Patent provisions and Health: The evolution of international investment agreements

New Generation of FTAS and their implications on health systems and policies

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Introduction: recent trends

- Intellectual Property Rights as an Investment
- Emerging trends in international investment law, as it relates to intellectual property
  - Realisation that IPRs are in fact an investment
  - Increasing number of disputes – and 'risk' to the ability of governments to protect health
  - Increased fragmentation / blurring of TRIPS and international investment agreements
  - Reactive negotiating/drafting

Ripple in still water…

- Recent IP-related claims
  - *FTR Holdings S.A. (Switzerland) et al. v Uruguay* (October 2010)
  - *Philip Morris Asia (HK) v Australia* (June 2011)
  - *Eli Lilly v Canada* (November 2012)

FTR Holdings S.A. (Switzerland) et al. v. Oriental Republic of Uruguay

- Measures
  - Prohibited brand variation; a company is only lawfully allowed to sell one product variety.
  - Enlarges mandatory warning labels from 50% to 80% of the front and back panels.
  - Requires inclusion of “shocking and sensational images designed to evoke emotions of repulsion and disgust, even horror” as part of the health warnings on packaging.
- Claims
  - Most notable claims: NT, expropriation and unreasonable or discriminatory
  - Now “virtually impossible for the companies to use their brands and trademarks to promote their own products or even distinguish them from other brands”
  - Most other countries consider a health warning of 50% of the packaging to be “more than sufficient to clearly communicate the well-known health effects of smoking”.

Philip Morris v Australia

- Measures
  - Plain packaging of tobacco products
- Claims
  - Constitutes unlawful expropriation of PMA's investments and intellectual property without compensation (Article 6.1);
  - Fails to provide for fair and equitable treatment to PMA's Australian investments (Article 2(2));
  - Unreasonably impairs PMA's investments in Australia (Article 2(2));
  - Fails to provide full protection and security for PMA's investments in Australia (Article 2(2)); and
  - Breaches Australia's international obligations in relation to PMA's investments (Article 2(2)) by violating the TRIPS Agreement, the Paris Convention for the Protection of Industrial Property and the WTO Agreement on Technical Barriers to Trade.

Eli Lilly v Canada

- Measures
  - Court invalidated several Eli Lilly patents
  - Complaint against Canada's strict patentability requirements applied since 2005 regarding 'utility' ('promise doctrine') and a 'new, non-statutory disclosure obligation'
- Claims
  - expropriation and FET – invalidations 'are contrary to Canada's international treaty obligations' (i.e. TRIPS, NAFTA and the Patent Cooperation Treaty)

Emerging Trends

- 1. Realisation that IPRs are an investment
- 2. Incorporating TRIPS into a clarification of (indirect) expropriation
- 3. More precisely defining the scope of the protection
- 4. Product specific exceptions

1. IPRs as an investment

- Germany-Pakistan BIT (1959), Art 8(1)(a)

  'The term "investment" shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge.'