Defining Intellectual Property Rights as an ‘Investment’ in International Investment Law: A Case for Economic Development

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Abstract

IP and FDI are lauded as cornerstones of economic development. The respective international legal regimes, international investment law and international IP law, are structured to reflect this position. However, the relationship between IP, FDI and economic development is not clear cut. Although, both IP and FDI can contribute to economic development, the actual effect is dependent on a multitude of factors. This investigation focuses on one particular aspect of this complex relationship.

International investment agreements (IIAs) offer foreign investors the chance to challenge acts of the host state which they deem affected their investment, in front of an international investment tribunal (investment arbitration). In order to qualify for an investment arbitration, the foreign investor must hold a covered ‘investment’. IP is commonly defined as an investment in IIAs. However, a pure textual definition of something as an ‘investment’ does not guarantee that it will also be regarded as an ‘investment’. Tribunals will often delve into deeper legal analyses in order to make this determination. In some such instances, the contribution of the ‘investment’ to the economic development of the host state will be assessed as a factor.

IPRs are primarily exclusionary rights and the way a right holder uses them can differ. They can be used just to exclude competition, but also in more proactive ways to secure trade and importation of the IP-containing products or build complex business operations centered around the IP. Although all of these uses are generally permissible under IP rules, the question arises whether all of the uses warrant international investment law protection. Moreover, what would be the relationship of a particular IPR and its use with the contribution to the economic development of the host state? Attempting to answer these questions, the analysis will primarily focus on two recent cases that have dealt with the stated issues in considerable detail, *Philip Morris v. Uruguay* and *Bridgestone v. Panama*.