Impact of International Investment Dispute Arbitration on the Protection of Intellectual Property Rights in Host States: Current Status and Development Trends

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Abstract. In recent years, international investment treaties have included intellectual property rights into the category of "investment", and the protection methods are no longer limited to disputes between states (diplomatic protection and WTO dispute settlement). Investors can start international investment arbitration proceedings against host states through investment treatment clauses and Investor-state dispute settlement. Cases such as the Morris Asia v Australia and Eli Lilly v. Canada show that intellectual property owners are trying to use international investment treaties and their arbitration mechanisms more actively to challenge IP policies (measures) in host states. However, this situation will affect the IP policy and practice of the host state and break the balance established between the protection of private rights and the welfare of society. Based on this, host states should be more careful in establishing international treaties that specify IP policies and the obligations of investors. At the same time, host states and the international community have made clear the boundaries of IPR protection in investment treaties, and it is necessary to maintain the autonomy of host states' IPR policies (measures).

Keywords: International investment disputes; Intellectual property; Investor-state arbitration; Fair and equitable treatment; Public interest.

1. Introduction

Intellectual property protection in international investment began in 1959, when the Germany-Pakistan Bilateral Investment Treaty explicitly treated property rights such as patents and trade secrets as investments [1]. In addition, some investment agreements specify intellectual property protection standards as investment or invoke intellectual property covenant protection standards. Before that, investors could only passively get relief from the infringement of intellectual property rights through diplomatic protection or WTO dispute settlement and seek help from their own states. Diplomatic protection needs to be put forward by the domestic government and needs to meet the relatively strict conditions in the public international law, which is more restrictive. It is not the obligation of a government to propose diplomatic protection, so it is highly likely that its government will not start diplomatic protection due to political, diplomatic and other factors [2]. For the investors, supporting their rights depends on the government of their own state, the possibility of relief is exceedingly small. The advent of international treaties changed that. Intellectual property rights become "investments" under investment treaties and are then protected by investment treaties. For example, when the legislative, administrative or judicial measures of the host state harm the interests of intellectual property, the investor (owner) can take advantage of the Investor-state dispute settlement (ISDS) of the investment treaty to take the host country to international arbitration and claim compensation for the loss of intellectual property [3].

The safeguarding of the intellectual property of investors through global agreements has emerged as a contemporary legal instrument to confront the intellectual property framework of the receiving nation and mandate it to comply with the requisite provisions of intellectual property law.The first advantage of the international investment arbitration process for investors is that any investor would be able to bypass the domestic recourse procedures of both the domestic government and the host state and directly challenge a state's intellectual property law and enforcement actions through the rules of international law [4]. In addition, investors may file a non-breach action in the International

Investment Tribunal, which is currently not possible under the TRIPS regime. In the event of the victorious outcome of the investor's intellectual property rights lawsuit in the international arbitration, the host state may be obligated to reimburse the investor. However, such an eventuality is liable to have a detrimental impact on its own policies. At present, most of the academic and practical researches interpret the advantages of international investment arbitration from the perspective of right holders and investors. Few studies have looked at the host state. However, in fact, the recent changes brought about by international arbitration treaties are also important issues for host states to focus on. With the continuous development of intellectual property in the era of science and technology, host states need to ensure that the intellectual property interests of investors are not infringed in international investment, but there are often disputes between the system of public power and the protection of private rights. When formulating policies and signing international investment treaties, host states should consider how to avoid international arbitration of intellectual property as much as possible. Host states should carefully evaluate the intellectual property obligations in investment treaties, and consider how to avoid that the policies related to intellectual property in treaties are not deemed to be expropriated or otherwise violate the rules of international treaties. The present paper aims to analyze the effects of International Investment Dispute Arbitration on the enforcement of intellectual property rights in host states. Additionally, it will offer some relevant suggestions.

2. Protection of Intellectual Property under International Investment Dispute Arbitration

2.1. Intellectual Property as International Investment

Intellectual property rights are regarded as "investment" is the logical starting point of international investment treaties to protect the rights of intellectual property.

North American Free Trade Agreement (NAFTA) lists eight forms of investment, including intangible property and other claims under investment-related contracts. The term "intellectual property" does not explicitly appear in the listing of investments in Chapter 11 of NAFTA, but it is generally believed that intellectual property as intangible property can be covered in the category of investment. In some international investment agreements, vague concepts such as "rights related to intellectual property" or "patentable inventions" are used, leading to discussions on whether patent applications or drug marketing applications constitute investment.

The evaluation of the international investment aspect of intellectual property (IP) is contingent upon the phrasing of the investment treaty. The expanse of IP as a form of investment is reliant on the constitution of the investment treaty in question. Several investment treaties do not impose any restrictions on the limit of investment. For example, Article 1 of the 2012 U.S. model BIT simply claims that the form of investment includes intellectual property. As per this definition, the ambit of Intellectual Property being regarded as an "investment" is inclusive. Furthermore, varieties of intellectual property that do not garner acknowledgement from the intellectual property accord may come under the purview of "investment" in the investment pact. In addition, some investment treaties even explicitly include types of intellectual property not recognized by TRIPS into the scope of investment protection. For example, the scope of IP as "investment" in the investment chapter of Trans-Pacific Partnership Agreement (TPP) is larger than that of TRIPS. Parties are required to ensure that inventions of plant origin, new uses of products known to each state or new methods or processes for using known products are patentable. This provision would extend the scope of IP protected by investment treaties beyond the requirements of intellectual property treaties [5].

Second, whether an investor can obtain IP as an "investment" also depends on the IP policy of the host state. Regionalism is a characteristic of intellectual property rights. International conventions do not unequivocally lay down the foundations of safeguarding intellectual property rights, however, they do enforce the most minimal threshold standards for the various kinds of intellectual property which they acknowledge. A subject that is protected intellectual property in one state may be in the

public domain in another. It is imperative that potential investors take into consideration the distinct sorts of legal safeguards afforded to intellectual property in the country of operation. It is only through adherence to such safeguards, as outlined by the host state's legal framework, that the investment treaty can reflect the form of intellectual property that has been granted protection.

Finally, as an "investment", intellectual property also needs to have investment attributes. In the case of salini v. Morocco the tribunal stated that the concept of "investment" is objective. An investment has the characteristics of asset input, risk bearing, duration, expected return and benefit to the economic development of the host state. An in-depth, comprehensive analysis is imperative to determine whether a given intellectual property possesses the requisite traits of an investment, namely, its acquisition, application, and marketability within the confines of its originating state.

2.2. Protection of Intellectual Property and Dispute Settlement in Relation to International Investment

2.2.1 Diplomatic protection

The term "diplomatic protection" denotes the act of a nation engaging in diplomatic measures or employing other legal mechanisms under the guise of a state's sovereignty, in order to address conflicts on behalf of its nationals (including both corporate and natural persons) who have been adversely impacted by the internationally wrongful conduct of another sovereign entity, specifically in circumstances wherein no compensatory recourse can be achieved by means of local administrative and judicial avenues.

The principle of exhaustion of local remedies is also reaffirmed in many international investment conventions and human rights conventions. For example, article 26 of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provides that It has been postulated that the States Parties possess the lawful right to demand the complete depletion of indigenous administrative or judicial recourses as a prerequisite for their voluntary acquiescence to engage in arbitration predicated upon this Convention. The arbitration procedure established by the Convention to settle disputes between host states and investors from foreign country is an international procedure. In practice, however, it is extremely difficult for investors to invoke diplomatic protection because the home state needs to take political relations into account.

2.2.2 WTO dispute settlement

The scope of application of WTO dispute settlement mechanism mainly includes all disputes brought by WTO agreement consultation and dispute settlement provisions, disputes between members concerning their rights and obligations caused by WTO agreement, disputes between members concerning their rights and obligations caused by actions taken by DSB alone or jointly with any other applicable agreement [6].

According to the Article 64 of TRIPS, Articles 22 and 23 of GATT concerning the normative procedure for settling trade disputes directly introduce the settlement of intellectual property disputes, and trade means or even cross retaliation means can be used to ensure the realization of intellectual property protection. Member States may make use of Annex 2（Understanding on Rules and Procedures Governing the Settlement of Disputes）of the WTO Agreement DSU to resolve disputes related to intellectual property rights. DSU are the main and direct legal basis of the dispute settlement.

As Article 1 of the DSU states, the DSB is the main body responsible for resolving disputes between member states. Only the DSB has the power to form a panel for each dispute, accept or reject the panel's findings and awards, and supervise the implementation of WTO dispute awards by member States. Therefore, if investors need to conduct intellectual property litigation through this mechanism, they need to seek the help of their state, and accept restrictions and expand.

2.2.3 Investor-state dispute settlement

Investor-State Dispute Settlement (ISDS) refers to the settlement mechanism of the disputes arising from the investment relationship between foreign investors and the host government. This

mechanism makes use of the rules of international investment treaty, and investors take the initiative in litigation, directly submit to international arbitration, and seek compensation for intellectual property damages. Different from the above two inter-state mechanisms, Using ISDS can significantly reduce the influence of the investor's origin country and the host country's political intervention, thereby creating an effective global mechanism for relief. The possessor of intellectual property holds the inherent ability to readily activate the considerable or technical conditions of the investment agreement with the intent to dispute the validity of the host nation's course of action and, in doing so, demand indemnification for incurred damages.

International investment treaties do not contain rules about intellectual property, and their protection of intellectual property is mainly the connection between the provisions of investment treaties and intellectual property treaties, among which the more common provisions include; Fair and equitable treatment, expropriation clause, performance requirement prohibition and other investment treatment clause. In practice, intellectual property owners often use fair and equitable treatment clauses. In the case of "Eli Lilly v Canada ", Lilly held that Canada's use of "utility of commitment" as a criterion for patentability violated the provisions of trips and violated the company's legitimate expectations, thus violating the obligation of fair and equitable treatment.

3. The Purview and Magnitude of the Repercussions Arising out of Global Investment Controversy Arbitration on Intellectual Property Implementation within the Jurisdiction of the Host States

3.1. Investors' Expectations of IP Stability

Intellectual property rights are the rights granted by national legislation. The national provisions on the conditions and procedures of granting intellectual property rights will affect the stability of intellectual property rights. In order to eliminate low-quality patents or erroneous grants, there is a possibility that intellectual property rights may be revoked or declared invalid after being granted. However, the intellectual property owner expects that the intellectual property will not be revoked or declared invalid after the acquisition of the intellectual property, and the intellectual property is expected to be stable. In the case "Bridgestonev. Panama", the applicant proposed that intellectual property rights were the core investment of its subsidiary in Panama, because they needed to invest funds to promote the sales of corresponding products in the host state, so they not only took risks but also generated interest expectations, which had the characteristics of investment. The arbitral Tribunal supported this statement [7].

Investors, who participate in international investment arbitration proceedings, anticipate impartiality and propriety in the international investment arbitration clauses that deal with the preservation of intellectual property stability, known as "fair and equitable treatment" clauses. If the judicial or administrative authority of the host state revokes or declares the patent invalid, the intellectual property owner (investor) can claim that the host state deprives the investor of the legitimate expectation, and the host country violates the fair and just clause, then two problems arise: Does the fair and equitable treatment clause of the international investment agreement imply a requirement for the relative stability of the host country's intellectual property legislation and implementation? Should the host state commit to limiting the scope and content of statutory interpretation and enforcement in judicial or administrative decisions in order to meet investors' legitimate expectations of investment treaties?

From the perspective of universal obligations, the current international investment agreements do not have clear requirements on the stability of intellectual property obligations. At the global echelon, the anticipated constancy of investors' intellectual proprietorship entitlements ought not to be at odds with the fundamental notion of flexibility of safeguards conferred to intellectual property. If a state deems it necessary to make a commitment to the stability of its IP legislation and enforcement, it may choose to do so in domestic legislation or in investment contracts [8]. In the case Eli Lilly and

Company v. The Government of Canada, the arbitration Tribunal proposed the criteria for the review of whether the Canadian law violated the fair and just treatment clause: whether the requirements for determining the usefulness of the patent in Canadian patent law have changed dramatically; Whether the determination of patent utility requirements in Canadian patent law are arbitrary and discriminatory [9]. The Tribunal considers that in the framework of international investment, the patentee, as an investor, has a reasonable expectation of the stability of patent rights, and expects that domestic legislation and implementation will not undergo drastic changes. But, In the same case, faced with the applicant Eli Lilly's claim that Canada's patent utility standard has changed "dramatically" from traditional utility to "promised utility", which violates the reasonable expectation of investors that the host state should provide a stable legal system, Canada denies the change in the standard of patent authorization. In response to this controversy, the arbitral Tribunal pointed out in its ruling that "although applicants cannot accurately predict the development direction of patent practicability, they should respect that the law as the basis of judicial decisions changes with the passage of time. In recent years, more and more cases challenging the standards of drug patent practicability will promote the change of relevant rules, which is a normal phenomenon in the evolution of the legal system [9]." It can be seen from the judgment that the arbitral Tribunal does not expect the host state to satisfy investors' reasonable expectations by promising to limit the scope and content of the interpretation and application of laws in the court's judgment or administrative decision.

3.2. IP Legislation and Enforcement Practices

Changes in the rules governing the legislation of IP law and the application of the law in the host state may constitute expropriation or violations of minimum standards of treatment. Some current investments have introduced the TRIPS into the takings clause, providing that the takings clause does not apply to compulsory licenses that comply with TRIPS or revocation, restriction or grant of intellectual property that is consistent with TRIPS, as the Article 5 of US Model BIT (2012). Other bilateral or regional investment agreements do not explicitly include specific implementation acts such as grant, revocation and exception of intellectual property rights as exceptions to the expropriation clause. In theory, such agreements provide greater scope for private investors to initiate ISDS, and thus greater uncertainty in arbitral decisions in the case of international investment arbitration disputes [10]. In the case Morris v.Uruguay, contravene the investment protection obligations under the Swiss-Uruguay BIT, the plaintiff argued that Uruguay's tobacco control measures were an infringement of its trademark rights. The court's final decision concluded that Uruguay's tobacco control measures only limited the manner in which trademarks could be used and did not significantly affect investment in trademarks and thus did not constitute expropriation [11]. However, it can be seen from this case that the arbitral tribunal will consider whether the act or policy of the host state constitutes expropriation.

Second, the prohibition of performance requirements in investment treaties may extend the host state's IPR protection obligations. According to the performance requirement prohibition clause in the investment treaty, the host state may not establish a specific form of performance requirement for the rights or treatment of foreign capital. In accordance with the 2012 US Model BIT, Article 7 specifically prescribes that the host state is federally prohibited from mandating the transfer of distinct technologies, production methodologies, or any other proprietary information to individuals residing within its borders, with regards to the initiation, procurement, growth, management, execution, or cessation of international capital. The clause prohibits the host state from forcing technology transfer on foreign capital. In contrast, intellectual property treaties such as TRIPS do not explicitly prohibit technology transfer performance requirements. Therefore, in international investment arbitration, the host state's compliance with the investment clause is likely to lead to the expansion of the host state's intellectual property protection obligations.

4. Suggest Approach: Maintaining the Balance between the Protection of IP Rights and the Public Interest

4.1. Conflict between Protection of IP and the Public Interest under International Investment Arbitration

Intellectual property obligations in international investment pose a threat to the sovereign right of the host country to produce legal interpretations. Although Articles 1.1, 7 and 8 of TRIPS affirm the justification of restricting intellectual property rights in the public interest. But these principles are not specified in NAFTA or most investment treaties currently in force. In the case of Eli Lilly and company v. Canada, even if Canada eventually won the case, due to the initiation of arbitration, Canada's intellectual property law has come under great pressure from the public. During the arbitration, six amicus opinions were submitted to the tribunal. Although three opinions expressed concerns about the review of domestic intellectual property law by the investment Tribunal, the other three pointed out that Canada's "principle of practicality of commitment" was unreasonable and deviated from international trend [9]. None of the opinions defended the rationality of the practicality standard itself. In addition, for five consecutive years between 2013-2017, when Lilly and Canada were in dispute, the United States accused Canada of imposing excessive requirements on patent applications under the principle of practicality of commitment in its Special 301 report. And three months after the final award of the arbitration in this case, the Supreme Court of Canada struck down the "principle of practicality of commitment", which could reasonably be assumed to have been influenced by the international pressure caused by the case.

Finding the delicate equilibrium between safeguarding the rights of intellectual property owners and promoting the welfare of the masses is one of the fundamental principles of the intellectual property framework. Over-protection of private rights will impede the diffusion of knowledge and the circulation of technology. Because the intellectual property system is designed to encourage technical innovation, to increase intellectual achievement, to promote society’s development, such an outcome will harm the social interests of the public. Under the TRIPS standard of international intellectual property protection obligations, clearly, member states, based on compliance with minimum obligations, are able to specify the mode of implementation of intellectual property obligations based on the actual situation of their own states and regions. ISDS strengthen the status of transnational corporations as international social actors. They can influence the decision-making of host states through direct investment, which may bring potential risks to the realization of the policy objectives of public health protection in host states. ISDS may lead to excessive protection of IP rights, which is not only reflected in the expansion of intellectual property protection obligations caused by the implementation of international treaty provisions by the host state, but also expands the rights of transnational investors, which may lead to monopoly. Take pharmaceutical products as an example, as a knowledge-intensive product with important social attributes, pharmaceutical products need intellectual property system to encourage drug research and development on the one hand, and compensate the huge cost input of the right holder with exclusive rights. On the other hand, drugs concern people's lives, health and social and public safety. It is necessary to ensure that people have access to and afford drugs that save lives or improve the quality of life, so as to avoid the formation of high-priced monopolies by multinational pharmaceutical companies in a state's market [12]. The conflict between patent exclusivity and public health is particularly evident in the legislation and application of pharmaceutical intellectual property rights. Many intellectual property disputes in the field of international trade and investment are also concentrated in this field.

4.2. The methods to maintain the balance

On the subject of intellectual property rights in international investment treaties, it is important to ensure that appropriate levels of intellectual property protection are established and maintained, while leaving room for autonomy in host states' intellectual property policies, so as to strike a balance between the protection of private rights and the well-being of society. The host state itself should

maintain this balance by carefully reviewing investment treaties and considering the balance between private rights and public interests when formulating policies.

4.2.1 Clarify the intellectual property clauses in international treaties

The scope of "investment" and "investor" should be clearly stated in the host country and investor treaty. The granting or recognition of intellectual property is an "investment" in compliance with the laws of the host country, and the acquisition or possession of intellectual property does not in itself constitute an investment [5]. As for "investors", investment treaties should explicitly exclude protection against rights abusers.

Secondly, the intellectual property owners resort to investment arbitration for the purpose of enforcing the investment treatment clause. The more vague and broad the expression of the investment treatment clause, the greater the scope for intellectual property owners to abuse the investment treaty and investment arbitration mechanism. Therefore, investment treaties should specify the circumstances, conditions, procedures and effects of investment treatment clauses applied to IPR claims, limit the arbitral tribunal's discretion, and reserve reasonable space for national IPR policies. Third, to set up treaty exceptions, in order to avoid the arbitral tribunal directly judging the investment treatment based on the intellectual property treaty, it may consider setting up corresponding exception treaties in the investment treaty. Under certain circumstances, exception treaties enable the recipient countries to limit the treatment of investments related to intellectual property, to ensure that society's common interests, such as public health, safety and environmental well-being, are adequately protected. For example, Article 33 of Agreement Between Canada and China for the Promotion and Reciprocal Protection of Investments states that none of the provisions contained in this Agreement shall be deemed as impeding a party from undertaking essential actions such as safeguarding the well-being of humans and vegetation, conserving natural resources and the like.

4.2.2 Reservation of host state regulatory rights

Because of the complexity of some international intellectual property cases, the negotiation process of investment agreements focuses on a balance between protection and government policy options that seek, at least in part, to exclude domestic intellectual property litigation. In the negotiations of the EU-Canada Trade Agreement, it is clarified that ISDS is not an appellate body for the award of the domestic court, and the issue of the grant and validity of intellectual property rights is decided by the domestic court of the host state. Incorporated within the draft of the Transatlantic Trade and Investment Partnership lies the investment segment, which envelops a clause that is inconsequential to the regulatory capability of the host state in executing measures mandated to actualize sensible policy objectives encompassing safeguarding public health, ensuring safety standards, and environmental protection. It is worth noting that the regulatory authority vested in the host state must be acknowledged and safeguarded within the scope of international pacts.

4.2.3 Setting clear obligations for investors in relation to the public good

In international treaties, investors should have not only private rights, but also explicit obligations concerning the public good. Numerous states are bound by treaty obligations entailing their investors' adherence to domestic jurisprudence, in addition to other particularized national responsibilities concerning matters such as fraudulent conduct, corruption, or appraisals of environmental impact. For example, Article 10 and Annex 2 of Brazil-Angola Agreement on Cooperation and Facilitation of Investment said that investors and their investments should seek to contribute as much as possible to the sustainable development of host countries and local communities through a highly socially responsible approach. In terms of intellectual property, hosts could include compulsory licensing for foreign investors in the treaty, or an obligation to dispose of intellectual property in case of environmental protection, a global pandemic (e.g., covid-19), and other public interest situations.

5. Conclusion

The vast majority of bilateral, multilateral, and regional investment agreements in recent years have included intellectual property as an intangible asset, and some have explicitly identified intellectual property as a guideline for investment protection or have used conventions relating to intellectual property. Investors can also take the initiative to seek redress for intellectual property infringement through ISDS in investment treaties. Nevertheless, this modification presents a significant obstacle to the intellectual property policy and regulatory authority of the hosting state, thereby exacerbating the clash between safeguarding individual rights and preserving the collective welfare. In setting up an international treaty, the host state should clearly define the provisions on intellectual property, to avoid the arbitral tribunal's arbitrary expansion of investors' intellectual property rights, which may adversely affect the policy and autonomy of the state. At the same time, international investment treaties should include exceptions to define obligations related to the public welfare of investors. The safeguarding of proprietary entitlements is inherently intertwined with proscriptions. Neither excessive protection nor refusal of protection is sufficient. International investment arbitration and the extension of international investment treaties to the subject of intellectual property should not upset the balance set up by intellectual property rules between the protection of private rights and the public interest. Host states should be more careful and comprehensive in the establishment of international treaties and set up more comprehensive provisions on intellectual property rights.

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