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Human rights in IP-investment disputes

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Enforcing Intellectual Property in Trade and Investment Agreements







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Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17)

Language of the case: all the official languages

Applicant

Kingdom of Belgium (represented by: C. Pochet, L. Van den Broeck and M. Jacobs, agents, Agents)

Question submitted to the Court

Is Chapter Eight ('Investments'), Section F ('Resolution of investment disputes between investors and states') of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?

Damages = Potential chilling effect

- Average damages claim almost USD 500 m
- Average award around USD 80 m
- Party costs around USD 5 m
- Tribunal costs around USD 1 m
- Claimants in ISDS cases *with a human rights dimension* are wealthy and well-known multinational corporations from Western industrialized countries.
 - Jeffery P. Commission: How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years, Kluwer Arbitration Blog.
 - Steininger, S. (2018). What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration. *Leiden Journal of International Law*, 33–58.

Why there is an increasing overlap between IP, IIA norms and human rights?

- Laws pursuing legitimate public interest aims by necessity affect the interests and business activities of some investors in the host state.
- Even when the legislative measures pursue public interest aims related to the protection of human rights, some investors will be adversely affected in the form of impediments on market access, profit levels or business model.
- This also applies to laws related to IP.

Human Rights inflation



Why there is an increasing overlap between IP, IIA norms and human rights? (2)

- IIAs have proliferated and investment treaty standards such as fair and equitable treatment (FET) and indirect expropriation have been interpreted broadly during the recent decades.
- IP rights have similarly expanded and gotten stronger during the last decades. Moreover, IP is increasingly protected as an investment and IIAs may offer more investor-friendly protection and damages than IP law.

Have arbitral tribunals taken human rights into account in IP-related cases?

- Both investors and respondent states have presented human rights arguments.
- Human rights might *de facto* strengthen IP through investment arbitration.
- Investors have invoked human rights more often than respondents.
- Tribunals have also referred to them more often at the investors' motion.

- Tribunals may use human rights in the interpretation of the IIAs through:
 - recourse to Article 31(3)(c) of the VCLT
 - the notion of '*relevant principles of international law*' as prescribed by several BITs
- Formulation of the applicable IIA important for the possibility to integrate human rights in investment arbitration.

Philip Morris v. Uruguay

- One of the few cases where tribunals have discussed socio-economic rights.
- The case is exceptional also from the perspective that the tribunal:
 - pursued a balancing exercise similar to human rights case law; and
 - developed the doctrine of margin of appreciation known especially from the case law of the ECtHR.
- Born's dissenting opinion.

Philip Morris v. Uruguay (2)

Indirect expropriation:

- *“...in order for a State’s action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action **must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate**. In the Tribunal’s view, the SPR and the 80/80 Regulation satisfy these conditions.”*

Philip Morris v. Uruguay (3)

- The tribunal referred to Uruguay' constitution and the WHO Framework Convention on Tobacco Control (FCTC), “*guaranteeing the human rights to health*”.
- It accepted that the challenged measures were taken by Uruguay with a view to protect public health in fulfilment of its national and international obligations.

Philip Morris v. Uruguay (4)

Under the FET standard the tribunal:

- Agreed with Uruguay: *“that the ‘margin of appreciation’ is not limited to the context of the ECHR but ‘applies equally to claims arising under BITs,’ at least in contexts such as public health.”*
- *“The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the “discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith ... involving many complex factors.”*

Philip Morris v. Uruguay (5)

Finally accepting the measures also under the FET standard...

- “*In short, the 80/80 Regulation was a **reasonable measure adopted in good faith to implement an obligation assumed by the State under the FCTC**. It was not an arbitrary, grossly unfair, unjust, discriminatory or a disproportionate measure, in particular given its **relatively minor impact on Abal’s business**”.*
- Tribunal also rejected the investor’s claim that the measures would be against the investor’s *legitimate expectations or legal stability of the host state* as part of the FET standard. It read these standards in the light of the states’ right to regulate. Yet the measures must still remain within “***the acceptable margin of change***”.

Urbaser v. Argentina

- A human rights breach of the *investor* could potentially function *as a counter-claim* when the IIA has a wide enough jurisdiction clause.
- “...*the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public **and private parties**, not to engage in activity aimed at destroying such rights.*”
- But the human right to water only obliges states..

Conclusions

- The doctrine of *margin of appreciation* is to be welcomed.
- It is a general principle of international law relevant and applicable “*at least in contexts such as public health*”
- The doctrine of margin of appreciation could also be developed in the interpretation of the TRIPS in WTO dispute settlement (e.g. 3ST).