Fair and Equitable Treatment of Foreign Investments and Intellectual Property Rights

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Abstract

In assessing the impact that treating intellectual property (IP) as an investment asset can have on the IP policy space available to states, it is essential to draw a distinction between the rules governing the expropriation of investment assets and the rules relating to the fair and equitable treatment (FET) of investments. This distinction is necessary because, in some investment agreements, measures relating to IP are excluded from the scope of the rules on expropriation whereas there is usually no such exclusion for IP from the scope of the FET standard. Furthermore, even where an investor claims that an IP measure amounts to an indirect expropriation of its IP asset, it is quite possible for an investment tribunal to defer to the regulatory powers of the host state especially where the challenged measure is consistent with the rules of International IP Law and/or where the measure has been adopted to address a public health problem. Moreover, the content and scope of the FET standard is ambiguous thus making it a potentially useful tool in the hands of an investor seeking to challenge an IP measure.

This paper therefore seeks to examine the potential impact that the FET standard can have on the IP policy space available to states. Using the two recent decisions of investment tribunals in the cases of *Philip Morris v Uruguay* and *Eli Lilly v Canada* as case studies, the paper will critically examine the extent to which a claim based on a denial of FET can narrow down the policy space available to states to design their national IP laws in a way that suits their level of development and societal needs. The paper will also assess the extent to which a human rights perspective might be useful in the context of an investment dispute based on a denial of FET and which involves an IP right.