changing Concepts of State Sovereignty*, 103 AM. SOC'Y INT'L L. PROC. 413 (2009).

50. UNCITRAL RULES ON ARBITRATION, *supra* note 24.

51. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 391 (1998).

52. Henry G. Burnett & Jessica Beess und Chrostin, *Interim Measures in Response to the Criminal Prosecution of Corporations and Their Employees by Host State in Parallel with Investment Arbitration Proceedings*, 30 MD. J. INT'L L. 31, 52 (2015).

53. *City Oriente Limited v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, ¶ 62 (Nov. 19, 2007).

54. *Id.* ¶ 55.

tribunal granted the claimant the interim measure orders.<sup>55</sup> In other words, respecting the sovereignty of a state in prosecution of a crime is the general rule, except when the state abuses its prerogative.<sup>56</sup> In addition, the impact of the criminal proceedings must undermine, or extend, the dispute and hinder the integrity of the arbitral proceedings, not merely its affiliated entities.<sup>57</sup> In the Al Jazeera case, the timing of the institution of the criminal proceedings indicates that the criminal proceeding was instituted and terminated before the plaintiff commenced a BIT claim proceeding. Therefore, the criminal proceeding could not have been commenced deliberately to interfere with the arbitration.

The criminal issue is a field related to the interests of the country, and the state's criminal prosecution of an investor is a part of the state's defense in the investment arbitration. The state will surely always declare that it reserves for itself the jurisdiction to hear the case and that only the domestic courts could undertake the proceedings, in accordance with the national law.<sup>58</sup> As such, the respondent can state a jurisdiction objection on the grounds of the state's prerogatives.

### *3. The Expropriation and Protection Standard Issue—Consent to Arbitration*

The jurisdiction of investment arbitration is derived from agreement between the states.<sup>59</sup> The form of consent is varied and could include: a consent clause in direct agreement, a settlement provision in domestic legislation, or provisions in a bilateral or multilateral investment treaty.<sup>60</sup> If the consent is not found in the documents mentioned above or the states announced that consent for international arbitration was limited to only specific matters, which exclude disputes over compensation for expropriation<sup>61</sup> and protection standard, Egypt could object to the international arbitration.

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55. See *id.*; see also *infra* Part IV.

56. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 72 (2001).

57. Alexis Moure, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 ARB. INT'L 95 (2006).

58. Burnett & Beess und Chrostin, *supra* note 52, at 52.

59. See generally Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1273–74 (2009).

60. See generally Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L.Q. 371, 375 (2007).

61. See generally Pamela B. Gann, *Compensation Standard for Expropriation*, 23 COLUM. J. TRANSNAT'L L. 615 (1985).

*E. Jurisdiction and Applicable Law in Investment Treaty Arbitration**1. The Investor Has Breached Host State Law and International Public Policy*

Based on fact, the reporters of Al Jazeera violated a criminal law of Egypt. According to *Hamester v. Ghana*,<sup>62</sup> the respondent could argue that because Al Jazeera failed to comply with the national law to which a treaty referred, the investment would not be covered by the guarantee of the treaty. Many investment treaties contain a provision that the investment in the host state territory should be conducted “in accordance with the law of the host state[.]”<sup>63</sup> The BIT sets an obligation for the host state to support, promote, and protect the investment of a foreign investor but also requires the investor to invest in a manner that obeys the regulations and legal orders enacted by the host state. Even when such a clause is not contained in the BIT, article 26 of the Vienna Convention on the Law of Treaties 1969<sup>64</sup> also obligates parties to respect every treaty in good faith. In *Plama v. Bulgaria*,<sup>65</sup> the tribunal also invoked good faith from domestic law and international law to refuse the substantive rights of the claim for protection.

Therefore, Egypt could state that the malefaction of the reporter in Al Jazeera was not only in breach of the national criminal law but was also contrary to international public policy.<sup>66</sup>

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62. Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 85 (June 18, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf> [<https://web.archive.org/web/20201213201948/https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf>].

63. Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 *FORDHAM INT'L L.J.* 1473, 1476 (2011).

64. See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 *VA. J. INT'L L.* 431, 495 (2004).

65. *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Award, ¶ 144 (Aug. 27, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf> [<https://web.archive.org/web/20201213202253/https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf>].

66. James D. Fry, *Désordre Public International Under the New York Convention: Wither Truly International Public Policy*, 8 *CHINESE J. INT'L L.* 81 (2009).

2. *The Conduct by the Host Country Is Consistent with the National Sovereignty to Protect Legitimate Public Welfare Objectives*

The respondent could argue that the measure taken in imprisoning the reporters of Al Jazeera and shutdown of the claimant's operations were lawful actions within the police power of the state for the purpose of protecting the general welfare.<sup>67</sup> A host state is not responsible for the loss of property or injury that is due to a "bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory. . . ."<sup>68</sup> That is to say, since the claimant had severely breached the domestic law, the host country was entitled to use its national sovereignty to seize the illegal property of the foreign investor and to punish any individual whose behavior was contrary to the general welfare. Although this measure or order may have had a negative impact, depreciating the value of or depriving the investor of its property, the respondent was free to do this because of the claimant's prior unlawful conduct, which derogated the public welfare.

### III. REINTERPRETING THE FAIR AND EQUITABLE TREATMENT PROVISION

Assuming that the tribunal declares its jurisdiction on the case, the next major issue is whether there is a breach of a substantive standard of the Qatar-Egypt BIT. In this respect, the first standard to consider is the fair and equitable treatment (FET) since it is the most frequent breach of investment treaties. In short, the specific question is whether FET binds Egypt to such an extent that the domestic court's decision (with respect to Al Jazeera's journalists) could be characterized as a breach of FET—or conversely, whether FET could constitute sufficient basis to protect free media operations in Egypt and other countries.

The tribunals have avoided giving a clear definition of fair and equitable treatment, and as such, the method to analyze the factual situation is based on some principles that the tribunals have demonstrated in the cases when they applied FET. The principles include consistency and protection of the legitimacy expectation,<sup>69</sup> reasonableness,<sup>70</sup> due

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67. See *Police Power. Regulation of Trade, Professions, and Business. Protection of the Economic Welfare of a State*, 28 HARV. L. REV. 819 (1914).

68. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 cmt. g (AM. LAW INST. 1986); see also Bashayer Al-Mukhaizeem, *The Dilemma of Indirect Expropriation of Host States and the Right to Regulate in the International Investment Sphere*, 4 LEGAL ISSUES J. 1, 13 (2016).

69. See Richard Clayton, *Legitimate Expectations, Policy, and the Principle of Consistency*, 62 CAMBRIDGE L.J. 93, 105 (2003). See also Julien Chaisse & Ruby Ng, *The*

process, and transparency.<sup>71</sup> This section focuses on whether the denial of freedom of expression constitutes breach of FET.

*A. Application of the Investment Treaty to the Case*

The question on the application of the treaty refers to the substantive provisions in the treaty. The bilateral investment treaty (BIT) between Egypt and the State of Qatar should be applied to govern the acts of Egypt since it was in force at the time the acts were committed.<sup>72</sup> Treaties only apply to acts that occur after their entry into force, which means that they are generally non-retrospective in nature.<sup>73</sup> Article 28 of the Vienna Convention on the Law of Treaties<sup>74</sup> provides that a treaty only binds a party with regard to acts or omissions after the treaty came into force and, unless otherwise stated, does not govern acts committed prior to its entry into force. This position is also echoed under article 13 of the International Law Commission's Articles on State Responsibility,<sup>75</sup> which provides that a state is only in breach of an international obligation if, at the time of such breach, it was bound by such an obligation.<sup>76</sup>

The existence and operation of the BIT between Egypt and the State of Qatar at the time the acts in question were committed is not disputed, and therefore, the BIT was the substantive law in force and provided the standard against which the legality of Egypt's acts could be determined.

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*Doctrine of Legitimate Expectations: International Law, Common Law and Lessons for Hong Kong*, 48 HONG KONG L.J. 79, 92 (2018).

70. Silvia Zorzetto, *Reasonableness*, 1 ITALIAN L.J. 107, 128–29 (2015).

71. Christoph Schreurer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 365 (2005).

72. The Egypt-Qatar BIT was signed on February 12, 1999, and came into force on July 14, 2006. *International Investment Agreements Navigator*, INVESTMENT POL'Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheria/1387/egypt---qatar-bit-1999-> [https://web.archive.org/web/20201213202312/https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheria/1387/egypt---qatar-bit-1999-] (last visited Feb. 4, 2020) [hereinafter *UNCTAD Egypt-Qatar*] (select "Egypt" in dropdown box; then scroll down to find "Egypt - Qatar BIT (1999)" link).

73. See Nick Gallus, *Article 28 of the Vienna Convention on the Law of Treaties and Investment Treaty Decisions*, 31 ICSID REV. 290, 293 (2016).

74. Ulf Linderfalk, *On the Meaning of the Object and Purpose Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19*, 72 NORDIC J. INT'L L. 429, 431 (2003).

75. See generally JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 131 (2002).

76. The U.N. General Assembly took note of the Draft Articles in Resolution 56/83. U.N. GAOR, 56th Sess., 85th plen. mtg. at 1, U.N. Doc. A/Res/56/83 (Jan. 28, 2002).

The BIT set out the conditions for investment in each of the state parties and provided for ramifications and dispute resolution in case those conditions were breached. The BIT is, therefore, the proper legal document that governs the relationship between Egypt and Al Jazeera. The BIT will also apply since it was created to benefit nationals of the two states, and it is clear that Al Jazeera is a national of the State of Qatar.

In addition to this, the other issue that has to be determined to establish the applicability of the BIT is whether there was an investment.<sup>77</sup> Al Jazeera was operational in Egypt with a bureau. This amounts to an investment, as the bureau was an asset involved in economic activities. Therefore, the BIT applies in this case.

From the facts provided, it can be concluded that the dispute in question arose after the entry into force of the BIT and involved an investment of a national of the other contracting state and, therefore, is subject to the BIT.

*B. A “Creeping” Violation of the Fair and Equitable Treatment Standard?*

FET is an absolute standard of protection<sup>78</sup> offered by investment treaties to cover investors and investments from the other contracting state. Though widely included in international investment treaties and disputed in multiple investment arbitration proceedings, the exact content of FET is not agreed<sup>79</sup> upon, and therefore, the facts of each case are examined and determined independently. This “gap in treaty definitions has allowed investors and governments to take opposite stances in delineating the precise scope of the term, with governments arguing for a restrictive view of the term and investors shouting for an expansive

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77. There are no limitations in the BIT according to the mapping of the BIT by the Investment Policy Hub. Thus, the BIT provides a broad investment definition by not excluding portfolio investments and other specific assets (e.g., sovereign debt, ordinary commercial transactions, etc.) and by not bringing any closed (exhaustive) list of covered assets. Moreover, there is no list of requirements regarding characteristics of investment, and it does not contain an “in accordance with host State laws” requirement. *UNCTAD Egypt-Qatar*, *supra* note 72.

78. Ardeshir Atai, *Iranian Bilateral Investment Treaties: Substantive Principles and Standards*, 14 J. WORLD INV. & TRADE 397, 405 (2013).

79. Ursula Kriebaum, *FET and Expropriation in the (Invisible) EU Model BIT*, 15 J. WORLD INV. & TRADE 454, 478 (2014). *See also* Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime*, 15 J. INT’L ECON. L. 51, 65 (2012).

view.”<sup>80</sup> FET launches the discussion in formulating an argument that the foreign investor was not well-treated on the grounds of discriminatory or other unfair measures being taken against its interests. In fact, FET is a key concept, and its interpretation and application very much depend on the understanding and appreciation of specific facts and circumstances. That being said, past interpretations and applications show that FET “signifies the principle of non-discrimination and proportionality in the treatment of foreign investors.”<sup>81</sup> Despite there being no internationally agreed on framework as to what entails FET, the key substantive and procedural elements of FET are reasonableness,<sup>82</sup> consistency,<sup>83</sup> non-discrimination,<sup>84</sup> and due process, respectively.

In *Tecmed v. Mexico*,<sup>85</sup> FET was partly defined as requiring contracting parties, in light of the good faith principle,<sup>86</sup> to act transparently and in a consistent manner to ensure foreign investors were aware of laws and regulations that would govern the investment. The contracting parties were also to use legal instruments in accordance with their usual functions and to compensate investors in case they were deprived of their investments. In *Saluka v. Czech Republic*,<sup>87</sup> the tribunal described the treatment expected from the host state in the negative form, requiring that a host state would not act in an inconsistent, non-transparent, unreasonable (unrelated to a rational policy), or discriminatory manner against a foreign investor. Additionally, the host

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80. Bamali Choudhury, *Evolution or Devolution: Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD INV. & TRADE 297, 297 (2005).

81. PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 638 (2d ed. 2007).

82. See Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV. 351, 386 (2016).

83. See Jason Haynes, *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, 14 J. WORLD INV. & TRADE 114, 118 (2013). See also Katarina Chovancova, *The Fair and Equitable Treatment and Its Current Status in International Investment Law*, 6 Y.B. INT'L ARB. 171, 179 (2019).

84. *ADF Grp. Inc. v. United States*, ICSID Case No. APB(AF)/00/1, Award, ¶ 194, (Jan. 9, 2003).

85. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003), <https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf> [<https://web.archive.org/web/20201213202517/https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf>].

86. Bernardo M. Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT'L L. REV. 761, 781 (2011).

87. *Saluka Invs. B.V. v. Czech Republic*, Partial Award, ¶ 309 (Perm. Ct. Arb. Mar. 17, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> [<https://web.archive.org/web/20201031081917/https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>].

state would protect the procedural propriety and due process of the investor, which would include ensuring the investor is not coerced or harassed by regulatory authorities. Lastly, in *Waste Management v. Mexico*,<sup>88</sup> the tribunal described infringement of FET as “conduct attributable to the State . . . [that] is arbitrary, grossly unfair, unjust or idiosyncratic, . . . or involves a lack of due process leading to an outcome which offends judicial propriety[.]”

From a review of past tribunal decisions, the principles that have been identified to encompass FET are stability,<sup>89</sup> transparency,<sup>90</sup> the investor’s legitimate expectations,<sup>91</sup> compliance with contractual obligations,<sup>92</sup> procedural propriety<sup>93</sup> and due process,<sup>94</sup> acting in good faith, and freedom from coercion and harassment.<sup>95</sup> In this scenario, the conduct in question that has given rise to the FET breach claim was Egypt’s improper interference with Al Jazeera’s activities, imprisonment of Al Jazeera reporters, and constructive closure of Al Jazeera’s operations.<sup>96</sup> These actions have injured the investment of Al Jazeera in

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88. *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf> [<https://web.archive.org/web/20200830191734/https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf>].

89. Peter D. Cameron, *Stability of Contract in the International Energy Industry*, 27 J. ENERGY & NAT. RES. L. 305, 307 (2009).

90. Tsai-Yu Lin, *Inter-Mingling TRIPS Obligations with an FET Standard in Investor-State Arbitration: An Emerging Challenge for WTO Law*, 50 J. WORLD TRADE 71, 76 n.3 (2016).

91. Abhijit P. G. Pandya & Andy Moody, *Legitimate Expectations in Investment Treaty Arbitration: An Unclear Future*, 15 TILBURG L. REV. 93, 109 (2010). See also Emmanuel T. Laryea, *Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (J. Chaisse et al., eds, Springer, Singapore 2020), [https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2\\_55-1](https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2_55-1) [[https://web.archive.org/web/20201213202818/https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2\\_55-1](https://web.archive.org/web/20201213202818/https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2_55-1)].

92. Srikanth Hariharan, *Distinction Between Treaty and Contract: The Principle of Proportionality in State Contractual Actions in Investment Arbitration*, 14 J. WORLD INV. & TRADE 1019, 1029 (2013).

93. Kriebaum, *supra* note 79, at 477.

94. *Id.* at 473–74.

95. Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, 12 J. WORLD INV. & TRADE 783, 803 (2011).

96. Louisa Loveluck, *Egypt Tightens Muzzle on Media, Sentences Al Jazeera Reporters to Prison*, CHRISTIAN SCI. MONITOR (June 23, 2014), <https://www.csmonitor.com/World/Middle-East/2014/0623/Egypt-tightens-muzzle-on-media-sentences-Al-Jazeera-reporters-to-prison> [<https://web.archive.org/web/20201213202943/https://www.csmonitor.com/World/Middl>

Egypt, both by preventing ordinary business activities and by exposing the investment's managers and reporters to personal risk and harm. Based on these facts, the principles that stand out are the investor's legitimate expectation, procedural propriety and due process, good faith, and freedom from coercion and harassment. These principles, anchored in the investor's freedom of expression, are discussed below.

An investor has a legitimate expectation<sup>97</sup> that a host state's legal framework, within which the investor considers and invests, will remain in force during the life of the investment and not drastically change to the detriment of the investment. The legal framework of a host state (at the time the investment was made) creates legitimate expectations on the part of the foreign investor, which may later lead to breach of FET.

The concept of legitimate expectations is particularly useful to describe a frequent (and recurring) situation where the state that has attracted the investor has also induced an investment by way of certain informal representations or promises, on which the investor has relied at the time of making the investment.<sup>98</sup> If these are both specific and individualized, the doctrine of legitimate expectations will provide a valuable tool to hold the host state liable. This approach is in line with domestic law systems, which typically extend protection to legitimate expectations in these types of situations.<sup>99</sup>

In the present case, it can be presumed that when Al Jazeera made its investment in Egypt, the legal framework in existence was conducive for their investment and did not include interference with Al Jazeera's activities to the extent of making it impossible to operate. As a media press, Al Jazeera had the legitimate expectation that its right of freedom of expression would be guaranteed under the legal framework in place when it made its investments. There was, therefore, a change detrimental to Al Jazeera's legitimate expectation, which was caused by Egypt's interference, and thus, a breach of FET. In both *Occidental v. Ecuador*<sup>100</sup>

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e-East/2014/0623/Egypt-tightens-muzzle-on-media-sentences-Al-Jazeera-reporters-to-prison].

97. *But see* Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88 (2013).

98. *See* Andrew Larkin, *Good Governance, Local Governments, and Legitimate Expectations: Accommodating Federalism in Investor-State Arbitration*, 49 N.Y.U. J. INT'L L. & POL. 499, 546 (2017). *See also* Yenkong Ngangjoh-Hodu & Collins C. Ajibo, *Legitimate Expectation in Investor-State Arbitration: Re-Contextualising a Controversial Concept from a Developing Country Perspective*, 15 MANCHESTER J. INT'L ECON. L. 45, 48 (2018).

99. *See generally* Potestà, *supra* note 97.

100. *Occidental Petrol. Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, ¶ 449 (Nov. 2, 2015), <https://www.italaw.com/>

and *CMS v. Argentina*,<sup>101</sup> the tribunals held that investors had an expectation that there would be stability in the legal and business framework of the host state, in which an investment had been made, and that any instability and unpredictability amounted to breach of FET.<sup>102</sup>

On the principle of procedural propriety and due process with regard to the imprisonment of several Al Jazeera reporters, it is imperative that in disputing a judicial process of a host state on grounds of FET, a claimant must prove manifest injustice. Manifest injustice was defined in *Loewen v. United States*<sup>103</sup> as lack of due process leading to a decision that offends judicial propriety. This was further stated in *Waste Management v. Mexico*,<sup>104</sup> where it was also held that lack of due process leading to decisions that offend judicial propriety is infringement of FET, and it cited examples like lack of natural justice in judicial proceedings.<sup>105</sup> Due process serves as the shield protecting fundamental procedural rights and was transposed into arbitration because arbitral tribunals issue binding decisions that determine parties' substantive rights.<sup>106</sup>

Procedural propriety includes ensuring due process is adhered to in judicial proceedings to have transparent outcomes. On the same issue, in

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[<https://web.archive.org/web/20201213202958/https://www.italaw.com/sites/default/files/case-documents/italaw4448.pdf>].

101. *CMS Gas Transmission Co. v. Republic of Arg.*, ICSID Case No. ARB/01/8, Award, 1, 5–6 (May 12, 2015), <https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>

[<https://web.archive.org/web/20201027034919/https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>].

102. See Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, 49 ALTA. L. REV. 203, 221 (2011).

103. *Loewen Grp., Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 132 (June 26, 2003), <https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf>

[<https://web.archive.org/web/20201029053209/https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf>].

104. *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf>

[<https://web.archive.org/web/20200830191734/https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf>].

105. Stephen Fietta, *Expropriation and the “Fair and Equitable” Standard*, 23 J. INT'L ARB. 375, 388 (2006).

106. *Freshfields Arbitration Lecture 2016*, FRESHFIELDS BRUCKHAUS DERINGER (Nov. 2, 2016), [http://knowledge.freshfields.com/en/Global/r/1699/freshfields\\_arbitration\\_lecture\\_2016](http://knowledge.freshfields.com/en/Global/r/1699/freshfields_arbitration_lecture_2016)

[[https://web.archive.org/web/20201213203606/http://knowledge.freshfields.com/en/Global/r/1699/freshfields\\_arbitration\\_lecture\\_2016](https://web.archive.org/web/20201213203606/http://knowledge.freshfields.com/en/Global/r/1699/freshfields_arbitration_lecture_2016)] (quoting Lucy Reed).

the case of *Mondev v. United States*,<sup>107</sup> the tribunal stated that in deciding whether an impugned decision was improper and discreditable, it must consider the international level and accepted standards of administration of justice.

For the imprisonment of Al Jazeera reporters to amount to an infringement of FET, Al Jazeera would have to prove that there was manifest injustice due to lack of application of due process, which was described in the above cases. Further, it is important to note that a crucial consideration in a claim based on denial of justice<sup>108</sup> brought before an arbitral tribunal is whether the claimants exhausted the local remedies available to them in relation to judicial decisions.

On the question of good faith,<sup>109</sup> there is an obligation on a host state to act in good faith and not to purposefully inflict harm on an investment. Though it is not a requirement to prove bad faith in a claim for FET, it is possible to claim a breach of FET due to a host state's bad faith in its actions that were detrimental to an investment.<sup>110</sup> In the present case, it is possible to prove that Egypt acted in bad faith by interfering with Al Jazeera's operations and by imprisoning its reporters. Looked at collectively, it can be inferred that there was a hidden bad faith motive in Egypt's actions and, therefore, a breach of its obligation of FET.

On the issue of freedom from coercion and harassment, Egypt breached its duty to accord FET to Al Jazeera through coercion and harassment. Improper interference with Al Jazeera's activities and imprisonment of its reporters amounted to coercion and harassment and, therefore, breach of the obligation of FET. This was established by the tribunal in *Desert Line v. Yemen*,<sup>111</sup> in which case there were armed threats against and arrests of some of the investor's family members and

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107. *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 127 (Oct. 11, 2002), <https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf> [<https://web.archive.org/web/20201019175103/https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf>].

108. Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. 729, 731 (2009).

109. See Rumana Islam, *Role of Good Faith in Interpreting Fair and Equitable Treatment (FET) Standard in Arbitral Practice*, 12 BANGL. J. L. 107 (2012).

110. See Deyan Draguiev, *Bad Faith Conduct of States in Violation of the 'Fair and Equitable Treatment' Standard in International Investment Law and Arbitration*, 5 J. INT'L DISP. SETTLEMENT 273, 275–80 (2014).

111. *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶ 186 (Feb. 6, 2008), [https://www.italaw.com/sites/default/files/case-documents/ita0248\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf) [[https://web.archive.org/web/20201213203800/https://www.italaw.com/sites/default/files/case-documents/ita0248\\_0.pdf](https://web.archive.org/web/20201213203800/https://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf)].

employees. The tribunal found this to infringe an obligation of FET towards the investor.

In a nutshell, though there are no details of what the interference by Egypt entailed, it is expected that once an investor is allowed entry into and is established in the host state, the investor is at liberty to conduct, manage, and perform all facets of running its investment without undue interference from the host state.<sup>112</sup> Egypt's behavior, based on the case law described above, could be said to be unfair, unjust, and unreasonable. Unwarranted interference can amount to breach of FET, as was held in the case of *CME v. Czech Republic*,<sup>113</sup> where the respondent interfered with and undermined the claimant's investment in the Czech company CNTS, which amounted to a breach of the obligation of FET.

Lastly, it is important to note that there would be no requirement for Al Jazeera to prove bad faith and malicious intent on the part of Egypt to establish breach of FET, as was stated in *Loewen v. United States*.<sup>114</sup>

#### IV. POLICE POWERS AND INDIRECT EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW

After the FET, it is important to consider the role of expropriation in the present dispute. More precisely, this section reflects on the legal question as to whether the Egyptian local courts' decisions could constitute a form of indirect expropriation. Should it be the case, one could logically deduce that IIAs may, to some extent, offer guarantees against free media operations.

Indirect expropriation<sup>115</sup> refers to state interference with an investor's property rights that results in the investor being deprived of the benefits that accrue from the investment and the ability to use the investment in a meaningful manner but, nonetheless, retaining the legal title to the

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112. Alireza Falsafi, *International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard*, 30 SUFFOLK TRANSNAT'L L. REV. 317, 320 (2006).

113. *CME Czech Republic B.V. v. Czech Republic*, Final Award, ¶ 52 (UNCITRAL Arb. Proc. 2003), <https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf> [<https://web.archive.org/web/20201213203853/https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf>].

114. *See Loewen Grp., Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 132 (June 26, 2003), <https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf> [<https://web.archive.org/web/20201029053209/https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf>].

115. *See generally* Max Gutbrod & Steffen Hindelang, *Externalization of Effective Legal Protection Against Indirect Expropriation*, 7 J. WORLD INV. & TRADE 59, 59 n.1 (2006).

property. It is important to note that it is the effects of the host state's actions that are taken into consideration in determining existence of indirect expropriation.<sup>116</sup> In *Quasar de Valores SICAV S.A. et al. v. Russia*, indirect expropriation was held to be “deduced from a pattern of conduct, observing its conception, implementation and effects as such, even if the intention to expropriate is disavowed at every step.”<sup>117</sup>

As Brownlie has stated, “state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation.”<sup>118</sup> It follows that “foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.”<sup>119</sup>

Though there are no set out criteria for determining indirect expropriation,<sup>120</sup> over the years, tribunals have established three criteria that can be applied to identify indirect expropriation. These criteria are: the degree of interference with the property right;<sup>121</sup> the character of the government measure;<sup>122</sup> and the interference with the investor's reasonable and investment-backed expectations.<sup>123</sup>

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116. L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It when I See It, or Caveat Investor*, 13 ASIA PAC. L. REV. 79, 90 (2005).

117. *Quasar de Valores SICAV S.A., v. Russian Fed'n*, SCC Case No. 24/2007, Award, ¶ 45 (July 20, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1075.pdf> [<https://web.archive.org/web/20201213204008/https://www.italaw.com/sites/default/files/case-documents/ita1075.pdf>].

118. IAN BROWNLIE, PUBLIC INTERNATIONAL LAW 509 (6th ed. 2003).

119. *Id.*

120. See August Reinisch, *Introductory Note: From Thinning the Salini Criteria to the Relationship Between Regulatory Powers and Indirect Expropriation as well as FET-ICSID Arbitration in 2016*, in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2017 (2018). See also Johanne M. Cox, *The Test for Expropriation, 10 Expropriation and Other Treaty Standards*, in EXPROPRIATION IN INVESTMENT TREATY ARBITRATION, PART II (2019); Laura-Cristiana Spătaru-Negură, *Special Considerations Regarding Indirect Expropriation in International Economic Law*, 7 JURIDICAL TRIBUNE (TRIBUNA JURIDICA) 124, 124–33 (2017).

121. Rachel D. Edsall, Note, *Indirect Expropriation Under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U.L. REV. 931, 940 (2006).

122. Tarcisio Gazzini, *Drawing the Line Between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment-An Economic Analysis of Law Perspective*, 7 MANCHESTER J. INT'L ECON. L. 36, 40 (2010).

123. Pascale Accaoui Lorfing & Maria Beatriz Burghetto, *The Evolution and Current Status of the Concept of Indirect Expropriation in Investment Treaties and Arbitration*, 6 INDIAN J. ARB. L. 98, 107 (2018).

It is against these three thresholds that Egypt's conduct towards Al Jazeera will be examined to determine the impacts on Al Jazeera's freedom of expression and if there was indirect expropriation.

*A. Degree of Interference with the Property Right*

*1. Severe Economic Impact*

The impact of the host state's conduct on the investor's economic control or management of its investment is key<sup>124</sup> when it comes to determining whether such a measure or conduct constitutes indirect expropriation. There is broad support for the proposition that the host state's interference has to be substantial in order to constitute expropriation,<sup>125</sup> i.e., depriving the foreign investor of fundamental rights of ownership or interfering with the investment for a significant period of time.<sup>126</sup>

The indirect expropriation can be manifested in many forms. Indirect expropriation was found to exist if the measure severely interfered with an investor's day-to-day management or operation,<sup>127</sup> substantially deprived the investor of use or control of its property,<sup>128</sup> or, despite not physically occupying the investor's property, left it without value.

The claimant, Al Jazeera, operated a broadcasting business in Egypt since 2001 and invested at least \$90 million in operations. An indirect expropriation occurred, thus, constituting an infringement of freedom of expression rights. When Egypt's government unilaterally shut down the operations of the investor and imprisoned the manager and staff of the investor's company, it inevitably left the company paralyzed. Therefore, the upfront stake, including infrastructure costs, regulatory fees paid to Egypt, staff costs etc., were effectively neutralized; also, the investor's legitimate income related to the use of the investment was completely ended. The conduct preventing the investor's ordinary business activities adversely impacted the economic value, use, and enjoyment of the

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124. Fortier & Drymer, *supra* note 116, at 101.

125. Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 526 (2001).

126. OECD, "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law* (OECD, Working Paper No. 2004/04, 2004), <http://dx.doi.org/10.1787/780155872321> [[https://web.archive.org/web/20201213204018/https://www.oecd-ilibrary.org/finance-and-investment/indirect-expropriation-and-the-right-to-regulate-in-international-investment-law\\_780155872321](https://web.archive.org/web/20201213204018/https://www.oecd-ilibrary.org/finance-and-investment/indirect-expropriation-and-the-right-to-regulate-in-international-investment-law_780155872321)].

127. Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties*, FOREIGN INV. L.J. (1998).

128. See Kriebaum, *supra* note 6, at 69.

claimant's investment, substantially depriving the investor of its property.

## 2. *Duration of the Measure*

The tribunal also laid emphasis on the duration of the measure<sup>129</sup> affecting the investment for analysis of whether an indirect expropriation had taken place. In this case, the domestic courts sentenced the Al Jazeera reporters to five years in jail. The measure to shut down the investor's operation lasted for two years, from 2013 to 2015, before Al Jazeera filed the first BIT compensation claim against Egypt in April 2015. This status will continue, as the government did not declare a time limitation of this measure. Although measures in the present case have not yet permanently deprived Al Jazeera of its rights of ownership, they have amounted to an expropriation. In *Wena Hotels v. Egypt*,<sup>130</sup> the tribunal regarded the government's occupation of the investor's hotel, which lasted for nearly a year, as not "ephemeral," and found it amounted to expropriation. The Iran-U.S. claims tribunals also have ruled that the appointment of a temporary manager by the host state that affects the legitimate benefit of an investor may constitute an indirect expropriation on the condition that it is not "ephemeral."<sup>131</sup> In assessing the weight of the facts mentioned above, a "deprivation" intended to last only a short period could still be enough to impact the FDI (foreign direct investment). The measures taken by the Egyptian government were enough to constitute a long-term, profound taking of Al Jazeera's fundamental rights, likely constituting an expropriation.<sup>132</sup>

## B. *The Legitimate Expectations*

Legitimate expectations not only play a key role in the interpretation of fair and equitable treatment,<sup>133</sup> but are also used as a standard in the

129. See S. Viljoen, *Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 2)*, 2014 J. S. AFR. L. 520, 528 (2014).

130. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 98 (Dec. 8, 2002), <https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf>

[<https://web.archive.org/web/20201213204143/https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf>].

131. Maurizio Brunetti, *The Iran-United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation*, 2 CHI. J. INT'L L. 203, 208–09 (2001).

132. See *id.*; see also *supra* Part IV.A.2.

133. Tomas Mach, *Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims*, 2018 ELTE L.J. 105, 107 (2018).

assessment of indirect expropriation.<sup>134</sup> This is because the stable and safe investment environment<sup>135</sup> is the main decisive factor when a foreign investor considers establishment of a new business in a state. The fair and equitable treatment standard and full protection and security<sup>136</sup> are provided by the Agreement on Promotion, Protection and Guarantee of Investments signed by Egypt and Qatar as a special commitment, and the agreement protects legitimate expectations, on which the claimant Al Jazeera relied when it made the decision to invest in Egypt. The claimant had legitimate reasons to believe that the operations of the broadcasting company would extend over a long time and would be safeguarded by BIT and domestic law; based on this expectation, it therefore made investment and expected return through its operations.<sup>137</sup> Therefore, the host state's arbitrary measures disrupting the investor's business activities and subjecting the staff of the investor to great risk and harm, together with the general and special security commitment and absence of both due procedure and transparency as mentioned above, constitute an indirect expropriation.

### *C. General Regulatory Measures and Public Welfare*

It is commonly accepted that general regulatory measures sometimes may restrict the use of an investor's property, particularly when the host state uses its regulatory power to apply restrictions on investments to protect the general welfare. The state is not responsible for such general measures. International law authorities have concluded that "no right to compensation arises for reasonably necessary regulation for the protection of public purposes";<sup>138</sup> however, the application of "public purposes" is not absolute, but conditional.<sup>139</sup> The limiting of exercise of

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134. Nikhil Teggi, *Legitimate Expectations in Investment Arbitration: At the End of Its Life Cycle*, 5 INDIAN J. ARB. L. 64, 65 (2016).

135. *But see* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 426 (2010).

136. Catharine Titi, *Full Protection and Security, Arbitrary or Discriminatory Treatment and the Invisible EU Model BIT*, 15 J. WORLD INV. & TRADE 534, 535 (2014).

137. Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43 (2001).

138. George C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307 (1962).

139. Jane F. Carlson, *The Public Trust and Urban Waterfront Development in Massachusetts: What Is a Public Purpose?*, 7 HARV. ENVTL. L. REV. 71, 72 (1983).

the police powers is the international minimum standard of treatment.<sup>140</sup> If the conduct by the host state is arbitrary, unfair, unjust, or lacks due process and transparency, the host state also needs to compensate the investor.<sup>141</sup> In the present case, as I have explained so far in the section on fair and equal treatment, the conduct of the respondent in shutting down the offices of the investor and imprisoning Al Jazeera reporters was groundless and arbitrary. The decision-making process was undisclosed, and the respondent did not provide the investor fundamental procedural rights; it thus failed to comply with the international minimum standard of treatment<sup>142</sup> and the FET standard. As a result, the infringement of freedom of expression rights, the essential assets of Al Jazeera's investment in Egypt as a media press, may be found to constitute breach of investment treaty obligations.

#### V. IS INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) SUPERIOR TO LITIGATION BEFORE DOMESTIC COURTS?

As explained earlier, there are good reasons to think that an investment tribunal would declare jurisdiction on the matter of the Al Jazeera v. Egypt dispute. Looking at the merits, it is also very likely that the tribunal would find breaches of substantive law. In this respect, a new question emerges as to whether the factual circumstances of this case affect the way one should think about the relationship between ISDS and domestic courts.

Investor-state dispute settlements (ISDS),<sup>143</sup> as instruments of public international law, grant an investor the right to use dispute settlement proceedings against a foreign government. Both Qatar and Egypt have now been involved in more than a dozen such international disputes;<sup>144</sup> this suggests a certain degree of knowledge and capacity to handle these proceedings. The fact that Al Jazeera resorted to international investment arbitration, rather than some other forum, to find a solution to what is a difficult situation in Egypt, reveals the flexible nature of investment

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140. See generally Alireza Falsafi, *International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard*, 30 SUFFOLK TRANSNAT'L L. REV. 317 (2007).

141. Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355 (2017).

142. See generally Mach, *supra* note 133.

143. See generally Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 BROOK. J. INT'L L. 639 (2018).

144. See *infra* app. 3, at 534–39.

treaties as compared with other treaty-based regimes that may be binding but are not really enforceable, such as, for example, UN resolutions.<sup>145</sup>

The purpose of investment treaties is twofold. With regard to the host country, an investment treaty is used to attract foreign investment by providing a conducive environment for investment. Investment treaties improve the investment atmosphere in a state and demonstrate an open attitude towards foreign investment. On the other hand, on the part of the home state, investment treaties protect investments abroad and provide security from political and legal risks. The current case demonstrates that an investment treaty can be applied to protect human rights, namely, the freedom of speech.

#### *A. Domestic Courts*

##### *1. Potential Judicial Unfairness in Domestic Court of Host State*

The obstacle of using domestic judges in international investment dispute settlements is that it is difficult for domestic judges to make a decision against the host state.<sup>146</sup> In addition, in some countries, the court may not be fully independent.<sup>147</sup> As a result, in some jurisdictions, administrative power may interfere with judiciary power; this translates into, more or less, blatant non-independence of the judiciary. Alexander Hamilton wrote in the Federalist Papers: “[T]he judiciary is beyond comparison the weakest of the three departments of power[.]”<sup>148</sup> Hamilton then explained that it “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment[.]”<sup>149</sup> In this respect, the judiciary only has the “power of judgment.”<sup>150</sup>

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145. August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 J. INT'L ECON. L. 761 (2016).

146. See Collin Koenig, *If We Could, Then So Can You: The Seventh Circuit Resurrects Its Judge Versus Arbitrator Analogy to Reinstat a Repeat Arbitrator*, J. DISP. RESOL. 279 (2012). See also Phillip S. Angermeyer, *I've Heard Your Story: How Arbitrators Decide*, in SPEAK ENGLISH OR WHAT? Ch. 3 (2015).

147. VINEETA YADAV & BUMBA MUKHERJEE, *DEMOCRACY, ELECTORAL SYSTEMS, AND JUDICIAL EMPOWERMENT IN DEVELOPING COUNTRIES* (2014).

148. THE FEDERALIST NO. 78, at 391–97 (Alexander Hamilton) (Ian Shapiro et al. ed., 2009).

149. *Id.*

150. *Id.*

Even when a court makes a decision in favor of the investor, the respective country may interfere with enforcement.<sup>151</sup> The lawsuit process is very likely to be full of uncertainty and risks. Therefore, in a host country without an impartial judicial mechanism, operating a business entails high commercial risks, discouraging investors from operating there, and, in turn, reducing the foreign capital of the host state.

## 2. Law Application

Law application is the other element not facilitating international investment disputes. The domestic court will always be bound to apply the domestic law, which sets up barriers for the investor in terms of both substantial and procedural rights.<sup>152</sup> Moreover, as there is a lack of qualified judges and experts in some countries, there is a technical barrier to applying the appropriate law, contravening treaty rights and obligations when resolving complex international investment disputes.<sup>153</sup> Besides, most countries have not established a judicial review system on their regulations and laws, so a court may have no authority to examine the rules and orders enacted by the government.<sup>154</sup> In fact, as explained in the *Suez, Sociedad General de Aguas de Barcelona S.A., v. Argentine Republic* case, “reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed.”<sup>155</sup> The theoretical basis of this approach no doubt is found in the work of the eminent scholar Max Weber, who advanced the idea that one of the main contributions of law to any social system is to make economic life more calculable.<sup>156</sup> He also argued that capitalism arose in Europe because European law demonstrated a high degree of “calculability.” An

151. Maksim Mateikovich, *Challenges of Court Orders Enforcement*, 8 J. ADVANCED RES. L. & ECON. 899 (2017).

152. See generally Cedric M. J. Ryngaert & Duco W. Hora Siccama, *Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts*, 65 NETH. INT’L L. REV. 1 (2018)

153. Elizabeth Moul, *The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime*, 55 SANTA CLARA L. REV. 881, 887 (2015).

154. Fredric Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 1007 n.93 (1991).

155. *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 222 (July 30, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0813.pdf> [<https://web.archive.org/web/20200928045513/https://www.italaw.com/sites/default/files/case-documents/ita0813.pdf>].

156. See generally David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, (1972).

investor's expectations, created by the law of a host country, are effectively calculations about the future."<sup>157</sup> However, legitimacy<sup>158</sup> and reasonability<sup>159</sup> are the main issues in international investment disputes. Thus, domestic courts in most cases have failed to provide the investor the effective remedy.

*3. The Courts of Investor's Home Country or Another, Third Country—Lack of Jurisdiction*

The courts of the investor's home country or another, third country lack territorial jurisdiction in most cases, since the conflict of laws rules will point to the place with the most significant relationship where the investment took place. Additionally, selecting the lex forum in a third state that is neither the host state nor the home country may often be unacceptable in the third state.

A state's immunity rule would restrain the use of domestic courts outside of the host country.<sup>160</sup> International investment disputes often involve regulation or political orders enacted by the government, which would have used its sovereign power when dealing with the foreign investor. According to the doctrine and rules of state immunity, the government of a state may not be amenable before its own courts.<sup>161</sup> In addition, hearing the international investment dispute in the home state would also have the potential judicial bias problem that would discriminate in favor of the host state.

*B. Analysis of the Value of Investment Treaties Based on Al Jazeera's Initiation of International Investment Arbitration*

One of the core clauses adding significant value to an investment treaty is the dispute settlement clause. This clause attracts foreign investment to host states since it provides an avenue through which an investor can pursue settlement of disputes in an independent forum.

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157. *See id.* at 735.

158. Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID*, 41 GEO. WASH. INT'L L. REV. 709, 735 (2010).

159. Diane A. Desierto, *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827, 866 (2010).

160. HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* (3d ed. 2015).

161. In the United States, the Eleventh Amendment prohibits federal courts from hearing certain cases brought by private citizens against states. U.S. CONST. amend. XI.

In contemporary international law, the protection of the rights of companies, their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements.<sup>162</sup> BITs usually provide legal protections of both physical and intellectual properties under international law and investment guarantees, with a special focus on the transfer of funds and expropriation, including the rules of compensation.<sup>163</sup> The United Nations views BITs as “the most important instrument[s]” for protecting FDI at the international level.<sup>164</sup>

Al Jazeera’s decision to pursue international investment arbitration as provided for in the BIT buttresses my opinion on the importance of investment treaties to investors as legal tools that protect investments abroad. Investment treaties are, among other reasons, entered to provide stability and predictability in the investment arena to allow for foreign investment. Al Jazeera’s reliance on the dispute settlement clause in the BIT to institute arbitration of the dispute with Egypt enhances the notion of stability and predictability provided by BITs, as there is a clear mechanism that has been established on how disputes are settled. Investment treaties are, therefore, valuable in the sense that there is a predictability established by investment treaties regarding the obligations of the host state and how disputes about the breach of these obligations are to be settled.

Investor-state arbitrations also provide alternative dispute resolution mechanisms that lack the pressure that accompanies state-to-state dispute settlement.<sup>165</sup> This is illustrated by Al Jazeera’s decision to pursue an investor-state dispute even though there were other agreements on which it could have relied for state-to-state dispute. This mechanism removes any political aspect in the dispute, and it becomes merely a settlement of a commercial dispute in the judicial arena. This aspect of the investment treaty encourages investment.

Al Jazeera could have pursued its claim in the domestic courts of Egypt.<sup>166</sup> However, from the investor’s point of view, such a forum would be riddled with uncertainty as to its impartiality. It would, therefore, not have been a viable forum; in addition to this, the Egyptian

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162. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, 2007 I.C.J. 582, ¶ 88 (May 24).

163. Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, 32 J. COMP. ECON. 788, 789–90 (2004).

164. UN Conference on Trade and Development, *Bilateral Investment Treaties 1959–1999*, 1, U.N. Doc. UNCTAD/ITE/IIA/2 (2000).

165. Peter Tzeng, *Sovereignty over Crimea: A Case for State-to-State Investment Arbitration*, 41 YALE J. INT’L L. 459, 461–63 (2016).

166. See Egypt-Qatar BIT, *supra* note 9, at art. 6.

domestic court is the same judiciary that imprisoned a number of Al Jazeera's reporters. Another issue that arises with the option of pursuing settlement of a claim in the domestic courts is that such courts will apply domestic law, which could be at odds with international standards. Therefore, the investor would not be assured of justice.

Other obstacles that could be faced in an action under the domestic legal system of the investor's home state or a third state, which could be nominated as the forum for institution of the claim, are: claims of sovereign immunity<sup>167</sup> of the state against exercise of sovereign powers; the act-of-state doctrine;<sup>168</sup> lack of close connection between the claim and the state; and also political issues. The option, therefore, to pursue investor-state arbitration, made available by the investment treaty, provides an alternative that is more impartial<sup>169</sup> and reliable for Al Jazeera.

The above obstacles in the other forums that could be available to Al Jazeera to pursue its claim illustrate the importance of investment treaties that provide for investor-state arbitration, which grants the investor direct access to an effective, unbiased international forum for dispute settlement. On the part of the host state, agreeing to international arbitration is advantageous since it reflects the state's conducive environment for foreign investment, which, therefore, attracts more foreign investment and avoids issues of diplomatic protection that may affect its international relations. Al Jazeera's decision, therefore, enhanced the necessity and importance of having an investment dispute resolution mechanism.

In international arbitration, the investor and the state have an opportunity to choose arbitrators<sup>170</sup> who are experienced and in whom they have confidence; sessions are also private, which ensures confidentiality<sup>171</sup> of the proceedings. Arbitration is also more efficient<sup>172</sup> than domestic court proceedings. For all these reasons, international arbitration of investor-state disputes is preferable as enshrined in the

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167. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

168. Andrew D. Patterson, *The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine Are Wrong*, 15 U. C. DAVIS J. INT'L L. & POL'Y 111 (2008).

169. Charles N. Brower & Stephen W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 489 (2008).

170. Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 54 (2005).

171. Himaloya Saha, *A Critical Analysis of the Commonly Recommended Reforms of Investor-State Dispute Settlement (ISDS)*, 4 LEGAL ISSUES J. 39, 42 (2016).

172. Nikesh Patel, *An Emerging Trend in International Trade: A Shift to Safeguard Against ISDS Abuses and Protect Host-State Sovereignty*, 26 MINN. J. INT'L L. 273, 277 (2017).

investment treaty. The Al Jazeera case highlights that there is no inherent contradiction between the state's obligation to protect people's freedom of expression and its obligation to protect the investor's investment.

#### VI. STATE-STATE INVESTMENT ARBITRATION<sup>173</sup> AS A MEANS OF REASSERTION OF CONTROL

The Al Jazeera v. Egypt dispute suggests that ISDS tribunals could play a major role in the protection of non-economic rights (such as free press and freedom of speech), which is a hypothesis that has been largely ignored by the literature. In this section, the Article extends the reflection on the ramifications of this dispute to discuss whether the facts of Al Jazeera v. Egypt should lead to a reassessment of the promises and pitfalls of state-to-state dispute resolution in the context of investment treaties.

State-to-state dispute settlement was the norm in the early friendship, commerce and navigation (FCN) treaties<sup>174</sup> and in some early investment treaties. However, as the volume of investor-state arbitration cases increased exponentially since the 1990s, state-to-state arbitration decreased. State-to-state dispute settlement has lately received renewed attention, in part due to concerns associated with investor-state arbitration, such as inconsistencies in the ways some tribunals have awarded rulings. It is also becoming more relevant due to a trend towards including investment chapters in free trade agreements (FTAs),<sup>175</sup> such as NAFTA<sup>176</sup> and the Trans-Pacific Partnership (TPP),<sup>177</sup> which twelve countries in Asia Pacific signed recently. These agreements include comprehensive provisions for state-to-state dispute settlement. State-to-state investment claim disputes arise either when a state affords diplomatic protection to an investor or when a state directly institutes proceedings against another state for a breach of an investment treaty.<sup>178</sup> What follows is a critical examination of whether investment claims

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173. Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 1 (2014).

174. John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 306 (2013).

175. See generally Taylor C. O'Neal, *Of Free Trade Agreements and Models*, 19 IND. INT'L & COMP. L. REV. 569 (2009). See also Guiguo Wang, *International Investment Law: An Appraisal from the Perspective of the New Haven School of International Law*, 18 ASIA PAC. L. REV. 19 (2010).

176. Stewart A. Baker, *After the NAFTA*, 27 INT'L L. 765 (1993).

177. Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129 (2014).

178. KATIA YANNACA-SMALL, *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* (2d ed. 2019).

should be settled state-to-state through an examination of the two scenarios in which a state-to-state dispute may arise: diplomatic protection and direct dispute between states. The purpose of this section is to analyze whether the fact that Al Jazeera resorted to an international investment arbitration, rather than some other forum, affects our thinking about the value of investment treaties.

#### *A. Diplomatic Protection*

Diplomatic protection<sup>179</sup> is recognized under international law as an obligation on a state to protect its nationals against other states that are its equal. Investors originally did not have access to international remedies to pursue states for violations of their rights, so the investor's state would, therefore, take up claims on the investor's behalf and sue the offending state in its own name. This principle of international law was recognized in the *Mavrommatis Palestine Concessions* case, which asserted that a state is under an obligation to undertake cases on behalf of its subjects who do not have any available recourse against a state that infringes international law as part of its right to ensure that other states adhere to international law.<sup>180</sup>

A condition precedent to initiation of a claim by a state against another state in its own name on behalf of the investor—regardless of whether it is a natural person or a corporation—is that the investor must be a national of the state. Secondly, the investor has to prove that it has exhausted local remedies before resorting to diplomatic protection.<sup>181</sup> There are several limitations to pursuing diplomatic protection to claim infringement of rights, both on the part of the investor and on the part of the state.

On the part of the investor, diplomatic protection is a discretionary right exercised by the state,<sup>182</sup> which can be withdrawn at any time. This means that initiation and maintenance of a claim by the state is exercised in a discretionary manner, and there is no assurance that the state will maintain or even take up a claim. This emphasis on the discretionary nature of diplomatic protection was stated in the *Barcelona Traction*

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179. Guy I. F. Leigh, *Nationality and Diplomatic Protection*, 20 INT'L & COMP. L.Q. 453 (1971).

180. *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30).

181. Alberto Alvarez-Jimenez, *Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the Diallo Case*, 33 N.C.J. INT'L L. & COM. REG. 437 (2007).

182. John R. Dugard (Special Rapporteur on Diplomatic Protection), *First Rep. on Diplomatic Protection*, U.N. Doc. A/CN.4/506 (Apr. 20, 2000).

case,<sup>183</sup> where the International Court of Justice also asserted that a state considers political factors, as well as other factors, unrelated to the individual when deciding whether to offer diplomatic protection.<sup>184</sup> Though a state institutes its claim on behalf of the investor, the state is not under the instructions of the investor and is, therefore, not constrained in its powers with regard to the suit; in this scenario, a state may waive the claim or accept compensation from the other state, which the investor may think is insufficient, to bring the claim to an end.<sup>185</sup>

All these factors go against diplomatic protection being a viable path that an investor should consider taking up to claim infringement of its rights by another state. Though it is the investors' rights that are in question in such a claim, the investor unfortunately does not have control over the process. Instead, the investor is subject to the whims of the state as it institutes and conducts the investor's claim.

Due to the challenges mentioned above on the part of the investor, it is clearly disadvantageous for the investor to seek diplomatic protection to pursue its investment rights. The assurance of a stable, predictable, and reliable investment dispute settlement is one of the core concerns an investor has as it considers investing in a foreign state. Per the above discussion, diplomatic protection does not offer a stable, predictable, and reliable forum for settlement of investment claims and, therefore, is not a preferable mechanism for investment claim settlement.

On the part of the state, the challenge of pursuing diplomatic protection on behalf of its subjects is the strain that such claims create between states. This is especially so when developed home states use their influence to coerce developing host states in matters of foreign investors. This has led to some countries rejecting the notion of diplomatic protection, finding it intrusive of their internal affairs, or permitting diplomatic protection to only limited cases where there is a denial of justice.<sup>186</sup> The relations between states are also constrained when a state, in an endeavor to offer diplomatic protection to its subjects, uses countermeasures against the offending state, which are detrimental to the relationship between the states.

For the reasons mentioned above, it is therefore not prudent, even on the part of the state, to resort to state-to-state settlement of investment

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183. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 1962 I.C.J. 3, ¶ 79 (Feb. 5).

184. Yoshifumi Tanaka, *International Court of Justice*, 23 INT'L J. MARINE & COASTAL L. 327 (2008).

185. Jonathan Goren, *State-to-State Debts: Sovereign Immunity and the Vulture Hunt*, 41 GEO. WASH. INT'L L. REV. 681 (2010).

186. Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. 729, 731 (2009).

claims. It is for this reason that during the negotiation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, diplomatic protection was excluded as a direct recourse for settlement of investment claims. Instead, recourse for settlement of investment claims was moved from the political and diplomacy sphere to the law sphere. This change ensured the avoidance of some international relations issues.

### *B. Direct Disputes Between States*

The other way in which a state-to-state investment claim may arise is if there is a direct dispute between the states over breach of an investment treaty between the states. Usually, an investment treaty will provide state parties with the option of pursuing a breach of the treaty through arbitration between the states.<sup>187</sup> A state's choice to institute state-to-state arbitration is not a bar to an investor instituting investor-state arbitration, as was stated in *Lucchetti v. Peru*,<sup>188</sup> in which an investor had instituted investor-state arbitration. Thereafter, its home state, Chile, instituted state-to-state arbitration. Peru then sought to have the investor-state arbitration stayed for the state-to-state arbitration to proceed, arguing that state-to-state arbitration should take precedence. However, Peru's request was declined, and the investor-state arbitration proceeded.<sup>189</sup>

As with diplomatic protection, the interest of the state in state-to-state arbitration is unrelated to the investor's interests. The investor would also not be in control of the dispute settlement, despite being the aggrieved party who suffered the direct consequences of the breach of the investment treaty by the host state. Another issue that arises is that an investor is not assured of receiving any proceeds from an award arising from state-to-state arbitration. There is no obligation on the home state to transfer the proceeds of an award to the investor, yet it was the investor who suffered loss from the breach of the investment treaty. Reliance on state-to-state arbitration, therefore, would not be not in the investor's best interest.

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187. Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Ger.-Pak., art. 11, Nov. 25, 1959, 457 U.N.T.S. 24, <https://treaties.un.org/doc/Publication/UNTS/Volume%20457/volume-457-I-6575-English.pdf> [<https://treaties.un.org/web/20210107215614/https://treaties.un.org/doc/Publication/UNTS/Volume%20457/volume-457-I-6575-English.pdf>].

188. *Empresas Lucchetti, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, ¶ 7 (Feb. 7, 2005).

189. *Id.* ¶ 9.

The success of any system of law is based, among other reasons, on the functionality of its dispute settlement mechanism. International investment law's success is partly dependent on the investor's access to impartial and reliable investor-state dispute settlement<sup>190</sup> by arbitration. For the above reasons, therefore, state-to-state arbitration should not be the forum in which investment claims are settled, and, instead, investor-state arbitration should continue as the forum for settlement of such disputes. Taking that into consideration, the Al Jazeera case reinforced the value of investment treaties in resolving disputes relating to freedom of expression and investment protection.

## VII. CONCLUSION

The freedom of expression, an essential asset for Al Jazeera's investment, is linked to the investor's substantial rights under the relevant BIT. With respect to the issue of arbitral jurisdiction, assuming that the nature of the BIT compensation claim is limited to the arrest of the news reporters, it should be argued that the conduct of Egypt's government was justified and not arbitrary or otherwise in breach of international obligations. In the event of other evidence-based claims that the host state improperly interfered with Al Jazeera's investment activities, an argument based solely on the character of governmental measures may not be sufficient to convince the arbitrators to rule in the host state's favor.

Al Jazeera should argue on the material facts in order to prove a breach of FET on the part of Egypt, based on the standards of "reasonableness" and "nondiscrimination,"<sup>191</sup> as well as a breach of "full protection and security." In doing so, Al Jazeera should seek legal remedies to set right the wrongful treatment by the host state, such as imprisoning its news reporters, which prevented them from carrying out their usual business operations.<sup>192</sup> Furthermore, the claimant should seek an award for financial compensation under the standard of "consistency" for damage to its "legitimate expectations," which were based on Egypt's promise to protect its investment, which was considerable over the past decade. On the other hand, Egypt should construct its counterclaim

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190. Rachel L. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, 7 J. INT'L DISP. SETTLEMENT 117 (2016).

191. Candice A. Wyllie, *Comparative Analysis of Nondiscrimination in Multilateral Agreements; North American Free Trade Agreement (NAFTA), Energy Charter Treaty (ECT), and General Agreement on Tariffs and Trade (GATT)*, 18 WILLAMETTE J. INT'L L. & DIS. RES. 64 (2010).

192. Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681 (2008).

arguments based on a full and detailed explanation of the necessary governmental measures taken against the claimant to protect the state's national security interests and public policy. Whatever the outcome, the duty of the arbitrators is to make a decision that can be clearly understood by all concerned parties.

Business needs consistency, and arbitrators will seek to apply logical, sensible solutions that promote stability, taking into consideration the facts of the case and the rule of law. Notwithstanding, it is very difficult to determine, based on the available facts, whether Egypt's governmental conduct constituted an indirect expropriation without compensation. All is not lost for the claimant, though, since the threat of arbitration can often be strong enough to provoke, if not compensation, then another desired response. The imprisonment of the news reporters was cited in the BIT claim document as a key factor because it caused the shutdown of Al Jazeera's operations in the host state. Therefore, even in the event that Egypt's governmental conduct did not constitute an indirect expropriation, it may still be possible for the claimant to obtain a favorable outcome—if Egypt would consider releasing the imprisoned Al Jazeera news reporters.

Foreign direct investment (FDI) is at the cutting edge of globalization, and the law in this field will continue to be very important.<sup>193</sup> In signing a treaty, a sovereign state subordinates part of its autonomy and power to the legal constraints of that investment treaty. While arbitration is by no means perfect, it is an expanding universe, and it has the flexibility that states and investors are looking for under investment law.

In sum, state-to-state dispute settlement is likely to continue to grow in importance as the trend towards investment treaties being negotiated, along with trade agreements, also continues. At the same time, the application of state-to-state dispute settlements in treaty-based investment disputes will likely remain controversial due to concerns that it may “re-politicize” investment disputes.<sup>194</sup> In the context of the investor-state dispute settlement, the Al Jazeera case presented in this Article analyzes the relationship that freedom of expression has with investment protection, which are the host state's two obligations to provide to an investor. This case shows that the application of investment treaties can protect the freedom of expression and that there is no inherent contradiction between these two norms.

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193. Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity?*, 41 *GEO. WASH. INT'L L. REV.* 1 (2009).

194. Roberts, *supra* note 173.

## APPENDIX 1. TIMELINE OF THE AL JAZEERA V. QATAR DISPUTE

Stage	Development	Source
2000		
Beginning of 2000	At the beginning of this year, Egypt opened a “Media Free Zone” near Cairo, where foreign TV stations could broadcast whatever they wished without any censorship from the Egyptian government.	<a href="https://mepc.org/journal/new-arab-media-phenomenon-qatars-al-jazeera">https://mepc.org/journal/new-arab-media-phenomenon-qatars-al-jazeera</a>
Beginning of 2000	The Second Palestinian Intifada from 2000, and Al Jazeera’s coverage of it (which included footage of Palestinians burning Egyptian flags), generated much anger in Egypt.	<a href="http://theconversation.com/al-jazeeras-troubled-history-in-egypt-23504">http://theconversation.com/al-jazeeras-troubled-history-in-egypt-23504</a>
March	Al Jazeera seized the opportunity to open a major office in the “Media Free Zone” in March 2000 after signing an agreement with the Egyptian government.	<a href="https://mepc.org/journal/new-arab-media-phenomenon-qatars-al-jazeera">https://mepc.org/journal/new-arab-media-phenomenon-qatars-al-jazeera</a>
2011		
January 27	Al Jazeera Mubasher, the network’s live channel, was dropped by the Egypt’s government-run satellite transmission company, Nilesat.	<a href="https://www.npr.org/2011/02/09/133615792/foreign-policy-the-al-jazeera-effect">https://www.npr.org/2011/02/09/133615792/foreign-policy-the-al-jazeera-effect</a>
January 30	Outgoing Egyptian Information Minister Anas al-Fiqi ordered the offices of all Al Jazeera bureaus in Egypt to be shut down and the accreditation of all network journalists to be revoked.	
February 11	After Mubarak’s fall, the immediate threat to media outlets subsided, but an undertone of suspicion remained. Al Jazeera continued to report from Egypt from the time Mohamed Morsi became the country’s first democratically elected president through the time that he was deposed by the military twelve months later.	<a href="https://www.aljazeera.com/news/2019/06/obituary-egypt-freely-elected-president-mohamed-morsi-190617161921218.html">https://www.aljazeera.com/news/2019/06/obituary-egypt-freely-elected-president-mohamed-morsi-190617161921218.html</a>

2012		
June 30	Mr. Morsi, of the Muslim Brotherhood, was declared the winner of Egypt's first competitive presidential election, handing the Islamists both a symbolic triumph and a potent weapon in their struggle for power against the country's top generals.	<a href="https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html">https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html</a>
2013		
July 3	In an announcement read on state television, Gen. Abdel-Fattah el-Sisi, the Egyptian defense minister, ousted Mr. Morsi, the nation's first freely elected president, suspending the Constitution, installing an interim government, and insisting it was responding to the millions of Egyptians who had opposed the Islamist agenda of Mr. Morsi and his allies in the Muslim Brotherhood. The military intervention, which Mr. Morsi rejected, raised questions about whether the 2011 revolution would fulfil its promise to build a new democracy at the heart of the Arab world.	<a href="https://www.nytimes.com/2013/07/04/world/middleeast/Egyptian-military-reasserts-its-allegiance-to-its-privileges.html?ref=world">https://www.nytimes.com/2013/07/04/world/middleeast/Egyptian-military-reasserts-its-allegiance-to-its-privileges.html?ref=world</a>
July 4	Egypt's military-led authorities shut down several stations, including one operated by the Muslim Brotherhood, after President Mohamed Morsi was toppled by the army.	<a href="https://www.aljazeera.com/news/middleeast/2013/07/2013740531685326.html">https://www.aljazeera.com/news/middleeast/2013/07/2013740531685326.html</a>
July 9	Al Jazeera staff quit over biased Egypt coverage.	<a href="https://www.washingtontimes.com/news/2013/jul/9/we-aired-lies-al-jazeera-staff-quit-over-biased-eg/">https://www.washingtontimes.com/news/2013/jul/9/we-aired-lies-al-jazeera-staff-quit-over-biased-eg/</a>
August 30	Egypt banned Al Jazeera, detaining ten journalists, killing five journalists, and raiding nine news organizations, creating at least sixty-four cases of temporary detentions, assaults, and confiscations.	<a href="https://cpj.org/2013/08/egypt-bans-al-jazeera-detains-journalists-raids-ou.php">https://cpj.org/2013/08/egypt-bans-al-jazeera-detains-journalists-raids-ou.php</a>
September 23	An Egyptian court ordered the dissolution of the Muslim Brotherhood and the confiscation of its assets, making it harder for the new military-backed government to fulfill its promises of a new, inclusive democratic process—one that would be	<a href="https://www.nytimes.com/2013/09/24/world/middleeast/egyptian-court-bans-muslim-brotherhood.html">https://www.nytimes.com/2013/09/24/world/middleeast/egyptian-court-bans-muslim-brotherhood.html</a>

	open even to Mr. Morsi's Islamist supporters.	
December 30	Egyptian police arrested four Al Jazeera journalists. The interior ministry accused the journalists of holding "illegal meetings" with the banned Muslim Brotherhood, which was declared the week before to be a terrorist organization.	<a href="https://www.theguardian.com/media/greenslade/2013/dec/30/journalist-safety-egypt">https://www.theguardian.com/media/greenslade/2013/dec/30/journalist-safety-egypt</a>
2014		
January 29	Twenty Al Jazeera journalists faced charges in Egypt of belonging to the Muslim Brotherhood, fabricating news reports, and tarnishing Egypt's reputation.	<a href="https://www.theguardian.com/world/2014/jan/29/egypt-prosecutors-charge-20-aljazeera-journalists">https://www.theguardian.com/world/2014/jan/29/egypt-prosecutors-charge-20-aljazeera-journalists</a>
April 28	The Qatar-based satellite network Al Jazeera served Egypt with a \$150 million compensation claim for what it said was damage to its media business, inflicted by Cairo's military-backed rulers, a step that likely worsened Qatari-Egyptian relations.  Al Jazeera served its Notification Of Dispute on Egypt.	<a href="https://gulfbusiness.com/qatars-al-jazeera-files-150m-damages-claim-egypt/">https://gulfbusiness.com/qatars-al-jazeera-files-150m-damages-claim-egypt/</a>  <a href="https://www.carter-ruck.com/images/uploads/documents/Press_Release_Al_Jazeera_Egypt-2804141.pdf">https://www.carter-ruck.com/images/uploads/documents/Press_Release_Al_Jazeera_Egypt-2804141.pdf</a>
June 8	Gen. Abdel-Fattah el-Sisi was sworn in as president.	<a href="https://www.aljazeera.com/news/middleeast/2014/06/sisi-be-sworn-as-egypt-president-20146843619902534.html">https://www.aljazeera.com/news/middleeast/2014/06/sisi-be-sworn-as-egypt-president-20146843619902534.html</a>
June 23	Two Al Jazeera English journalists were sentenced to seven years in jail, and one was sentenced to ten years by an Egyptian court on charges, which included aiding the Muslim Brotherhood and reporting false news.	<a href="https://www.nytimes.com/2014/06/24/world/middleeast/sentencing-of-journalists-in-egypt-draws-condemnation.html">https://www.nytimes.com/2014/06/24/world/middleeast/sentencing-of-journalists-in-egypt-draws-condemnation.html</a>
July 7	Egypt's Sisi regretted the trial of Al Jazeera reporters.	<a href="https://www.bbc.com/news/world-middle-east-28192749">https://www.bbc.com/news/world-middle-east-28192749</a>
2015		
February 1	Al Jazeera journalist Peter Greste was freed, deported from Egypt, and flown to Cyprus, bringing an end to 400 days	<a href="https://www.bbc.com/news/world-middle-east-31083890">https://www.bbc.com/news/world-middle-east-31083890</a>

	behind bars.	
May 5	Mohamed Fahmy filed a lawsuit against Al Jazeera for C\$100 million (US\$75.3 million) in punitive and remedial damages for alleged negligence and breach of contract. He accused the network of “negligence” by misinforming him about its legal status and his safety in Egypt.	<a href="https://www.theguardian.com/media/greenslade/2015/may/12/jailed-al-jazeera-english-journalist-sues-his-employers-for-negligence">https://www.theguardian.com/media/greenslade/2015/may/12/jailed-al-jazeera-english-journalist-sues-his-employers-for-negligence</a>
June 21	A senior journalist, Ahmed Mansour, with Al Jazeera was detained in Germany as a result of an Egyptian arrest warrant, which raised a possible international dimension to the antagonism between Cairo and the Qatar-based network.	<a href="https://www.theguardian.com/world/2015/jun/21/ahmed-mansour-germany-detains-al-jazeera-journalist-on-egyptian-warrant">https://www.theguardian.com/world/2015/jun/21/ahmed-mansour-germany-detains-al-jazeera-journalist-on-egyptian-warrant</a>
August 29	The Egyptian Court returned Al Jazeera reporters to prison.	<a href="https://www.voanews.com/middle-east/egyptian-court-returns-al-jazeera-reporters-prison">https://www.voanews.com/middle-east/egyptian-court-returns-al-jazeera-reporters-prison</a>
September 23	Fahmy and Mohamed were released from prison after Egyptian President Abdel Fattah el-Sisi issued a pardon on 100 activists, including the Al Jazeera journalists, which was announced on his Facebook page. This marked the occasion of Eid al-Adha and the president’s visit to the 70th session of the United Nations General Assembly. The Al Jazeera Media Network welcomed their journalists releases but continued to demand all charges and sentences against its journalists be dropped.	<a href="https://www.aljazeera.com/news/2015/09/al-jazeera-journalists-pardoned-egypt-150923112113189.html">https://www.aljazeera.com/news/2015/09/al-jazeera-journalists-pardoned-egypt-150923112113189.html</a>
2016		
January 27	Al Jazeera filed a claim for damages against Egypt at the World Bank arbitration court accusing Egypt of targeting its journalists and offices.	<a href="https://www.aljazeera.com/news/2016/01/al-jazeera-files-claim-damages-egypt-160127072801299.html">https://www.aljazeera.com/news/2016/01/al-jazeera-files-claim-damages-egypt-160127072801299.html</a>
June 19	Morsi and Al Jazeera journalists were sentenced for spying. Death sentences were upheld for six defendants. The ex-president and his aides received twenty-five-year jail terms.	<a href="https://www.aljazeera.com/news/2016/06/egypt-espionage-case-160618062408884.html">https://www.aljazeera.com/news/2016/06/egypt-espionage-case-160618062408884.html</a>

December 25	Egypt confirmed Al Jazeera producer's arrest for "provoking sedition" on behalf of the Qatar-based broadcaster that it considered a mouthpiece of the banned Muslim Brotherhood.	<a href="https://www.reuters.com/article/us-egypt-qatar-jazeera-idUSKBN14E0BR">https://www.reuters.com/article/us-egypt-qatar-jazeera-idUSKBN14E0BR</a>
2017		
May 25	Egypt blocked twenty-one websites for "terrorism" and "fake news."	<a href="https://www.reuters.com/article/us-egypt-censorship-idUSKBN18K307">https://www.reuters.com/article/us-egypt-censorship-idUSKBN18K307</a>
2018		
April 3	Sisi won Egypt's election.	<a href="https://www.vox.com/2018/3/26/17033030/egypt-elections-results-sisi-president-trump">https://www.vox.com/2018/3/26/17033030/egypt-elections-results-sisi-president-trump</a>
August 18	Egypt's Sisi signed a new law tightening government control online, ordering the blocking of websites that "constitute a threat" to the state, and punishing those who run them with imprisonment or fines.	<a href="https://www.aljazeera.com/news/2018/08/egypt-sisi-signs-law-tightening-government-control-online-180818144043935.html">https://www.aljazeera.com/news/2018/08/egypt-sisi-signs-law-tightening-government-control-online-180818144043935.html</a>
2019		
May 24	The Egypt Court ordered the release of journalist Mahmoud Hussein after more than 880 days of detention. However, it remained unclear exactly when the Qatar-based Egyptian producer would be freed from prison.	<a href="https://www.aljazeera.com/news/2019/05/egyptian-court-orders-release-mahmoud-hussein-190523100017910.html">https://www.aljazeera.com/news/2019/05/egyptian-court-orders-release-mahmoud-hussein-190523100017910.html</a>
December 23	Al Jazeera's Mahmoud Hussein was held in an Egyptian prison for three years without charges or trial, in breach of national and international law.	<a href="https://www.aljazeera.com/news/2019/12/al-jazeera-mahmoud-hussein-held-egypt-prison-3-years-191220114733158.html">https://www.aljazeera.com/news/2019/12/al-jazeera-mahmoud-hussein-held-egypt-prison-3-years-191220114733158.html</a>
2020		
February 5	Mohamed Fahmy abandoned a multimillion-dollar legal case against Al Jazeera relating to his detention in Egypt in 2013.	<a href="https://www.aljazeera.com/news/2020/02/al-jazeera-journalist-drops-case-doha-based-network-200205142520323.html">https://www.aljazeera.com/news/2020/02/al-jazeera-journalist-drops-case-doha-based-network-200205142520323.html</a>

APPENDIX 2. ENGLISH TRANSLATION OF THE EGYPT-QATAR BIT (NON-OFFICIAL)<sup>195</sup>

**AGREEMENT  
BETWEEN  
THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT  
AND  
THE GOVERNMENT OF THE STATE OF QATAR  
FOR THE PROMOTION AND PROTECTION OF MUTUAL  
INVESTMENTS**

The Government of the Arab Republic of Egypt and the State of Qatar hereinafter referred to the contracting parties.

Desiring to expand and deepen economic cooperation agreed between the contracting parties in an agreement on trade exchange, economic and technical cooperation and investment promotion signed from the two parties in Cairo city in 02-January-1990 for the benefit of the two countries.

In particular, to find favorable conditions for investments of investors of either contracting party in the territory of the other contracting party.

And recognizing the need to promote and protect investments of investors of both countries, and stimulating the flow of investment and individual business initiative with a view to achieving economic prosperity of both countries. And without prejudice to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab states that was approved in the Arab League.

Have agreed as follows:

**ARTICLE (1)  
DEFINITIONS**

For the purpose of this agreement:

- 1) "Investment" means every kind of assets and in particular, though not exclusively, includes:
  - a) Movable and immovable property and any other property rights such as Mortgages and possessory rights and the franchise as well as guarantees.
  - b) Shares and debentures of a company and securities and any other form of participation in a company.
  - c) Industrial and intellectual property rights include rights related to publishing, patents, trademarks, brand names, industrial designs and trade secrets and manufacturing

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195. Unofficial translation by the author of the Article.

technical operations and craft knowledge and business reputation.

d) Business Concessions conferred by law or by virtue of a contract, including concessions to search for, cultivate, extract or exploit natural resources.

e) A change in the form in which assets are invested does not affect their character as investments on condition that this change should not be contrary to the legislation of the contracting party in the territory held by the investment.

2) "Return" means the amounts yielded by an investment during specific time and in particular, though not exclusively, includes profit, interest, dividends, royalties, capital gains and fees. And return on investment in the case of re-invested has the same investment protection.

3) "Investor" means:

a) Any physical person holding the nationality of a contracting party in accordance with the laws of that party.

b) Any legal person taking the form of a public company or a private or a mix of any kind or consortium or public EST or public body, association or individual enterprise or project made in the territory of the province Contracting Party and in accordance with applicable laws has, or managed or supervised directly or indirectly by citizens of contracting party.

c) Any of the Contracting Parties.

4) "Territory" means:

a) In respect of the Arab Republic of Egypt:  
Land located within the international borders of the Arab Republic of Egypt and the inland waters and territorial sea and continental shelf and Marine Special Economic Zone under the sovereignty of the Arab Republic of Egypt economic zone or territorial jurisdiction in accordance with the provisions of international law.

b) In respect to the State of Qatar:  
The territory of the State of Qatar, including the territorial waters and the continental shelf, which makes the State of Qatar owns in accordance with the law of the national and international law, sovereign rights and judicial authority.

#### ARTICLE (2)

#### PROMOTION AND PROTECTION OF INVESTMENTS

1) Each Contracting Party shall encourage and create favorable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

- 2) Investors' investments of any of the contracting parties at all times should be treated fairly, and should have enough and full protection and safety in the territory of the other contracting party.

ARTICLE (3)  
MOST-FAVOURÉD – NATION PROVISIONS

- 1) Each contracting party shall accord to the investments made in its territory by investors of the other Contracting Party a treatment not less favorable than that which it accords in like situation to investments of investors of any third state.
- 2) Investors of one Contracting Party whose investments made in the territory of the other Contracting Party suffered losses owing to a war or other armed conflict, revolution a state of national emergency, revolt, insurrection, disturbances or other similar events, shall be accorded by the latter Contracting Party, as regard the measures taken to cover the losses a treatment not less favorable than that it accords to its investors or the investors of any third state whichever is more favorable. The amounts resulting shall be freely transferable.
- 3) The provisions of this agreement relating to the granting of the most favored nation treatment, shall not be construed so as to oblige one Contracting Party to extend to the investors or the other Contracting Party the advantages resulting from any economic or custom union currently exists or to be established in future, a free trade zone or regional economic organization, to which either of the Contracting Party is or may become a Party. And that treatment shall not relate to any advantage granted by any of the two Contracting Parties to investors from third State according to a double taxation agreement or other agreements on reciprocal basis concerning taxation matters.

ARTICLE (4)  
EXPROPRIATION

Any Contracting Party is not allowed to take expropriation or nationalization measures against the investments of any investor from the other Contracting Party, unless the following conditions are fulfilled:

- 1) The measures are adopted for legal purpose and in accordance with due process of law.
- 2) The measures are not discriminatory.
- 3) These measures shall be accompanied with allocations for prompt and effective payment of compensation provided that the compensation shall be equal to the real economic value in the announcement time of the expropriation decision.

ARTICLE (5)  
FREE TRANSFER

- 1) Each Contracting Party shall allow in accordance with its laws, regulations, and national policies without undue delay the free transfer in any freely convertible currency:
  - a) Net profits, dividends, returns, technical assistance, technical fees, and interest and other current income resulted from the investments of the investors of the other Contracting Party.
  - b) The proceeds accruing from total or partial sale or liquidation of an investment of the investors of the other Contracting Party.
  - c) Funds allocated for settlement of debts and loans provided by investors of one Contracting Party to the investors of the other Contracting Party of what the two parties consider investment.
  - d) Income and Earnings of employees of either Contracting Party allowed working in connection of investment in the territory of the other Contracting Party.
- 2) The rates of exchange applied on transfers mentioned in paragraph (1) of this article are the same rates of exchange in force at the date of the transfer and in accordance with the rates of exchange.
- 3) The Contracting Party which the investment are invested in its territories undertakes to accord the transfers mentioned in paragraph (1) of this article a treatment not less favorable than that which it accords to investors of any third party.

ARTICLE (6)  
SETTLEMENT OF DISPUTES BETWEEN ONE CONTRACTING PARTY  
AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

- 1) Any legal dispute arising directly from an investment between either Contracting Party and one investors of the other party, should be amicably settled between the parties involved.
- 2) If the dispute cannot be settled this way within six months from the date of the written notification, it may be submitted upon request of any of the two parties with one of the following ways:
  - a) Competent court in a territory of the Contracting Party primarily investment on its territory.
  - b) International arbitration of the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between states and Nationals of other States opened for signature at Washington D.C. on 18 March 1965.

- c) A special jury either party to the dispute investment may not choose other settlement dispute when chose a settlement from the mentioned ways.
- 3) The constitution of the tribunal mentioned in paragraph 2(c), and of this Article, the following:
  - a) Each party of dispute should appoint an arbitrator and the two arbitrators should choose a third one with a different third nationality for the presidency of the court, and they should all be appointed during two months from the date of receipt of one of the parties of the other party an announcement informing him of its intention to raise the dispute to an arbitral tribunal.
  - b) If no appointments are made within the period specified in the previous paragraph, either party may ask , in the absence of any other agreement from the secretary general of the permanent court of arbitration in the Hague to make necessary appointments.
  - c) By Majority vote decisions are taken, and they shall be final and binding on the parties, and are executed in accordance with local laws, decisions shall be taken in accordance with the provisions of this convention and the laws of the Contracting that the investment on his territory and the rules of international law.

#### ARTICLE (7)

#### SETTLEMENT OF DISPUTE BETWEEN THE CONTRACTING PARTY

- 1) Disputes as to interpretation or application of provisions of this agreement shall be settled by means of negotiations.
- 2) If such a dispute cannot thus be settled in accordance with item (1) above within six months after the commencement of the negotiations, it shall, upon the request of either contracting Party, be submitted to a special arbitral tribunal.
- 3) The arbitral tribunal formed in particular in a manner that each Contracting Party shall appoint one arbitrator and these two arbitrators shall nominate a chairman who shall be a national of a third state. The two arbitrators to be appointed within 5 months maximum from the date of receiving the arbitration notification.
- 4) If within any of the periods specified the necessary appointments of the arbitral tribunal members have not been made, either Contracting Party may invite the president of the International Court of Justice to make any necessary appointments, unless he is a national of either Contracting Party or if he is otherwise prevented from discharging this function, the Vice-president of the International Court of justice shall be invited to make the necessary appointments, if he is not a national of either Contracting Party.

- 5) The arbitral tribunal shall reach its decisions on the basis of law respect and the provisions of this agreement and of other agreements as well as on the general principles and rules of International Law.
- 6) The arbitral tribunal shall determine its own procedures and its decisions shall be reached by majority of votes, and such decisions shall be final and binding.
- 7) Each contracting Party shall bear the cost of the arbitrator it has appointed and of its representation. The cost of the chairman and the remaining costs shall be borne equally by the contracting Parties unless the arbitral tribunal decides otherwise according to the special conditions.

ARTICLE (8)  
TRANSFER OF RIGHTS

Where one contracting Party has granted any financial security for any of his investors in respect of an investment, then, the other Contracting Party without prejudice to the rights of the first Contracting party mentioned in article (6), shall recognize the transfer of any rights or suit for the investor to the first Contracting Party and the placement of this investor in the right or suit. And it Shall not exceed the right that is transferred or the invitation to that investor.

ARTICLE (9)  
APPLICATION SCOPE OF INVESTMENTS

This Agreement apply to investments invested or to be invested by investors from either Contracting Party in the territory of the other Contracting Party according to its legislations, laws, and regulations prior to the effective date of this agreement shall have no effect on disputes occurred prior to the date of its entry into force.

ARTICLE (10)  
DURATION AND TERMINATION

- 1) This agreement shall enter into force thirty days after the receipt if the later of notifications showing the completion of both parties the constitutional requirements required for the entry into force of this agreement.
- 2) This agreement shall remain in force for ten years and shall be extended tacitly for further similar period unless terminated according to paragraph three of this article.
- 3) Each Contracting Party has the right to terminate this agreement at the end of its duration or at any time after the expiry of the initial ten years period by a written notice served to the other Contracting Party one year prior to the intended termination date.

4) Concerning the investment established or obtained prior to the termination date of this agreement, all other articles of this agreement shall remain effective for ten years from the termination date.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments have signed this convention.

Done in Doha City in 24-Shaban-1420, 2 December 1999 in two originals in Arabic, both texts being equally authentic.

For the Government of the Arab Republic of Egypt.	For the State of Qatar.
Amr Moussa Minister of Foreign Affairs	Sheikh Hamad bin Jassim bin Jaber al Thani Minister of Foreign Affairs

### APPENDIX 3. LIST OF INVESTMENT DISPUTES INVOLVING QATAR OR EGYPT

Case name	Economic sector	Treaty	Year of claim	W = won by claimant S = won by state	Award date	Outcome (brief summary)
Arcelor Mittal v. Egypt	Secondary: C - Manufacturing	BLEU (Belgium-Luxembourg Economic Union) - Egypt BIT (1999)	2015	Pending	Awaited	Awaited
Unión Fenosa Gas v. Egypt	Primary: B - Mining and quarrying	Egypt - Spain BIT (1992)	2014	Pending	Awaited	Awaited
Al Sharif v. Egypt (I)	Tertiary: F - Construction & Tertiary: H - Transportation and storage	Egypt - Jordan BIT (1996)	2013	Settled	N/A	N/A

Al Sharif v. Egypt (II)	Tertiary: H - Transportati on and storage	Egypt - Jordan BIT (1996)	2013	Settled	N/A	N/A
Al Sharif v. Egypt (III)	Tertiary: H - Transportati on and storage	Egypt - Jordan BIT (1996)	2013	Settled	N/A	N/A
ASA v. Egypt	Tertiary: E - Water supply; sewerage, waste management and remediation activities	Egypt - Italy BIT (1989)	2013	Pending	Awaited	Awaited
Cementos La Union v. Egypt	Secondary: C - Manufacturi ng	Egypt - Spain BIT (1992)	2013	Pending	Awaited	Awaited
Utsch v. Egypt	Secondary: C - Manufacturi ng	Egypt - Germany BIT (2005)	2013	Pending	Awaited	Awaited
Ampal v. Egypt	Tertiary: D - Electricity, gas, steam and air conditioning supply	Egypt - United States of America BIT (1986), Egypt-Germany BIT (2005)	2012	Pending	Awaited	Awaited
Maiman v. Egypt	Tertiary: D - Electricity, gas, steam and air conditioning supply	Egypt - Poland BIT (1995)	2012	Pending	Awaited	Awaited

Veolia v. Egypt	Tertiary: E - Water supply; sewerage, waste management and remediation activities	Egypt - France BIT (1974)	2012	Pending	Awaited	Awaited
Bahgat v. Egypt	Not available	Egypt - Finland BIT (2004)	2011	Pending	Awaited	Awaited
Bawabet v. Egypt	Secondary: C - Manufacturing	Egypt - Kuwait BIT (2001)	2011	Pending	Awaited	Awaited
Indorama v. Egypt	Secondary: C - Manufacturing	Egypt - United Kingdom BIT (1975)	2011	Settled	N/A	N/A
National Gas v. Egypt <sup>196</sup>	Tertiary: H - Transportation and storage	Egypt - United Arab Emirates BIT (1997)	2011	S	3 Apr. 2014	Jurisdiction denied by the tribunal
Sajwani v. Egypt	Tertiary: L - Real estate activities	Egypt - United Arab Emirates BIT (1997)	2011	Settled	N/A	N/A
H&H v. Egypt <sup>197</sup>	Tertiary: I - Accommodation and food service activities	Egypt - United States of America BIT (1986)	2009	S	6 May 2014	Indirect expropriation, FET, FPS, and Umbrella clause claimed, but no breaches found

196. National Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7 (Apr. 3, 2014), <http://www.italaw.com/cases/2494> [<https://web.archive.org/web/20200929104103/https://www.italaw.com/cases/2494>].

197. H&H Enterprises Investments, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB 09/15 (May 6, 2014), <http://www.italaw.com/cases/1460> [<https://web.archive.org/web/20200926060214/https://www.italaw.com/cases/1460>].

Malicorp v. Egypt <sup>198</sup>	Tertiary: H - Transportation and storage & Tertiary F - Construction	Egypt - United Kingdom BIT (1975)	2008	S	7 Feb. 2011	Indirect expropriation, FET, Minimum standard of treatment, and Denial of justice were claimed, but all claims were denied at merits stage
Helnan v. Egypt <sup>199</sup>	Tertiary: I - Accommodation and food service activities	Denmark - Egypt BIT (1999)	2005	S	3 July 2008	All claims were denied at merits stage
Siag v. Egypt <sup>200</sup>	Tertiary: L - Real estate activities	Egypt - Italy BIT (1989)	2005	W	1 June 2009	All the alleged breaches were found, including FET, Direct expropriation, etc.
Jan de Nul v.	Tertiary: F - Construction	BLEU (Belgium-	2004	S	6 Nov. 2008	FET and other

198. Malicorp Ltd. V. Arab Republic of Egypt, ICSID Case No. ARB/08/18 (Feb. 7, 2011), <http://www.italaw.com/sites/default/files/case-documents/ita0499.pdf> [<https://web.archive.org/web/20191105214213/https://www.italaw.com/sites/default/files/case-documents/ita0499.pdf>].

199. Helnan Int'l Hotels v. Arab Republic of Egypt, ISCID Case No. 05/19 (July 3, 2008), <http://www.italaw.com/sites/default/files/case-documents/ita0399.pdf> [<https://web.archive.org/web/20201031072523/https://www.italaw.com/sites/default/files/case-documents/ita0399.pdf>].

200. Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15 (June 1, 2009), [http://www.italaw.com/sites/default/files/case-documents/ita0786\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf) [[https://web.archive.org/web/20200415234621/https://www.italaw.com/sites/default/files/case-documents/ita0786\\_0.pdf](https://web.archive.org/web/20200415234621/https://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf)].

Egypt <sup>201</sup>		Luxembourg Economic Union) - Egypt BIT (1999), BLEU (Belgium-Luxembourg Economic Union) - Egypt BIT (1977)				breaches were alleged but were denied by the tribunal
Joy Mining v. Egypt <sup>202</sup>	Primary: B - Mining and quarrying	Egypt - United Kingdom BIT (1975)	2003	S	6 Aug. 2004	Jurisdiction was denied by the tribunal
Ahmonseto v. Egypt <sup>203</sup>	Secondary: C - Manufacturing	Egypt - United States of America BIT (1986)	2002	S	18 June 2007	FET and other breaches were alleged but were denied by the tribunal

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201. Jan de Nul N.V. and Dredging Int'l N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (Nov. 6, 2008), <http://www.italaw.com/sites/default/files/case-documents/ita0440.pdf> [<https://web.archive.org/web/20201027102549/https://www.italaw.com/sites/default/files/case-documents/ita0440.pdf>].

202. Joy Mining Mach. Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/03/11 (Aug. 6, 2004), <http://www.italaw.com/sites/default/files/case-documents/ita0441.pdf> [<https://web.archive.org/web/20201125195731/https://www.italaw.com/sites/default/files/case-documents/ita0441.pdf>].

203. Ahmonseto, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/15 (June 18, 2007), <http://www.italaw.com/cases/62> [<https://web.archive.org/web/20201027155927/https://www.italaw.com/cases/62>].

Champion Trading v. Egypt <sup>204</sup>	Primary: A - Agriculture, forestry and fishing	Egypt - United States of America BIT (1986)	2002	S	27 Oct. 2006	FET and other breaches were alleged but were denied by the tribunal
Middle East Cement v. Egypt <sup>205</sup>	Tertiary: H - Transportation and storage	Egypt - Greece BIT (1993)	1999	W	12 Apr. 2002	Indirect expropriation was alleged and found
Wena Hotels v. Egypt <sup>206</sup>	Tertiary: L - Real estate activities	Egypt - United Kingdom BIT (1975)	1998	W	8 Dec. 2000	All the alleged breaches were found, including Indirect expropriation and FET

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204. Champion Trading Co., Ameritrade Int'l, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9 (Oct. 27, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0148.pdf> [<https://web.archive.org/web/20160813093702/http://www.italaw.com/sites/default/files/case-documents/ita0148.pdf>].

205. Middle E. Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6 (Apr. 12, 2002), <http://www.italaw.com/sites/default/files/case-documents/ita0531.pdf> [<https://web.archive.org/web/20201021110731/https://www.italaw.com/sites/default/files/case-documents/ita0531.pdf>].

206. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 (Dec. 8, 2000), <http://www.italaw.com/sites/default/files/case-documents/ita0902.pdf> [<https://web.archive.org/web/20201213204143/https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf>].