Journal of Intellectual Property Rights
Vol 25, January-March 2020, pp 15-22

Role of IP in Investor-State Conflicts Involving Human Rights Issues

Chintan Nirala[†]

King's College London, Strand, London WC2R 2LS, United Kingdom

Received: 4 October 2019; accepted: 5 February 2020

The field of investor-state arbitration in recent years has been a playground between investors and state. Fortunately or unfortunately, it has also taken within its garb the issues involving human rights. The state is often coerced by the investors to forsake its duty to protect the rights of its own citizens in lieu of its treaty obligation to protect their agreed investor rights. A new actor has emerged in this conflict, namely, Intellectual Property Rights. The article is an attempt to assess the role of intellectual property and its possible contribution in conciliation of the conflict. The first section traces the path of intellectual property emerging as an 'investment' in the context of investment law. The second section focuses on the use of intellectual property (IP) norms and human rights standards in treaty interpretation and arguments forwarded by both parties. The third section sets out the possible role that IP can play as a conciliator in this conflict.

Keywords: Investment Treaty, International Investment Agreements, *TRIPS Plus*, Investment Arbitration Proceedings, The Tobacco Plain Packaging Act, 2011, WTO Agreement on Technical Barriers to Trade, NAFTA, Investor State Dispute Settlement Proceedings, Vienna Convention on the Law of Treaties, Umbrella Clauses, intangible goods, human rights

The proponents of international law witnessed a sharp rise in instances of investor-state arbitrations within past few years. Such phenomenal growth is a rare occurrence in the sphere of international law. However, it also brought some unexpected consequences with it. One such consequence was the direct conflict between investors and state on the issue of human rights (HR) during investor-state disputes. The states during investment disputes are often faced with the dilemma of choosing between its duty to protect the rights of its own citizens and its treaty obligation to protect 'agreed' investors' rights. However, there lies a prevalent notion of perceiving human rights and the field of investment law as wholly distinct, autonomous legal domains having no meaningful relationship between them.[1] The ostensible structural differences between the two fields have led to this fallacy, which eventually results in the ignorance of human rights by investment tribunals. Recently, intellectual property (IP) has come up to be one of the crucial actors in International Investment Agreements (IIAs)bridging the gap between these two fields and demolishing the flawed belief of them being disconnected from each other. These arbitrations in past and possibly in future too are going to address "difficult and often elusive substantive questions" of intellectual property law,[2] entailing grave public interest implications for host states.

The paper will first try to elucidate the role played by IP in investment arbitration, specifically in instances where IP became a subject matter in a human-rights conflict between host state and investor. The section will emphasize on the emergence of IP as an investment and later, the issues related to it. The second section focuses on the human-rights conflict between investor and host state involving IP as a subject matter of the dispute. It will try to elucidate the arguments used by investors and human rights advocates in cases of *Philip Morris and Eli Lilly*. Lastly, the article will try to explore whether IP can act as a medium with which the present conflict can be conciliated.

Role of IP in Investment Treaty

The main objective of any International Investment Agreement (IIA), primarily in the form of BITs or included in the investment chapter of FTAs, is to afford protection to the foreign investment done by the investor in the host state. It became the most sought-after dispute settlement mechanism for the investors because of the added protection provided in the IIA, at times surpassing the customary international law standards. The protection is provided generally through the provisions of unlawful expropriation, fair

[†]Email: chintannirala0106@gmail.com

and equitable treatment, non-discrimination, umbrella clauses and likewise. This also became one of the major reasons for the paradigm shift from WTO to Investment Tribunals for investment claims provide *TRIPS Plus* commitments, owing to the extra protection given in BIT as compared to TRIPS.

Emergence of IP as an 'Investment'

IIAs as a general trend now include 'intellectual property' within its ambit of protected investment.[3] Julian Mortenson in his paper "Intellectual Property as Transnational Investment" observed while addressing the meaning of investment that the "*the default presumption* must be that intellectual property would be included in any broad definition of "investment."[4] This development of IP, that is, to be perceived as a 'property' or 'investment' was the result of 'propertization of intangible goods'.[5] The phenomenon where the proprietary aspect of intangible rights like copyright, trademarks, patents and likewise are emphasized and thereby, shifted towards a property-based regime.[6] One such example of this process is evident in the shift of trademark from 'deception-based' to 'property-based.'[7] Consequently, this commoditization affected legislations, treaties and court interpretations. International instruments like TRIPS were formulated and likewise, European Court of Human Rights interpreted Article 1 of the First Protocol as one protecting right to property where property included trademark. However, problem started with the over-emphasis on the proprietary aspect. Lemley, while commenting on this stated that '[c]ourts seem to be replacing the traditional rationale for trademark law with a conception of trademarks as property rights, in which "trademark owners" are given strong rights over the marks without much regard for the social costs of such rights.'[8]

However, by raising IP to the pedestal of investment in the IIA, investors get direct access to the tribunal for challenging host states measure for allegedly affecting their investment – their intellectual property.

The Cause of 'Conflict'

The investment protection treaties though provide substantive and procedural protection to IP investments but lack considerably to elaborate further on the extent of the IP Rights and its regulation thereto. The clash initiates, typically with the state enforcing a regulatory measure with the intention of public interest. For instance, Article 8 of TRIPS, entitled 'Principles', allows member states to adopt measures necessary to *protect public health*, provided that such measures are consistent with the provisions of the Agreement.[9] A regulation is adopted by the State in public interest, the investors initiates investment arbitration against the regulation for being an indirect expropriation, thereby, seeking a hefty compensation (which is sometimes more than its annual budget) claim before the tribunal. States under the apprehension of giving claimed compensation roll back the impugned regulation, even before the award is given on merits. Likewise, a mere threat of a potential dispute with a powerful investor can exert a chilling effect on public health regulation, especially in developing countries.[10] In *Ethyl Corp* v *Government of Canada*,[11] the Canadian government withdrew the legislation banning methylcyclopentadienyl manganese tricarbonyl (MMT) at least partially in response to a claim for expropriation in an investment arbitration even though the legislation was designed to protect public health. Similarly, in *Nusa Tenggara* v *Republic of Indonesia*, after the Indonesian government banned open-pit mining in protected forests, the threat of expropriation claims from affected mining companies caused the government to repeal the ban.[12]

Therefore, in such cases, the arbitral tribunals are faced with the question of deciding between two conflicting obligations: the obligation of the State to regulate IP in public interest on the one hand, and the State's obligation to protect and not interfere with the investor's investment. The next section will consider few cases to understand the nature of disputes and arguments in detail.

Conflict in Action

Philip Morris Asia v *Australia*[13] - Philip Morris Asia, a company based in Hong Kong, initiated investment arbitration proceedings in 2011 under the Hong-Kong-Australia BIT[14] challenging the Tobacco Plain Packaging Act (TPP) passed by the Federal Government of Australia. The Act was passed by the Australian Government in the interest of public health, aiming for the reduction in the practice of smoking amongst its population. By this Act, Tobacco should have 'plain packaging' which further requires:

a. All cigarettes are to be packaged in a prescribed colour or otherwise in drab dark brown packaging (Clause 19 (2) b(i));
b. Prohibits the use of trademarks and other marks on tobacco packaging (only the brand, business or company name, or any other variant name for the company product, can appear) (Clause 20(2));

c. permits the brand, business, company or variant name to be displayed only in certain standard styles and positioning on the packaging (Clause 21).

According to the Explanatory Memorandum, TPP "*prevents a trade mark from being placed on tobacco products or their retail packaging, so as to prevent trade marks from being used as design features to detract attention from health warnings, or otherwise to promote the use of tobacco products*".[15] Further, it required increase in the graphic health warning on the front face of the pack from 30% to 75%. The following image is an illustration of how a standard package after regulations would look like:

Philip Morris challenged the measure claiming breach of BIT as plain packaging would amount to:

a) Unlawful expropriation of its investments and valuable intellectual property without compensation (Article 6(1));
b) Failure to provide fair and equitable treatment to PMA's investments (Article 2(2));
c) Fails to provide full protection and security for PMA's investments in Australia (Article 2(2));
d) Breaches legitimate expectation that Australia will comply with its international treaty obligations under TRIPS, the Paris Convention for the Protection of Industrial Property and the WTO Agreement on Technical Barriers to Trade (TBT).

Philip Morris v *Uruguay*[17]- Likewise, Philip Morris also initiated investment arbitration proceedings against Uruguay under Switzerland-Uruguay BIT,[18] challenging two legislative measures passed by Uruguay to protect public health:

a) 'Single presentation requirement' on cigarette packaging.[19]
b) Increase in the graphic health warning on the cigarette package from 50% to 80% (the 80/80 requirement).[20]

(Prototype of plain cigarette packaging as mandated by The Tobacco Plain Packaging Act, 2011 (PA, 2011a), which came into force December 2012 in Australia.)[16]

Philip Morris based his case primarily on the same line of argument as used in *Philip Morris* v *Australia*; citing breach of FET standard *via* legitimate expectation by stating that Uruguay should have complied with its TRIPS obligations and unlawful expropriation of their investment including intellectual property and goodwill of the company.[21]

Eli Lilly v *Canada*[22] - Eli Lilly, a US Based Pharmaceutical Company, initiated arbitration under Chapter 11 of NAFTA[23], challenging the invalidation of pharmaceutical patent for its two drugs by Canadian Court. The patent was revoked under the 'promise doctrine' followed by the Canadian Court which requires the applicant to show with sufficient evidence the specific utility of the invention as claimed in the application (promise doctrine).[24] Eli Lilly failing under the promise doctrine argued that the strict patentability standards followed by the Canadian courts are in violation of Canada's international IP obligations under NAFTA, TRIPS and the Patent Cooperation Treaty (PCT). Failure to comply with such obligations, in turn, makes Canada breach NAFTA's investment chapter 11 as the same provides for the 'positive obligation' of Canada to ensure compliance with NAFTA and PCT. The line of argument adopted by Eli Lilly was same as that of earlier two Philip Morris cases, that is, breach of the FET clause by asserting violation of legitimate expectation in that Canada failed to comply with International IP norms. However, Eli Lilly was different from the earlier two cases in the respect that NAFTA had a specific clause which limits expropriation standard to be applied on certain IP protections as long these limits are consistent with international IP rules. That is why, Eli Lilly's main argument relies on the breach of Canada's obligations under international IP rules.

The claimant lost in all these three cases, with *Philip Morris* v *Australia* getting dismissed on lack of jurisdiction and others on merits, but what is more important to consider is the arguments forwarded in these cases. The arguments clearly show how IP has been dragged in the fight in Investor State Dispute Settlement Proceedings.

Arguments Forwarded by Both Sides

Before getting into the arguments forwarded by the investors and states, it is pertinent to consider in brief the interpretative gates through which International IP norms and International Human Rights gets access to what can be called a comparatively opaque system of 'Investment Arbitration'.

Gateway to the Investment Arbitration (Interpretation)

The Tribunal in *AAPL* v *Sri Lanka*[25] stated that:

"[an investment treaty] is *not a self-contained closed legal system* limited to provide for substantive material rules of direct applicability, but *it has to be envisaged within a wider juridical context* in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature"[26]

One of the ways of envisaging BIT within a wider juridical context is by resorting to Article 31(3)(c) and Article 32 of the Vienna Convention on the Law of Treaties (VCLT) and letting IP and human rights seep in the investment treaty regime. ILC while commenting on Article 31 of the VCLT observed that it is reflection of the principle of 'systemic integration' or 'a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law – in other words, international law *understood as a system*'. It further stated that 'although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relation to its normative environment – that is to say "other" international law'.[27]

Therefore, this line of argument not only supports the tribunal's exercise of referring to human rights standards or IP norms while interpreting the treaty but also justifies the inclusion of these norms when they form the normative environment of the dispute. On a cautious note, they must be relevant to the interpretation and should form subject matter of the dispute.[28]

Arguments

This section is divided into two parts; the conventional part where the investors using the principles of investment law have tried to invoke the host state's International IP obligations, and on the other hand, Host State have used international law principles and HR norms to retaliate the attacks of the investors and to justify its measure.

Investor's Argument (using BIT and International IP Norms)

The FET and Legitimate Expectation

The claimant in both the Philip Morris cases and Eli Lilly case, contended International IP Norms on the host state by way of FET. FET protection allows the claimant to have legitimate expectation from the host State. In this case, legitimate expectation from the host state to comply with the international IP norms and treaties. Therefore, the debate boils down to the question that whether international IP norms can act as a legitimate source of expectation? In other words, can an investor legitimately expect that the host state complies with its international IP obligations?

If yes, then, a foreign investor may institute investor-state arbitration if the host state fails to comply with International IP Rules as same would amount to frustration of his legitimate expectation and hence breach of FET protection. However, as Dr Henning Khan observes that it is difficult to give such broad interpretation to FET when there is no explicit reference to such treaty obligations in the IIA.[29] Therefore, an investor can expect host state compliance with international (IP) rules when these rules are (1) directly applicable as part of the domestic law; (2) sufficiently concrete to be applied by domestic institutions; and (3) give rise to individual rights of the investor.[30]

Umbrella Clauses

Another medium through which the investors tried to enforce IP norms is through the use of Umbrella Clauses. Umbrella Clauses, in general terms, are those provisions which imports the obligations of the host state from other legal sources into the international investment agreements, for instance, contractual obligations with the investor.

Again, the question remains whether the umbrella clause is wide enough as to include State's obligation towards international IP norms? Considering the decision of *Eureka* v *Poland*,[31] the answer seems to be in negative. It suggests that it covers only those kinds of obligations which have a *specific and direct* relationship with the investment of the investor.

Likewise, the principle underlying umbrella clauses, *pacta sunt servanda,* limits the operation of clause to the contractual obligations of the state towards the investor, that is, the contractual claims can be imported to IIA by way of umbrella clauses but not host states obligations under an international treaty where *pacta sunt servanda* rationale does not apply.[29]

Most Favoured Nation Clause or National Treatment

The MFN and National Treatment Clause forms one of the core principles in the field of investment law. They work under the principle of non-discrimination by advocating that similar treatment should be given to the foreign investor as that given to its national or foreign investor of any other nation. The question is whether MFN clause can be used to challenge the host state's compliance of international IP obligations; in other words, arguing that same protection as provided in international IP treaties must be provided to him as a more favourable treatment of his IP rights as investments?[29]

The same argument was contented by Philip Morris against Australia by invoking the MFN clause in the HK-AUS BIT. If the answer to the question is in affirmation, then it means that the investor can enforce host state's compliance with all the international IP obligations it has entered into with other States. But the MFN clause has been often subjected by the tribunals to the limitation of *esjusdem generis*, therefore, narrowing down the operation of MFN clause. Applying the same principle, the subject matter of an IIA seems to be different than that of an international IP treaty. While IIAs focuses on foreign investment, IP treaties are concerned with creative or inventive expressions of the human mind. Thus, it can be safely asserted that it is unlikely that these clauses will allow a foreign investor to rely or extend to themselves IP protection the host state is obliged to grant by virtue of an international IP treaty.

State's Arguments (Human Right Standards and Treaties)

The State justifies its regulatory measure, issued with the objective of securing public interest and human rights, through the principle of police power. Exercise of police power acts as defence for state against all the arguments put forward by the investors in the above section.

Police Powers

The concept of police powers is considered as one of the offshoots from the sovereignty principle of the state. Any act done within it is considered as immunity under customary international law. It came in issue and was discussed in detail in the case of *Philip Morris* v *Uruguay*,[32] where the tribunal observed that the challenged measure did not amount to expropriation and is a valid exercise of police power by State. The Tribunal stated that '*BIT does not prevent Uruguay, in the exercise of its sovereign powers, from regulating harmful products in order to protect public health after investments in the field have been admitted*'.[32]

The Tribunal resorted to Article 31(3)(c) of the VCLT while interpreting the treaty '*[a]ny relevant rules of international law applicable to the relations between the parties*', including '*customary international law'*. This made the Tribunal competent to refer to the rules of customary international law as they have evolved. And in accordance to the customary international law, protecting public health has since long been recognized as an essential manifestation of the State's police power, therefore, the said measure was said to be valid.

International Human Right Norms

It is evident with the above discussion that State can issue legislations or regulatory measures for the fulfillment of Human Rights norms like public health or protection of environment and yet be immune from the challenge of the investor. For instance, the Australian Government formulated TPP Act in consideration of his obligations under Article 5, 11 and 13 of World Health Organisation's Framework Convention on Tobacco Control (FCTC).[33]

Third Party Intervention

Third Party interventions, in the form of *amicus briefs*¸ are accepted by the tribunal from qualified and reputed agencies especially in cases involving questions of public interest. These amicus briefs assist the tribunal in ascertaining the 'normative environment' around the dispute as required by Article 31(3)(c) VCLT while interpreting IIAs.

Converse Approach

The above section was under the conventional approach where the investor used IP norms to protect its investment and faces defence from the human rights norms adopted by the state to further its cause. This is rather a converse approach where jurist's investors use human rights treaties to protect their IP investment and state use IP Principles to advocate human right objectives.

Instances of Human Rights treaties used by Investors:

Universal Declaration of Human Rights[34]

Article 17- Right to own Property

Article 27- Right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

International Covenant on Economic, Social and Cultural Rights[35]

Article 15- Protection of the moral and material interests resulting from any scientific, literary or artistic production.

Instances of IP treaties used by State:

TRIPS-

Article 7- The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8- Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Solution - IP as a Conciliator

The field of Investment Arbitration often faces allegations of being a pro-investor system ignoring the rights of the general populace. Authors have also gone to the extent of calling investment treaty law and arbitration under a "*legitimacy crisis*"[35] "*becoming 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 face of environmentally or socially destabilizing foreign investment?*"[35] The ignorance of human rights by few tribunals have led to remarks like international investment law becoming a "*corporate bill of rights*"[35] or a "*system of corporate rights without responsibility*"?[36]

However, it does not mean that the arbitrators start leaning towards human rights but to have a balanced approach while facing this conflict. For instance, it is required that the protection of legitimate expectations of the investor *must be balanced* against the legitimate right of the host state to regulate in the public interest.[37] On the brighter side, IP has the potential to conciliate this tussle by guiding the path towards balanced approach.

Teleological Approach

The same can be achieved by following one of the measures suggested by VS Vadi for the arbitrators, that is, to follow the *Teleological Interpretation.*[37] The Teleological approach guides the arbitrators in the quest of finding the *thelos*, that is, the goal or aim of a given norm. Therefore, it is highly unlikely for the tribunal to be deceived by the lacuna or ambiguities of an IIA if the objective of the agreement is clear to them. For instance, the objective of an IIA is protection of property in the form of investment. Vadi while trying to explore the objective of the same protection cites Roman law, which forms the foundation of the modern concept of property. According to Roman law, *dominium est jus utendi et abutendi re sua, quatenus juris ratio patitur* – the rights of a property owner is not absolute and have certain limitations. This same reasoning will lead the arbitrators to limit the protection to a permissible threshold in accordance to the ulterior objective of the IIA, thus, striking a balanced approach needed to deal with the conflict.

IP takes the role of a conciliator in the conflict when it becomes the subject matter of the conflict. It can be used *as a teleological medium* to attain a balanced approach in the dispute. For instance, while providing the IP norms under TRIPS, it also provides for the social function via Article 7 and Article 8. The WTO Panel in the *EC – Geographical Indications*[38] dispute observed: "*The TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.*"

In the same pattern, Professor Gervais and Greiger suggested two *equilibria* within IP: Extrinsic and Intrinsic. The intrinsic equilibrium is concerned with the structure of the IP norm whereas the extrinsic equilibrium is concerned with maintaining the between the IP rights and other rights provided by different legal regimes. While commenting balance on the same Professor Gervais said, '*one should not protect beyond what is necessary to achieve policy objective(s) because the risk of a substantial general welfare impact is too high*'.[39]

Conclusion

It is a common occurrence in the field of investment arbitration to have dispute involving

private economic interest on one side and public welfare on the other side. Intellectual Property has emerged as a new actor in this dispute, by becoming the subject matter of the dispute. For instance, IP became a central issue in the fight between tobacco company and state governments trying to regulate smoking in the interest of public health. The Governments were acting under its duty to protect the human right of its citizen- right to health and a clean environment, but the same involves regulation of trademark which is an IP Investment of the tobacco companies. Ultimately, tobacco companies initiating investment arbitration against the governments.

Such arbitration can be initiated successfully only when IP is considered as an investment in the IIAs, which as a matter of general trend is now included in the definition of investment in IIAs. Both the sides, State and Investor, use Investment Law, IP Treaties as well as HR treaties to advocate their own cause. However, the dispute has great implications attached to it, both in terms of economy and human rights. Therefore, a balanced teleological approach is to be taken so that the nature of conflict is changed to that of a cooperation leading towards the development of all.

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