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The Great Battle of Intellectual Property versus State Sovereignty: Is Philip Morris v Uruguay a Good Referee? (Part I)

Michaela Brett Samuel Halpern · Friday, June 29th, 2018

The constructive framework of ISDS was intended to promote investment and growth through the establishment of a stable and predictable atmosphere for investment. However, some have argued that this purpose has been warped to allow a small group of private individuals to rule on public matters. Arbitrations such as *CMS v Argentina, Tecmed v Mexico,* and *Metalclad Corp v Mexico* have led to a concern that the rights of investors are given prominence over a State's sovereign rights and the legitimate use of a State's regulatory power. There have therefore been an increasing number of discussions on the need for greater safeguards. Even though investments are crucial to building the modern international economy, investment arbitration should not be seen as a hindrance to a country's ability to govern its population and pursue public policy objectives.

In a similar vein, intellectual property rights are essential to a country's development; a well-balanced intellectual property regime can promote innovation, consumer protection, and are increasingly becoming intertwined with human rights. Occasionally, however, the protection of intellectual property rights and the public interest of a state may clash. As discussed by various scholars including Rochelle Dreyfuss, Susy Frankel, Peter Yu, and Ruth Okediji, intellectual property rights being seen as an "investment" has critical consequences. The increased recognition of intellectual property rights as an investment itself opens the way for intellectual property law to "turn…on its head" by creating the possibility for questions of national innovation policy to be adjudicated by private actors.[1)] This series examines this battle between the intellectual property rights of investors and public interest considerations of a host State. In the majority of disputes brought to arbitration, the investor argues that the host State has breached the FET standard and therefore owes the investor appropriate compensation. The issue is that there is a lack of consensus as to the precise content and scope of the FET standard. This lack of a uniform approach or even definition of "fair and equitable treatment" leaves host states at risk of being beleaguered by large multinational corporations burying them in lengthy adjudicative procedures.

In 2016, a tribunal of three arbitrators rejected the claims of tobacco company, Philip Morris, against Uruguay in the World Bank ICSID case, *Philip Morris Bran Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland), and Abal Hermanos S.A. (Uruguay) vs. Oriental Republic of Uruguay*. Philip Morris is considered to be a significant step towards rebalancing the "battle of rights" and reinforcing that States have a sovereign right to decide the laws for their own populations.

The Battle of Rights

A major concern in ISDS is that decisions of public policy are left in the private hands of arbitrators and corporate lawyers. When investor rights, such as intellectual property rights, conflict with public policy initiatives and national priorities such as health regulations, environmental concerns, and human rights, the perception is that with ISDS, a handful of arbitrators become "the judge of the policies of the state, deciding on the basis of a subjective standard, because there is no public and shared determination about it."[2)] The one or three arbitrators adjudicating the dispute are chosen by the parties to the dispute, whereas a state's legislative power is backed by the "core principles of modern representative democracies" (for the most part). In other words, a country's legal framework is the result of an elected legislature and/or executive with any changes in the regulatory framework as reflective of the "the will of the *people souverain*." [3)]

That said, in resolving disputes that inevitably arise, arbitration provides a number of advantages over domestic litigation for both the investors and States. However, given the private nature of ISDS, we end up with private actors affecting public policy "in a vacuum."[4)] There is consternation that "as corporations become larger and more influential in global politics and trade negotiations, they will disproportionately control and benefit from [international investment agreements] at the expense of state sovereignty."[5)] Some commentators even go so far as to criticize investment arbitration as a "supranational decision-maker" which lacks any of the democratic checks and balances.[6)] Ruth Okediji notes that having private actors adjudicate public policy is a "subver[sion of] a core judicial function" and consequently "alters the contours of state power and responsibility."[7)]
Given the notion that intellectual property was originally seen as primarily in the public domain for the purpose of promoting creativity, the expansion and shift of intellectual property rights into an "investment" capable of expropriation risks perturbing the initial public good motivation behind intellectual property as well as the traditional safeguards.[8)] In other words, as Rochelle Dreyfuss and Susy Frankel discuss, intellectual property rights shifted from being seen as an incentive to becoming a commodity in itself.[9)]

The purpose of investment agreements was to provide an unprecedented avenue for private foreign investors to resolve disputes with the State hosting their investment and thereby reduce the risk of investing. However, the system appears to have become somewhat one sided with investment agreements seen as "a charter of rights for foreign investors, with no concomitant responsibilities or liabilities, no direct legal links to promoting development objectives, and no protection for public welfare in the fact of environmentally or socially destabilizing foreign investment…"[10)] If the objective of these investment agreements was to reduce investor risk with "risk" defined as a "moral wrong" from which an investor should be protected,[11)] then it is only logical and moral to allow a state to prioritize and act in accordance with bona fide public interests.

The FET context

Despite the pervasiveness of the FET claim, there is no defined mechanism for factoring into the balancing equation whether the host State had valid reasons for enacting the measure in question.

The result is a "regulatory chill" in which smaller and developing countries do not enact necessary legislation for fear of crushing liability.

The case law paints a sporadic and confused picture. In an expropriation context, some tribunals[12] look only at the effects of a host State's measure, some[13] look at whether the measure was non-discriminatory, *bona fide* and had a proportionate legitimate public purpose, and others[14] try to balance the host State's right to regulate in the public interest with the protection of the investor's rights. In an FET context, tribunals appear to be even more split and indeterminate. This lack of clarity, especially in the context of the rapidly changing intellectual property context, can evolve into disastrous results if not properly and promptly resolved.

Hirsch has said that Tribunals find breaches of FET on two grounds.[15] The first ground being specific government assurances in which FET is treated like detrimental reliance in contract law and the second ground being that the legislative change was accompanied by procedural defects. The problem is that the balance at stake here, investor rights vs. public interests, are not between contractual parties. Instead, what we have is an economic operation, on one side, and a sovereign power resulting from a political commitment to the populous, on the other.[16]

The ability of the FET claim to limit a State from regulating in pursuance of public interest is both unclear and confused as the application of the standard is undeveloped and inconsistent. What qualifies as "fair and equitable treatment" is not yet defined. But "fair" treatment should not mean the investor's rights are paramount. "Fair" should mean *fair* which necessarily requires an equitable balancing of *all* rights and interests at play.

The Intellectual Property Context

There is an emerging "new form of dialectics between the private and public interests in IP governance at the international level".[17] As discussed above, the battle in this case is not an even playing field as we have private interests competing with *public* national entities.[18] Arbitration provides the most well-equipped forum for such disputes as unlike national courts, arbitration offers an avenue for private investors to file claims against states. The arbitration of disputes concerning intellectual property rights "has the potential to revolutionize IP governance at the national and international levels."[19] Given the global reach and impact of intellectual property as well as the constantly changing nature of the industry, an international and flexible forum such as arbitration can provide the best medium for resolving intellectual property disputes.

IP rights and their proper enforcement are crucial to the promotion of innovation and, ultimately, to the growth of society as a whole. The importance of IPRs, particularly in the international realm, is becoming increasingly recognized. While a person having their work copied is not the same as someone being stripped of food and shelter, IP is increasingly seen as being entangled with human rights issues. When IP rights are considered important public policy tools in themselves, the question becomes to what extent these rights take precedence over other factors such as public interest and a State's sovereign rights.

In the second part of this article, we consider how the award in Philip Morris has affected this balance.

The author is the editor of the Intellectual Arbitrator.

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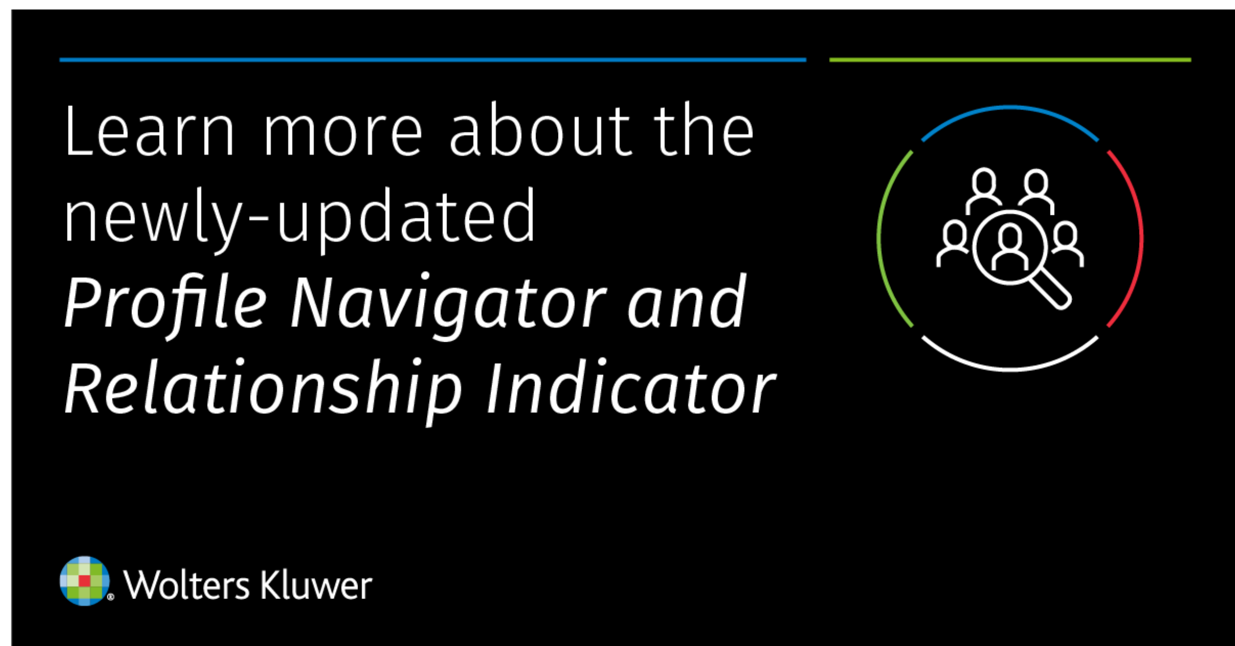

References

?1 Ruth Okediji, *Is Intellectual Property "Investment"? Eli Lilly v. Canada and the International Intellectual Property System*, 35 U. PA. J. INT'L. L. 1121, 1122 (2014); Peter K. YU, *The Investment-Related Aspects of Intellectual Property Rights* 843 (2016) noting that it is not the fact that intellectual property rights are considered investments that is the novel problem, it is the fact that this now means private investors can bring a suit without requiring assistance from the government and support of their home states.

?2 Riccardo Fornasari, *The Protection of Legitimate Expectations under the Fair and Equitable Treatment Standard*, KSLR COMMERCIAL & FINANCIAL LAW BLOG (May 12, 2015).

?3, ?18 id.

?4 Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1571 (2005) [hereinafter "Franck"].

?5 Leite, fn 14 citing Tamara L. Slater, Investor-State Arbitration and Domestic Environment Protection, 14 WASH. U. GLOBAL STUD. L. REV. 131, 132-133 (2015).

?6 James Gathii & Cynthia Ho, *Regime Shifting of IP Lawmanking and Enforcement from the WTO to the International Investment Regime,* 18 Minn. J. L. Sci. & Tech. 427, 495 (2017) citing Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALTA. L. REV. 983 (2009) and Sergio Puig, *The Merging of International trade and Investment Law*, 33 BERKELEY J. INT'L. L. (2015).

?7 Okediji, at 1122.

?8 Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property*, 36 MICHIGAN J. INT'L L. 557, 559–560 (2015); YU, at 835.

?9 See Dreyfuss and Frankel.

?10 United Nations Conference on Trade and Development, *The Development Dimension of FDI: Policy and Rule-Making Perspectives*, UNCTAD/ITE/IIA/2003/4 (Nov. 6-8, 2002), 212.

?11 Azernoosh Bazrafkan & Alexia Herwig, *Reinterpreting the Fair and Equitable Treatment Provision in International Investment Agreements as a New and More Legitimate Way to Manage Risks*, 7 EUROPEAN J. OF RISK REG. 439, 440 (2016) [hereinafter "Bazrafkan & Herwig"].

?12 *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Award, (Jan. 17, 2007), ¶ 270; *Compañía del Desarrollo de Santa Elena, S.A. v The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000), ¶ 72; *AES Summit Generation Limited AES-Tisza Erömü KFT v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010), ¶¶ 14.3.1-14.3.4 [hereinafter "AES"]; *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), ¶¶ 103 and 107.

?13 *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award (Jul. 14, 2006), ¶¶ 309-312; *Tecnicas Medioambientales Tecmed S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003), ¶¶ 121-122.

?14 *Methanex Corp. v United States of America*, Final Award on Jurisdiction and Merits, 44 ILM 1345 (2005), award rendered Aug. 3, 2005, pt. IV, ch. D, ¶ 7: "As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."

?15 Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause*, 12 THE JOURNAL OF WORLD INVESTMENT & TRADE, 784, 790, 792–99 (2011).

?16 Fornasari.

?17 Valentina S. Vadi, *Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investments*, 5 NYU J. INTELL. PROP. & ENT. L. 113, 118 (2015).

?19 Id, 118-119 citing Muthucumuraswamy Sornarajah, *Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness* , in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown and Kate Miles eds., 2011), 631-657 arguing that "disparate trends" in international investment law and arbitration "show neither evolution nor revolution but an ongoing conflict [between private and public interests] that either will bring a new system – resulting in a revolution – or will keep the old, simply because one or the other of the camps wins the tussle," at 632.

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