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Will the battle over Internet-filtering software play out on the investment treaty playing field?

Luke Eric Peterson (Investment Arbitration Reporter) · Monday, June 29th, 2009

Over on the always-interesting International Economic Law and Policy Blog, Simon Lester has been musing about the recent controversy over internet-filtering software in China. As has been widely reported in the financial press, computer makers are facing demands to install internet-filtering software (ostensibly to combat the problem of Chinese internet users being exposed to online pornography).

Simon wonders how China's actions square with its international trade obligations, but finds little clarity in the public statements of the US Trade Representative – which criticize the Chinese actions.

A piece in the Wall Street Journal offers a bit more clarity, insofar as it describes the tight deadline sprung upon foreign computer producers, and raises the spectre of their having been disadvantaged relative to Chinese companies.

Although we've seen little discussion of this to date, don't be surprised if the measures taken by China are also scrutinized for their compatibility with international investment agreements.

At least for those foreign computer makers with production and distribution facilities in China, will the new measures by China operate as restrictions on investments (rather than upon cross-border trade)?

If that's the case, investors in the computer sector are likely looking to see whether they fall under the protective canopy of one or more investment protection treaties.

China has one of the deepest back-catalogues of bilateral investment treaties of any country, even if many are less than cutting-edge in terms of their scope and protective cover. (As will be reported in the latest edition of my newsletter, Investment Arbitration Reporter, there have been some very notable recent developments in the use of these Chinese investment treaties in the context of international arbitration.)

One critical question in any claims arising out of this internet-filtering software dispute would be the expectations that investors had upon entering the Chinese market. For instance, it has been widely reported that Google, the search company, which has had its own ups and downs in China, operates under the terms of a highly-detailed license. I'm guessing that the terms of such licenses

make it crystal clear that foreign technology companies are no longer in the highly-permissive State of California.

While I will leave it to others to handicap the chances of any investment treaty claims, it seems to me that the investment treaty route could be the “sleeper” option in this whole controversy.

To date, much of the public discussion has focussed on the WTO compatibility of the new Chinese measures, but as the comments on Simon Lester’s recent blog-post makes clear: it may be that most of the affected computers at issue are actually produced by investors operating in China, rather than the products of cross-border trade.

Any claims in this context would occur against a backdrop where media companies have been availing themselves of investment treaty protections for years. In a short paper I’ve been working on, along with a colleague, for the Vale-Columbia Center on Sustainable International Investment, we’ve chronicled how investment treaties have been invoked by media organizations in various cases of alleged censorship or onerous new regulatory restrictions.

In a similar vein, one wonders if high-tech firms will attempt – either privately or publicly – to brandish investment treaties in an effort to dissuade the imposition by China of internet-filtering software?

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