

Chapter 5

Enforcing a State's International IP Obligations through Investment Law Standards of Protection – An Ill-Fated Romance

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What international investment law standards protect IP? Should States be held liable for breach of BIT protections? Our first author argues for a narrow application of treaty standards, such as “Fair and Equitable Treatment” and “Full protection and security.”¹

Prologue

Despite the efforts of the world's most developed countries to internationalize “IP rights,” many national governments have resisted this trend. This is because each national government has struck a different balance between competing public interests. Some governments seek to encourage greater innovation through the granting of strong IP rights (such as exclusivity in creation, use, or distribution). Other governments wish to make it easier for society and the market to benefit freely from innovation, without the barriers created by strong IP rights to unobstructed creation, reproduction, or use. Because different countries desire different outcomes in balancing these competing public interests, IP protections vary deeply between different nations, which has made it difficult to define (let alone enforce) *international* IP obligations.

International IP conventions have attempted to establish international IP norms and obligations accepted by a plurality (if not majority) of

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¹ The authors have agreed to limit our inquiry to the enforcement of *international IP rights* as set forth in international conventions on IP rights, and do not discuss whether an outright failure of a host State to enforce its own *municipal law* may constitute a breach of the typical FET or FPS standard—which the authors agree may, at least in theory, constitute a breach of the relevant treaty provision.

States.² These conventions are plentiful in number, such as the Agreement on Trade-Related Aspects of Intellectual Property (the “TRIPS Agreement”), the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), Patent Cooperation Treaty (PCT), regional IP treaties, and chapters of free-trade agreements such as the NAFTA. Despite their number and some commonalities between them, the obligations found in international IP conventions may not be immediately binding on signatory states, and in most instances, each State may—as a matter of domestic law—decide on the manner and degree to which it wishes incorporate international IP obligations into its own law.³ And because of the difficulty of determining the scope and enforceability of international IP obligations in specific cases, aggrieved foreign investors seeking to enforce a State’s apparent obligations under international IP conventions usually must look outside of the dispute resolution provisions of such treaties, which are typically limited to settlement among States (and not between private parties and States).⁴

It appears that many foreign investors are increasingly turning to investor-State arbitration as a means to enforce international IP obligations. Indeed, most international investment treaties⁵ expressly protect intellectual property (IP) rights,⁶ and their dispute resolution provisions allow private investors to seek redress against States for breaches of a treaty—a dispute resolution mechanism wholly different and more far-reaching than dispute provisions in international IP conventions.

Despite this recent trend, as next discussed, there are strong arguments that caution against widespread use of investor-State arbitration by private parties to enforce international IP obligations against States.

Part I of this paper reviews the existing sources of international IP obligations, to determine the extent to which international IP rights and obligations may be protected by a particular investment treaty—and the

² This article does not discuss international IP agreements not yet in force, such as the Anti-Counterfeiting Trade Agreement (ACTA), a plurilateral currently ratified only by Japan.

³ See Official Website of the World Trade Organization (WTO), “Overview: the TRIPS Agreement” (“Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.”), available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (accessed 9 April 2017).

⁴ See Roger Kampf, “TRIPS and FTAs: A World of Preferential or Detrimental Relations?,” in C Heath and AK Sanders *Intellectual Property & Free Trade Agreements*, Chapter 4 (Oxford 2007), at 123.

⁵ Primarily in the form of bilateral investment treaties (BITs), multilateral investment treaties (MITs) and free-trade agreements (FTAs).

⁶ See H Grosse Ruse-Khan, “Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation” Paper No. 52/2014, University of Cambridge Legal Studies Research Paper Series (September 2014); see also Kampf, *op. cit.*, at 121-23.

extent to which an investment treaty may (or may not) be an appropriate mechanism to bring such claims.

Part II of this paper discusses, as a threshold matter, whether (and by what means) private parties are able to bring claims in investment treaty arbitration to enforce international IP obligations.

Part III of this paper peels back the next layer of the analysis: assuming that a party's claim for breach of an international IP obligation may be brought in investment arbitration, whether and under what circumstances does an omission by a host State to enforce international IP obligations rise to the level of a breach of a typical FET or FPS standard.

At the heart of this analysis are vital questions which speak to the very fabric of the investment treaty system, including the appropriateness of applying existing standards of investment protection to international IP rights and obligations, and the scope of those standards of protection in the first place. By way of example, in considering the application of a FET standard to international IP rights, the type of behavior that must be manifested by a host State in violating international IP obligations must be so "*arbitrary, grossly unfair, unjust or idiosyncratic*" or "*offen[sive to] judicial propriety*"⁷ to amount to an investment treaty breach—a high bar where IP rights are (as next discussed) already inherently subject to limitations, changes, and regulation. Thus, as discussed further in this paper, traditional investment treaty standards of protection are ill-fitting vehicles to enforce international IP rights that are better left to existing state-to-state dispute resolutions mechanisms.

To further illustrate these points, this paper explores the fact patterns of recent cases and hypotheticals, including the recent *Eli Lilly v. Canada* case and the *Phillip Morris* cases. In general, efforts by claimants to enforce international IP norms in investment arbitration have largely been unsuccessful. This paper argues that this lack of success foreshadows a future trend, because investment treaties serve as a poor basis to integrate international IP rights that are ephemeral, lack uniformity, and are territorial in nature.

I. WHAT ARE THE SOURCES OF INTERNATIONAL IP OBLIGATIONS?

As a threshold matter, any attempt by a foreign investor to enforce international IP obligations in investor-State arbitration must have a basis in the investment treaty itself. But first, in order to discern whether there is any overlap in the rights protected by a particular investment treaty and international IP rights, one ought to have a sense of what those international IP obligations are.

⁷ See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("*Waste Management II*") at para. 98.

While an exhaustive discussion of international IP norms and obligations is outside the scope of this paper, in general, most legal systems of the world recognize three primary types of IP rights granted by the State: patent, copyright, and trademark.⁸

- Patent – a right granted to an inventor by a State to *exclude others* from making, using, selling, offering, or importing a patented invention for a limited period of time, in exchange for a detailed public disclosure of an invention;
- Copyright – a right granted by the State to the creator of an original literary or artistic work by a State to exclude others from using or distributing the original work without the creator’s consent, for a limited period time;
- Trademark – a right granted by a State to protect the use of a distinctive mark in commerce against subsequent users from employing the same or similar work where there is a likelihood of confusion between marks.

In addition, the municipal law of countries (and to a lesser extent, international law) may recognize trade secret protections⁹ and other types of specialized protection including protection for mask works (semiconductor chip layouts), databases, and designs. In addition, a State’s domestic laws may contain economic regulations such as unfair competition law which apply to IP rights.

For these IP rights granted by the State,¹⁰ an IP holder historically has needed to rely on the domestic law of each State to define the contours and scope of their rights internationally. Because of the inherent difficulty and significant costs associated with this, international IP treaties such as the TRIPS Agreement,¹¹ Berne Convention,¹² and PCT, among many others, sought to harmonize IP rights and provide minimum standards below which treaty signatories should not fall in conferring and protecting IP

⁸ See Robert P Merges, Peter S Menell, Mark A Lemley, *Intellectual Property in the New Technological Age*, 6th Edition (2012) at 11.

⁹ Trade secret protections pertain to secret or confidential devices, techniques, or knowledge held by an enterprise and protect through contracts, including non-disclosure agreements.

¹⁰ Trade secret and other areas of IP law regulated by contracts are not included in this set of IP rights.

¹¹ For a summary of the substantive standards of IP protection afforded by TRIPS agreement, see “Overview: the TRIPS Agreement,” WTO official website: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm. (accessed 6 April 2017).

¹² For a summary of the basic principles and minimum protections of the Berne Convention, see “Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)”, WIPO official website: http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (accessed 6 April 2017).

rights.¹³ Despite this, there remain wildly divergent definitions and implementations of IP rights and protections—making enforcement of an “international standard” exceedingly difficult. The most basic “international” IP rights and obligations are summarized below.

International Patent Rights and Obligations: A main contribution of the TRIPS Agreement, PCT, and Paris Convention was to streamline the patent application process and seek harmonization of priority rules (*i.e.*, the rules that dictate who receives a patent right, where there are multiple applications). Nevertheless, these treaties are not expansive in their granting of substantive IP rights—rather they are quite minimal in the substantive protections granted when compared to the scope of IP rights under a State’s municipal law.

By way of example, all countries now use a “first to file” patent system where the first inventor to file a patent application in a given territory receives the IP right, regardless of who was the “first to invent.” The United States was the last to have a “first to invent” rule, having amended its law in 2013, and still allows a grace period where an inventor may receive patent protection so long as she publicly disclosed the invention within one year (with certain exceptions).

In addition, international treaties set and preserve patent priority rules across borders. The Paris Convention, Article 4,¹⁴ defines a common priority date so that one may file an application in one member State and have the benefit of that same filing date when filing later in another member State. This prevents interlopers from claiming that IP rights issued in one State as their own in another State, before the legitimate owner has time to file. Likewise the PCT allows an inventor up to 30 months after initial filing of a patent to begin the in-depth prosecution of the application in other countries.

The TRIPS Agreement, which binds members of the World Trade Organization (WTO), also requires member States to:

- include most commercially important fields within the category of patentable subject matter, including pharmaceutical patents (exceptions that a State may impose may include inventions to public morality; diagnostic, therapeutic and surgical methods for the treatment of humans or animals; or plants/animals other than non-biological or microbiological processes);
- stipulate that national patent laws should require an “inventive step” or “nonobviousness,” as well as “industrial application”;

¹³ See Merges et al, *op. cit.*, at 394.

¹⁴ Article 4 of the Paris Convention provides “Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority in the periods hereinafter fixed...”

- stipulate that national patent laws protect the right to control imports of the patented product;
- eliminate or curtail the practice of granting compulsory licenses for patented technology.

Despite these attempts at harmonization of patent law across jurisdictions, there is significant resistance to harmonization of patent rights in the developing world, based on (among other things) the fear that an international IP treaty could have a devastating impact on access to essential medicines, diagnostics, and vaccines. For instance, in a 2006 World Health Organization bulletin discusses objections to the patent applications in India for AIDS drugs.¹⁵ Reluctance to harmonize patent law may also be rooted in the differing historical and cultural backgrounds of varying jurisdictions—for example, one author cites the belief in Chinese and Asian culture that inventions belong to the community and should be freely shared.¹⁶

International Copyright Rights and Obligations: Unlike the uneven adherence to international patent law norms, adherence to international copyright norms has tended to be more uniform under the Berne Convention, which now has 172 parties, including China and Russia.¹⁷ These international copyright norms include limiting the formalities a State may impose before receiving copyright protection, or preserving the exclusive rights of reproduction or public performance for creators. The TRIPS agreement, in particular, sets forth a minimum standard that computer programs and databases/data compilations be protected under copyright law (even if the underlying data is not protected). However, the degree to which a State protects against infringement (*i.e.*, piracy) or enforces such laws varies widely depending on the jurisdiction.

International Trademark Rights and Obligations: The Paris Convention and TRIPS Agreement provide minimal protection to trademarks (*i.e.*, requiring that a mark be eligible for protection if it is “visually perceptible,” setting forth a minimum number of years for duration, prohibiting unjustifiable encumbrances, etc.), and do not regulate the specific conditions for the filing and registration of marks. On the contrary, these conditions are determined by each Contracting State under its domestic law.¹⁸ The

¹⁵ See William New “Rich and poor countries divided on patent treaty,” in *Bulletin of the World Health Organization*, Vol. 84, No. 5 (May 2006); available at <http://www.who.int/bulletin/volumes/84/5/news20506/en/> (accessed 7 April 2017).

¹⁶ See Dongwook Chun, “Patent Law Harmonization In the Age of Globalization: The Necessity And Strategy For A Pragmatic Outcome,” *Cornell Law School Intern-University Graduate Student Conference Papers*, Paper 45 (2011), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1074&context=lps_clacp (accessed 7 April 2017).

¹⁷ See Merges et al, *op. cit.*, at 742.

¹⁸ See WIPO official website: “Summary of the Paris Convention for the Protection of Industrial Property (1883)”, available at <http://www.wipo.int/treaties/en/ip/paris/>

TRIPS Agreement also offers limited rights to the owner of a registered trademark, which allows the right holder to prevent a third party from using the same mark in the course of trade.¹⁹ Another agreement, the Madrid Trademark Agreement (MTA) and the associated Madrid Protocol, covers trademark law but does not protect any trademark rights itself.²⁰ Rather, the MTA and its protocol simply facilitate trademark prosecution in member States.

Other sources of international IP rights and obligations: In addition to these multilateral IP treaties, there are numerous regional treaties and free trade agreements that have been cited in investment awards for their protection of IP rights or imposition of obligations, including the MERCOSUR Protocol, the NAFTA, the Montevideo Treaty, and others. These treaties typically pertain to the three primary areas of IP rights granted by states discussed above, though other protections may also be covered.

II. WHAT STRATEGIES MIGHT AN INVESTOR EMPLOY IN BRINGING INTERNATIONAL IP OBLIGATIONS UNDER THE REMIT OF AN INVESTMENT TREATY, AND WHAT IS THE LIKELIHOOD OF SUCCESS?

The investment treaty is the relevant enforcement instrument and the starting point for any analysis of how the above-mentioned international IP rights may be enforced in investor-State arbitration. A claimant in investor-State arbitration seeking redress for a violation of an international IP obligation would need to look to the specific rights protected by the investment treaty and establish that the relevant international IP obligation falls within the remit of the State's obligations under that investment treaty. The claimant may need to establish (for instance) that a treaty contains a broad "umbrella clause" whose wide scope would appear to embrace a State's international IP obligations, or (even more difficult) that the international IP obligations is part of customary international law. A potential claimant may also look to how these international IP obligations or norms have (or have not) been incorporated into the host State's municipal law—which may be relevant to the claimant's legitimate expectations. As further discussed below, these prerequisites are extremely hard to establish in the context of international IP obligations, precisely because IP rights vary widely in different territories and lack enforcement mechanisms in many States.

summary_paris.html. *See also*, Paris Convention, Article 6(1) ("the conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation"); *accord Philip Morris SÀRL et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award 8 July 2016 ("*Philip Morris*"), at para. 259.

¹⁹ TRIPS Agreement, Article 16(1).

²⁰ *See Merges et al, op. cit.*, at 985.

A. *Jurisdiction and IP Rights*

The definition of “investment” in a given investment treaty are critical in determining whether IP rights fall within the jurisdiction *ratione materiae* of a tribunal constituted under that treaty.

By way of example, the U.S.-Ecuador BIT explicitly covers IP rights within the meaning of “investment”: “*intellectual property which includes, inter alia, right relating to: literary and artistic works, including sound recordings; inventions in all fields of human endeavor; industrial designs; semiconductor mask works; trade secrets, know-how, and confidential business information; and trademarks, service marks, and trade names...*” If IP rights are explicitly mentioned in the definition, it is beyond doubt that IP rights are covered “investments” within the meaning of a treaty, but for more general definitions of “investment,” an investor will need to demonstrate that IP rights fall within the remit of the treaty’s protection.

Another threshold question in evaluating whether a certain intangible asset is a covered investment is whether the investment was “*made within the territory*” of the relevant contracting party. Territoriality is more difficult to establish for intangible, digital assets such as websites with only a tangential relationship to the host State—but this should be a minimal barrier *if* a claimant has a physical presence in the host State.

Once jurisdiction is established, an investor’s claims might be brought within the remit of an investment treaty, *inter alia*,²¹ under the following theories:

- i. invoking international IP obligations as “obligations that the host State has entered into with regard to investments” under an umbrella clause;
- ii. a claim of a breach of the “legitimate expectations” standard (*e.g.*, as part of an FET claim), stipulating that a host State must comply with international IP norms;
- iii. a claim of a host State’s breach of the “full protection and security” provisions of an investment treaty, alleging that the host State has failed to enforce its own laws protecting a covered IP investment—some of which incorporate international IP obligations. This may also include claims that the host State failed to protect the IP right against third-parties, including, *e.g.*, malicious hackers.

Each of these possibilities is discussed below—and as next discussed, none serve as particularly strong vehicles for potential claimants to claim treaty breaches, due to the limited overlap between international IP rights and investment treaty standards of protection.

²¹ This paper does not purport to examine *all* relevant treaty claims.

1. *IP Norms Imported Through Umbrella Clauses*

An “umbrella clause” is a provision in an investment protection treaty that obliges the host State to observe specific undertakings towards its foreign investors, potentially bringing contractual commitments and other treaties under the investment treaty’s “protective umbrella.”²² Through an umbrella clause, a claimant may argue that the international IP right is protected as a matter of customary international law, or is otherwise an “*applicable rule of international law*” binding on a State under the umbrella clause of an investment treaty.

Tribunals, as a matter of proper treaty interpretation, should look to the specific language of umbrella clauses to define the scope of their remit. These have varied significantly:

- Article 8(2) of the German Model BIT (1991) provides an example of an expansive umbrella clause: “*Each Contracting Party shall observe **any obligation it has assumed with regard to investments** in its territory by nationals or companies of the other Contracting Party.*” (emphasis added)
- On the other hand, the Denmark-China BIT (1985) provides that “*...each Contracting Party shall observe any obligation it may have entered into with regard to **approved investment contracts** of nationals or companies of the other Contracting Party.*” (emphasis added)

The prevalence of “umbrella clauses” in new investment treaties is sharply declining,²³ and where umbrella clauses do appear, their scope may be explicitly limited to “contracts” as opposed to other treaty provisions such as an international IP treaty. Under principles of treaty interpretation, tribunals are obliged to construe umbrella clauses narrowly based on the express language found in the particular treaty. Nevertheless, umbrella clauses *may* allow for international IP obligations on the host State to be applicable in investment arbitration under certain circumstances.

2. *IP Norms Directly Applicable as a Matter of Municipal Law, or Incorporated Through Implementing Statutes*

Claimants may assert various international treaty obligations (such as those found in international IP conventions) in investment treaty arbitration, and argue that such obligations are binding on States as a matter of municipal law. Tribunals often evaluate these obligations as “hypotheticals,” without affirmatively establishing that the international IP obligations are

²² See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2d ed. (Oxford 2012), at 166.

²³ See Lise Johnson and Lisa Sachs, *International Investment Agreements, 2011-2012: A Review of Trends and New Approaches*, at 9.

binding on the host State as a matter of municipal law. Unbeknownst to tribunals wishing to deal with all issues in dispute, such *dicta* unhelpfully skips a vital step in the analysis.

For instance, in *Philip Morris v. Uruguay*, a tribunal evaluating claims under the Switzerland-Uruguay BIT analyzed the investor's claim that the TRIPS Agreement protected the investor's "right to use" his trademark—despite the tribunal observing in a footnote that "*Switzerland is not a part of [the TRIPS Agreement], which makes its applicability to the present dispute questionable.*"²⁴ The investor in that case also liberally alleged violations of other international IP conventions, including *inter alia* the MERCOSUR Protocol²⁵ and the Montevideo Treaty.²⁶ Unsurprisingly, Uruguay argued that the MERCOSUR Protocol and Montevideo Treaty applied only between the State Parties that had ratified it—Uruguay and Paraguay in the case of the MERCOSUR Protocol; and Uruguay, Argentina, Bolivia, Paraguay, and Peru in the case of the Montevideo Treaty. These issues were ultimately resolved on other grounds besides whether the MERCOSUR Protocol or Montevideo Treaty were incorporated into Uruguayan law.²⁷ Nevertheless, the *Philip Morris* tribunal's unfortunate willingness to assume the applicability of international IP obligations in order to make a finding on the merits could set a dangerous pattern for future tribunals seeking to expand the scope of a State's obligations under investment treaties.

Naturally, where there is a clear implementing statute which delineates the scope of the international IP obligation in a host State's domestic law, or where a host State's law provides that international IP treaty obligations are directly applicable and binding as a matter of municipal law,²⁸ this threshold issue then turns to the scope of the IP obligation itself. But too often, tribunals skip over these threshold questions—even when the answer is less than clear—in their eagerness to address the merits of a dispute. They should not.

III. UNDER WHAT CIRCUMSTANCES MIGHT A HOST STATE'S FAILURE TO ENFORCE INTERNATIONAL IP OBLIGATIONS RISE TO THE LEVEL OF AN FET OR FPS?

Now, assuming that a tribunal finds that an international IP obligation (1) is applicable because it has been incorporated into a host State's municipal law; or (2) falls within the remit of the investment treaty by means of an umbrella clause (or less likely, as "treatment more favorable"), under what

²⁴ See *Philip Morris* at para. 262 n. 334.

²⁵ *Id.* at para. 206. Uruguay argued that the MERCOSUR protocol applied only between the State Parties that had ratified it—Uruguay and Paraguay. *Id.* at para. 233.

²⁶ *Id.* at para. 207.

²⁷ See *id.* at paras. 264-266.

²⁸ See generally Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997), at 63-71.

circumstance might a host State's actions in breach of an international IP obligation also breach the relevant standards of protection found in a given investment treaty?

A. Fair and Equitable Treatment Claims Based on a Breach of International IP Obligations

An exhaustive discussion of the customary international law minimum standard of treatment, and the history of the "fair and equitable treatment" standard, is outside the scope of this paper. In summary, however, the FET and minimum standard of treatment provisions in investment treaties do not create new, autonomous standards of protection divorced from customary international law. Rather, these obligations are based on and incorporate the minimum standard of treatment of aliens under customary international law.

Despite this, the incremental expansion of the scope of the FET standard by some investment tribunals represents a trend which undermines State sovereignty by limiting a State's legitimate exercise of sovereign power in its legislative, executive, and even judicial processes.²⁹ This expansion adds to the growing sentiment that investor-State arbitration favors the investor over a sovereign State's legitimate policy choices to prioritize public health, environmental standards, or a more expansive regulatory state.³⁰ Indeed, a growing number of States have withdrawn from their bilateral and multilateral investment treaties, including from the ICSID Convention, based on these sentiments.³¹

The United States, among other nations, has taken pains to clarify that the FET standard is a reference to the minimum standard of treatment.

²⁹ See, e.g., Lise Johnson & Lisa Sachs, *The TPP's Investment Chapter: Entrenching, Rather Than Reforming, a Flawed System*, Chapter 4 (Columbia Center on Sustainable Investment November 2015) ("The FET obligation has morphed over roughly the last 15 years from a relatively unknown and unused protection into the most common standard on which investors initiate and succeed on challenges to conduct by all branches (executive, legislative, and judicial) and levels (local, state, and federal) of government. . . . Many of the concerns about how investment treaty protections and ISDS favor foreign investors' rights and expectations over broader public interest aims are based on the increasing use of the FET standard.").

³⁰ See, e.g., Cecilia Olivet & Pia Eberhardt, *The Industry of Investment Arbitration: The Lucrative Business of Injustice* (September 6, 2013).

³¹ See Matthew C. Porterfield, "Aron Broches and the Withdrawal of Unilateral Offers of Consent to Investor-State Arbitration," *Investment Treaty News* (11 August 2014), (citing withdrawal of Ecuador, Venezuela, and Bolivia), available at <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/Porterfield-Withdrawal-of-Unilateral-Consent-2014.pdf>, (accessed 7 April 2017); see also Nicolas Boeglin "ICSID and Latin America: Criticism, Withdrawals, and Regional Alternatives," June 2013, available at <http://www.bilaterals.org/?icsid-and-latin-america-criticisms>, (accessed 7 April 2017).

Both Professor Kenneth Vandeveld and Professor Jose Alvarez, two of the foremost authorities responsible for the United States' bilateral investment treaty (BIT) program, agree that a primary interest of the United States in concluding BITs was to "reaffirm the United States' understanding of traditional international law on foreign investment,"³² and "to re-affirm, not derogate from, relevant customary law."³³ Indeed, the parties to the NAFTA explicitly clarified in 2001 that "the concept of 'fair and equitable treatment' [...] do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment."³⁴

Having clarified that the FET standard is equivalent to the minimum standard of treatment of aliens under customary international law, it is now necessary to define this standard. As the Tribunal in *International Thunderbird* observed, the content of the minimum standard of treatment "should reflect evolving international customary law." *International Thunderbird* concluded that this threshold for violating the international minimum standard of treatment required a "gross denial of justice or manifest arbitrariness falling below acceptable international standards."³⁵

Similarly, the tribunal in *Waste Management v. Mexico (II)* held that a breach of the minimum standard of treatment occurs when a host State's "conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as may be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process."³⁶

Some scholars and tribunals also accept that the minimum standard of treatment encompasses a host State obligation to not frustrate the legitimate, investment-backed expectations that the investor had when making the investment, based on "the good faith principle established by international law."³⁷ It is not universally accepted that a mere failure of the host State to fulfill an investor's "legitimate expectations" breaches the minimum standard of treatment.³⁸ Assuming that the legitimate expectations test applies, this prohibition against a host State's frustration of an investor's legitimate expectations, however, (1) cannot exceed certain "well defined

³² Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 212 (1988).

³³ Jose E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 40 (2009) (emphasis added).

³⁴ FTC's July 31, 2001 interpretation of NAFTA Chapter 11, 6 ICSID Rep 567, 568.

³⁵ See *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, 26 January 2006, at para. 194.

³⁶ See *Waste Management II* at para. 98.

³⁷ See, e.g., *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, at para. 154.

³⁸ See, e.g., *Eli Lilly v. Canada*, UNCITRAL Case No. UNCT/14/2, Final Award, 17 March 2017, para. 300 ("Eli Lilly").

limits,"³⁹ (2) must be based on an "objective" standard and not on an investor's individual expectations,⁴⁰ (3) rely on specific representations by the host State in inducing the investment,⁴¹ (4) exist at the time the investor made the investment,⁴² and (5) be reasonable in the circumstances based on the specific conditions prevailing in the host State.⁴³

In the context of the protection of IP rights, a Tribunal may look to whether a claimant has a "legitimate expectation" that the host State would enforce its international IP obligations. Here, it is relevant to consider the specific representations made by the host State reasonably relied on by the claimant.⁴⁴ Where a host State has not accepted purported international IP norms in its own municipal law (with corresponding mechanisms of enforcement) it is *exceedingly unlikely* that an investor has a legitimate, investment-backed expectation that the host State would abide and/or enforce such international IP norms domestically—one of the hallmarks of the "legitimate expectations" standard.

If the host State has implemented international IP obligations into its municipal law, it is not enough that the claimant demonstrates that the host State has breached either domestic law or the other international IP treaty at issue—rather, as the tribunal in *CME v. Czech Republic* observed, international responsibility will be engaged under an obligation of "fair and equitable treatment" *only* where the host State has conducted itself in a manner which "[eviscerates] the arrangements in reliance upon which the foreign investor was induced to invest."⁴⁵ Moreover, the foundation of any "legitimate, investment-backed expectation" of regulatory stability is even harder to establish in the IP field, where domestic IP rights are subject to explicit exceptions, apply for a finite period of time, and may be legitimately reevaluated.

The two case studies that follow demonstrate the high bar that claimants in investor-State arbitration face in asserting that a host State has breached an FET provision in an investment treaty based on legitimate policy decisions or a change in jurisprudence.

³⁹ See *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 128.

⁴⁰ See, e.g., *Eli Lilly*, at para. 301.

⁴¹ See, e.g., *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4. Decision on Liability and on Principles of Quantum, 22 May 2012, at para. 152.

⁴² See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, at paras. 190-191.

⁴³ See, e.g., *Duke Energy Electroquil Partners & Electroquil S.A., v. Republic of Ecuador*, ICSID Case No. ARB/04/19 at para. 340.

⁴⁴ See *Waste Management II*, at para. 98; see also *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 Award 14 July 2006 ("*Azurix Corp.*"), at para. 350.

⁴⁵ See *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award September 13, 2001, at para. 611.

1. *FET Claims and International IP Obligations - Philip Morris and Uruguay's Cigarette Regulations*

In *Philip Morris v. Uruguay*,⁴⁶ Philip Morris brought claims under the Switzerland-Uruguay BIT, alleging that two of Uruguay's health regulations violated the BIT in its treatment of trademarks associated with cigarette brands in which Philip Morris had invested.⁴⁷ The first regulation was a single presentation requirement, which precluded tobacco companies from marketing more than one variant of cigarette per brand family. The second regulation provided for the increase in size of the graphic health warning required to be displayed on cigarette packages.

As part of its claims, Philip Morris relied on both Uruguayan trademark law and on international IP conventions. It claimed, *inter alia*, that the two regulations breached the FET provision of the BIT because the regulations violated the prohibition against arbitrariness and frustrated Philip Morris' legitimate expectations. The tribunal disagreed, and held that "*the Claimants had no legitimate expectations that such or similar measures would not be adopted.*" Furthermore, the Tribunal concluded that the effect of the two regulations "*had not been such as to modify the stability of the Uruguayan legal framework.*"

In reaching its conclusion, the Tribunal specifically distinguished the ephemeral trademark rights under Uruguay's law from "*an authorization or a contract*" where the host State would *guarantee* that a change in legal framework would not affect the trademark rights:

"Unlike the case of an authorization or a contract, where the host State may undertake some specific obligations, Uruguay entered into no commitment "with respect to the investment" by granting a trademark. It did not actively agree to be bound by any obligation or course of conduct; it simply allowed the investor to access the same domestic IP system available to anyone eligible to register a trademark. While the trademark is particular to the investment, it stretches the word to call it a "commitment."

In addition, the scope of any such commitment remains uncertain. As compared to a contract, where the host State enters into specific, quantifiable obligations in relation to an investment, a trademark is not a promise by the host State to perform an obligation. It is simply a part of its general intellectual property law framework. A trademark gives rise to rights, but their extent, being subject to the applicable law, is liable to changes which may not be excluded

⁴⁶ See *Philip Morris*.

⁴⁷ *Id.* at para. 9.

by an umbrella clause: if investors want stabilization they have to contract for it."⁴⁸

Accordingly, as the Tribunal in *Philip Morris* explained, any legitimate expectation of IP protection in a particular host State is subject to the host State's general intellectual property law framework, which is "liable to changes."

2. *Canada's Change in "Promise Utility Doctrine" of Patentability Did Not Amount to a Breach of NAFTA's Minimum Standard of Treatment*

In *Eli Lilly v. Canada*, Eli Lilly claimed that Canada's invalidation of two of Eli Lilly's patents (Zyprexa and Strattera) under Canada's "Promise Utility Doctrine" violated NAFTA's minimum standard of treatment under NAFTA Article 1105.⁴⁹

In patent law, only "useful" inventions are protected, and an inventor must disclose the potential uses of her invention when applying for a patent under a State's domestic law. Eli Lilly argued that Canada used to apply the "traditional utility test" for which a "mere scintilla" of utility sufficed, but then, Canadian jurisprudence began to apply the "promise utility doctrine" starting in 2003,⁵⁰ in what Eli Lilly called a "drastic change" to the law years after Eli Lilly had obtained patents for Zyprexa and Strattera. Eli Lilly argued that the "promise utility doctrine" imposed a higher utility standard in which a patent risks invalidation if a patentee "inadvertently over-promised what the invention could do" years prior.⁵¹ Among other arguments, Eli Lilly argued that the recent development in Canadian law represented "a stark divergence" from the state of the utility doctrine in other NAFTA Parties, where U.S. courts had invalidated only one patent application (out of 239 examined) based on a lack of utility in the United States, and no Mexican patents were invalidated under its utility standard. Eli Lilly also pointed to the U.S. Trade Representative's "serious concerns" regarding Canada's patent utility standards since 2013, and the "broad global consensus" on the meaning of utility.⁵²

Regarding the legitimate expectations test, Eli Lilly argued that it had the legitimate expectation that Canada would not retroactively apply the

⁴⁸ *Id.* at paras. 480-481.

⁴⁹ See *Eli Lilly* at para. 5. Conversely, Canada argued that the sole legal basis in which a national court decision could result in a breach of NAFTA Chapter 11 is a denial of justice, which the Claimant had not alleged. Canada also argued, *inter alia*, that there had been no dramatic change in Canadian court's interpretation of the requirement that an invention must be "useful"; and that Chapter 17 allegations were beyond the mandate of the Tribunal.

⁵⁰ See *id.* at para. 227 to 240.

⁵¹ *Id.* at para. 237.

⁵² *Id.* at paras 259-60.

“promise utility doctrine” under, *inter alia*, Canada’s “international commitments under NAFTA and the [Patent Cooperation Treaty (PCT), concluded in 1970].” According to Eli Lilly, its legitimate expectations were reinforced by NAFTA Chapter 17, which Eli Lilly argued imposed an affirmative obligation on Canada not to develop and retroactively apply the doctrine. Furthermore, Eli Lilly asserted that its patent applications were valid under the PCT, because the PCT “(i) does not require evidence of the utility of an invention to be disclosed, and (ii) prohibits member countries from imposing additional or different form and content requirements.”⁵³

Despite Eli Lilly’s reliance on Canada’s international IP obligations under *inter alia* the NAFTA and PCT, the tribunal rejected Eli Lilly’s claims because “there was no fundamental or dramatic change in Canadian patent law” sufficient to find a breach of the minimum standard of treatment.⁵⁴ First, the Tribunal declined to opine on the “contentious legal question of whether a violation of an investor’s legitimate expectations” could possibly breach NAFTA 1105’s minimum standard of treatment—and explained that it need not delve into the issue because, assuming the legitimate expectations test applied, Canada did not breach its obligations because the change in law was not “a dramatic change from previously well-established law.”⁵⁵ The “role of the Tribunal,” it explained, was not to “dismiss the [Canadian court decision] on the basis that it is ‘unpersuasive.’”⁵⁶

A main lesson from the *Eli Lilly* and *Philip Morris* awards is that there is an exceedingly high bar to recovery based on a FET claim rooted in international IP rights and obligations. It is possible that many tribunals applying the international minimum standard of treatment may decline to apply the “legitimate expectations” test. Even if a tribunal applies the test, tribunals will rightfully construe the obligations of the host State in protecting IP rights narrowly—and legitimate policy decisions, mere changes in the law, or “unpersuasive” domestic court opinions will not constitute a breach of the relevant FET provision. Moreover, tribunals will look askance at FET claims based on international IP rights if the host State can demonstrate that, under domestic law, the IP holder’s rights are inherently subject to limitations, changes, and regulation—so long as a host State’s limitation or revocation of IP rights affords a holder basic due process rights (*e.g.*, notice and an opportunity to be heard).

B. Full Protection and Security

A breach of the typical FPS standard is of a different character than the breach of an FET standard: in general, the FPS inquiry asks whether a

⁵³ *Id.* at para. 267.

⁵⁴ *See id.* at para. 442.

⁵⁵ *Id.* at para. 337.

⁵⁶ *Id.*

failure of a host State to enforce its laws against a *third party's actions taken against an investment* breaches the FPS standard. This may include claims that the host State failed to protect the investor's IP rights from systematic infringement, hacking, or other acts by private parties.

Like the discussion of the minimum standard of treatment and FET, *supra*, it is accepted that the traditional FPS provision affords the standard of treatment under customary international law: the *physical* protection of the assets and individuals connected with an investment.⁵⁷ In this sense, the FPS standard has an undisputed scope of application in the context of physical safety of persons and assets connected with protected investments.⁵⁸ The State's obligation, in this case, would be one of due diligence, *in essence*, to exercise the diligence due to ensure the physical safety of investments.⁵⁹ This standard is one of *conduct*, and a State cannot be held strictly liable for the conduct of third parties—in essence, the State does not guarantee or warrant against the disturbance of an investment by outsiders.⁶⁰

In order for a State to violate the obligation to provide "*protection and security*," the measures taken by a State by way of protection must "*obviously deviate from a reasonable standard*."⁶¹ A mere suggestion by an investor that the State could have taken alternative, more effective measures will, under most instances, not constitute a breach of the investment treaty.

This standard is borne out in arbitral practice. In *Saluka v. Czech Republic*, for instance, the State's behavior could not be a breach of the relevant FPS provision unless the course of action was "*totally unreasonable and unjustifiable*," and not tied to a rational legislative or executive policy decision.⁶² *Saluka* confirmed that the State enjoys a measure of sovereign appreciation in determining its policy, and recognized that the State did not breach its FPS obligations if the State's behavior was not "*totally devoid*" of legal concerns. This is a very high standard, even for physical investments.

In circumstances where the FPS protection is defined as covering "*physical security*" alone, the standard offers limited, if any, protection against

⁵⁷ See Giuditta Cordero Moss, "Chapter 7 - Full Protection and Security," in August Reinisch (ed.), *Standards of Investment Protection* (Oxford 2008), at 131, 137-150 (citing *AAPL v. Sri Lanka*, *AMT v. Zaire*, *Noble Ventures v. Romania*, *The Channel Tunnel Group Ltd, France-Manche S.A. v. United Kingdom and the Republic of France (Eurotunnel)*, Partial Award, 30 January 2007, para. 275).

⁵⁸ See *PSEG Global Inc., The North American Coal Corporation, and Konya İngin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award 19 January 2007, at para. 258.

⁵⁹ See Moss, *op. cit.*, at 139-140.

⁶⁰ See *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 Award June 27, 1990 at paras. 46-53.

⁶¹ See Moss, *op. cit.*, at 141.

⁶² See *Saluka Investments B.V., v. The Czech Republic*, UNCITRAL, Partial Award 17 March 2006 at para. 490.

the infringement of IP rights by third parties in most instances—these limited circumstances may include the destruction of servers or physical assets containing valuable IP information or data. However, the definition of “protection and security” as limited to “physical security” (*i.e.* a protection against “*physical damage*”) is well-founded in investment arbitration jurisprudence⁶³ and has its roots in customary international law.

A number of tribunals, however, have been eager to expand the FPS standard to cover “legal security.”⁶⁴ Similar to the FET standard, this may concern the availability of the judicial and administrative system to protect the interests of the IP investor, or even more broadly, to offer a “stable investment environment” to protect against third-party interlopers. Indeed, many tribunals have held (or implicitly recognized) that the FPS standard is “subsumed” into a treaty’s FET standard,⁶⁵ and acts found to be a violation of the FET standard of a treaty have also been deemed to breach the FPS standard of that same treaty.⁶⁶ Arbitration practice reveals that tribunals do not emphasize the text of a particular FPS provision in determining whether its scope encompasses “legal security” (*i.e.*, not distinguishing between “*the most constant protection and security*” from “*full protection and security*”). Nevertheless, it is the position of this paper that unless the treaty clearly indicates that a FPS provision should go beyond the traditional police protection afforded by a typical FPS standard (like the Germany-Argentina BIT, Article 4(1), which provides for “*full legal protection and security*”), an FPS provision should be construed narrowly to apply *only* to physical protection.

Nevertheless, the potential expansion of a standard of “legal protection and security” as applied to IP Rights has substantial ramifications for host States that may not have envisioned such an expansive international obligation to protect an IP investor from third-party infringers. This may implicate host State liability for enforcement of international obligations related to piracy and counterfeiting—areas of enforcement which may

⁶³ See, *e.g.*, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award 29 July 2008 at para. 668 (the FPS standard “obliges the State to provide a certain level of protection to foreign investment from *physical damage*”) (emphasis added).

⁶⁴ See *Azurix Corp.*, at para 408 (“it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor’s point of view.”); See also *National Grid Plc. v. Argentine Republic*, UNCITRAL, Award 3 November 2008, at para. 189 (“the phrase ‘protection and constant security’ as related to the subject matter of the treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets.”)

⁶⁵ See *Compañía de Aguas del Aconquija S.A., and Vivendi Universal S.A., v. Argentine Republic*, ICSID Case No. ARB/97/3, Award 20 August 2007, at para. 7.4.15.

⁶⁶ See *Azurix Corp.* at para. 406-408; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award 1 July 2004, at para. 183-191.

involve substantial, sometimes prohibitive, financial strain on a sovereign's budget.

Because very few, if any, international tribunals have addressed international IP rights within the context of an FPS claim, it is unclear how a tribunal would apply the FPS standards to a given set of facts. Below are four hypothetical FPS claims in each of the patent, copyright, and trademark fields:

- Assume that a British pharmaceutical manufacturer releases a new AIDS drug. Third-party local drug manufacturers in Swaziland (a country where 28% of its population is infected with HIV) reverse engineer the new drug, and sell the new drugs for \$2 per dose (instead of the \$20 sold by the claimant). The company is forced to lower its prices to compete. The British pharmaceutical company brings an FPS claim against Swaziland under the UK-Swaziland BIT for Swaziland's failure to diligently enforce Swaziland's international patent obligations which have been incorporated into domestic law. The BIT contains an obligation by the host State to provide "*full protection and security.*"
- Assume that a global music corporation from the United States brings a FPS claim under the NAFTA against Mexico for Mexico's failure to effectively enforce copyright laws against third-party infringers based in Mexico, leading to the illegal online downloading of copyrighted music. The NAFTA contains an obligation by the host State to provide "*full protection and security,*" but the NAFTA parties (through the NAFTA Free Trade Commission) released an interpretative statement in 2001 clarifying that the concept of full protection and security "*does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of aliens.*"
- Assume that a French fashion conglomerate brings an FPS claim against China under the China-France BIT on behalf of hundreds of its subsidiaries and brands operating in China, for China's failure to protect the fashion house's exclusive right to use its registered marks under international IP treaties such as the TRIPS Agreement. Assume that China, despite some efforts, has had little success in preventing third-parties from infringing on the fashion house's marks in the course of trade, affecting (among other products) handbags, champagne, cologne, and apparel. China asserts that the high course of enforcement is prohibitive. Assume that the BIT contains an obligation by the host State to provide "*full legal protection and security.*"
- Assume that a social media app start-up company from the United States brings an FPS claim against Russia for Russia's failure to prevent third-party hacking and cyberattacks by its

citizens, leading to the illegal sale of personal information and passwords. Assume that Russia denies that it has any responsibility to prevent such cyberattacks under the relevant bilateral investment treaty. Assume further that the relevant BIT contains an obligation by the host State to provide “*full protection and security.*”

Claimants in each of these hypotheticals may argue that the failure of a host State to maintain a legal system that allows for adequate sanctions on third parties who have violated an investor’s IP rights may amount to a FPS treaty violation.⁶⁷ As next discussed, the State may avail itself with a number of potential defenses and counterarguments to such claims.

Of the four hypotheticals, the claimant in the fashion house trademark example has the best prospects of asserting that the host State has an obligation of “legal protection,” which includes an obligation of offering a stable legal framework for the investment, as the offer of “legal protection” is explicit in the text of the treaty. This, however, does not automatically equate to a treaty breach. The Respondent State may assert – along the lines of the “legitimate expectations” test for FET – that the fashion house’s expectation of legal security under the treaty can only extend to the conditions that were present at the time of the investment. If China can demonstrate that it has *improved* its level of enforcement since the investment was made, it may argue that this is strong evidence that it has met its “*due diligence*” obligations.

On the other hand, the U.S. Claimant in the NAFTA copyright example would likely have a very difficult time arguing that the standard of “full protection and security” includes “legal security.” The NAFTA parties have already clarified that the FPS provision in NAFTA 1105(a) is equivalent to the customary international law minimum standard of treatment of aliens, and Mexico would have a strong argument that the relevant customary international law standard includes *only* physical protection.

The third example pertaining to patent enforcement of AIDS drugs in Swaziland is difficult to anticipate a particular outcome regarding the scope of the treaty provision. First, the text of the relevant FPS provision does not indicate whether the treaty covers only “physical security.” A tribunal may be persuaded that only due diligence against physical harm is required (*e.g.*, protection of pharmaceutical offices or employees against third parties), or may not. Here, the Respondent State may argue that it never intended to enter into binding treaty obligations arising from an obligation to provide “legal security” vis-à-vis third parties, and may argue

⁶⁷ In *Wena Hotels Ltd., v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award 8 December 2000 (“*Wena*”) for example, the tribunal held that one consideration connected with the FPS analysis was that the State failed to impose sanctions against third parties who had unlawfully seized the investor’s investment. See *Wena*, paras. 82-95.

that this type of treaty compliance is unforeseeable, becomes too costly, politically infeasible, and leads to a negative social outcomes.⁶⁸ Moreover, like the trademark example, the Respondent may also argue that any expectation of legal security is based on an objective standard of due diligence, within the context of the law and enforcement policies by the State at the time of the investment was made.

Finally, in the cybersecurity example, Russia would likely argue that cyberattacks are outside the scope of its FPS obligations under the relevant treaty, which it would argue covers only physical assets. Russia would further argue that, even if cyberattacks were covered by the scope of the FPS provision in the BIT (a point Russia would deny), it would be impossible for Russia to prevent all attacks, and even if possible, such a standard would be unduly burdensome and untenable. The investor may attempt to argue that cyberattacks are causing "physical damage" to its servers or other assets – a difficult fact to prove – or otherwise that Russia has otherwise failed to meet a "due diligence" standard in its enforcement of laws against third parties. These arguments are not likely to succeed under the current formulation of the FPS standard. Even if Russia has domestic laws that prohibit cyberattacks, an investor may need to prove *systemic* failure to enforce those laws (or a complete failure to seek redress against a third party once a cyberattack has already occurred).

These examples indicate that it is unlikely that contracting States to international investment agreements (especially in developing countries with limiting funding for enforcement against third-party IP infringers) will be held internationally responsible for FPS claims based on a third-party's actions infringing upon an investor's IP rights in most instances.

IV. CONCLUSION

If private investors are able to easily recover for purported breaches of international IP treaties in international arbitration, such a result risks disrupting the delicate balance that countries have achieved in their municipal law between competing public interests and policy prerogatives in developing IP protections where compliance by host States is complex, subject to domestic political decisions and budgetary constraints.

An expansive interpretation of FET and FPS claims in this context allocates too much power to foreign investors who already benefit from accessing new markets under existing FET and FPS protections. Indeed, if the cost of defending against investment claims becomes too great, this shift, like the expansion of the FET standard before it, may prompt States to disengage entirely from the investment treaty system and withdrawn from bilateral and multilateral investment treaties. This is an outcome that

⁶⁸ The success of these arguments in investor-State arbitration is unknown. A host State might choose to assert such argument within a theory of "sovereign appreciation."

stifles trade, isolates States further from the benefits of the system, and diminishes (rather than assists) efforts to harmonize IP rights internationally.

Moreover, there are compelling policy reasons why member and signatory States to international IP conventions agreed to settle disputes on the State level (and not with private citizens). Unlike standards of investment protection, minimum standards of international IP protection in each of the world's jurisdictions are harder to establish and define. State parties should be afforded the flexibility in establishing IP laws and jurisprudence without the constant threat of investment claims by private investors and multinational corporations. As *Eli Lilly v. Canada* demonstrated, States may be subject to costly investment claims even for shifts in national court interpretation of domestic IP laws.

At bottom, if tribunals were to increasingly adopt an expansive interpretation of FET and FPS clauses that effectively allows for a novel means for private investors to bring suit against states to enforce alleged breaches of international IP treaties, this would have severe negative consequences both to the legitimacy of investor-State arbitration and to international IP harmonization. Instead, tribunals should adopt a narrow reading of investment treaty standards of protection, finding a treaty breach based on the breach of an international IP obligation only where there is a clear basis to do so.