

A TWAAIL Critique of Intellectual Property and Related Disputes in Investor-State Dispute Settlement

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1. Introduction

Before the wave of intellectual property (IP) disputes in investor-state dispute settlement (ISDS)¹ emerged, three learned scholars foresaw the coming changes in international IP through the realm of investment protection. In 2001, Drahos viewed 'bilateral intellectual property and investment agreements are part of [a] ratcheting process that is seeing intellectual property norms globalize at a remarkable rate'.² Later, Drahos and Braithwaite warned that the United States would attempt to incorporate investment protection in the multilateral framework.³ They argued that investment protection through bilateral investment treaties (BITs) would result in higher IP protections. Therefore, they called developing countries to form a veto coalition against the ratcheting of IP standards through BITs.⁴ Subsequently, after making several attempts, developed countries failed in succeeding investment protection in the multilateral regime.⁵ In 2004, Helfer demonstrated the regime-shift by illustrating how international IP law-making had left its traditional institutional premise and its interactions with other areas such as public health, human rights and

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¹ *Philip Morris Brands Sarl, Philip Morris Products S.A and Abal Hermanos S.A v. Oriental Republic of Uruguay*, ICSID Case No: ARB/10/7 (Award, 8 July 2016) [hereinafter *Philip Morris v. Uruguay*]; *Eli Lilly and Company v The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 (Award, 16 March 2017) [hereinafter *Eli Lilly v. Canada*]; *Bridgestone Licensing Services, Inc. And Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34 (Award, 14 August 2020) [hereinafter *Bridgestone v. Panama*].

² Peter Drahos, 'BITS and BIPS: Bilateralism in Intellectual Property' (2001) 4(6) *Journal of World Intellectual Property* 798.

³ Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan Publications Ltd, London, 2002) 208.

⁴ *Ibid.*

⁵ Pratyush Nath Upreti, 'Intellectual Property, Investment and the WTO: A Historical Account' in Christophe Geiger (ed) *Research Handbook of Intellectual Property and Investment Law* (Edward Elgar Publishing, 2020) 182-206.

other areas.⁶ This was an early indication that IP norm-setting had moved beyond its institutional parameters; thus, interaction with different branches of law was inevitable.⁷

Drahos, Braithwaite and Helfer did not refer to IP protection through ISDS; however, their writings reflected the potential tension that BITs would bring and indicated that international rulemaking could go outside multilateral boundaries. Particularly, two points can be drawn from Drahos and Braithwaite's writings. First, IP and BITs were a result of political clout⁸ since developed countries used BITs to transfer or transplant maximum IP standards in developing countries. Second, the transformation of BITs into mega-regional trade and investment agreements was anticipated to spread maximum IP rules beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁹ However, the potential bite of dispute settlement mechanisms that were incorporated in BITs was ignored.

This realization came when *Philip Morris* requested investor-state arbitration against anti-smoking legislation in Uruguay that restricted the use of trademarks, which resulted in the expropriation of Philip Morris's property.¹⁰ *Eli Lilly* later challenged the decision of the Canadian Supreme Court to invalidate patents before an investment tribunal.¹¹ In the aftermath of *Philip Morris* and other disputes, Gathii and Ho took Helfer's vision of regime shift in international IP and argued emerging IP-related cases in ISDS as a 'regime shift' in the IP system. They accused industries of pursuing investment disputes to destabilise the balance achieved between producers and consumers through various norms that are enshrined in international and domestic IP laws.¹² A similar view was maintained by Brook and Geddes who argued against

⁶ Laurence R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 (1) *Yale Journal of International Law* 1-83.

⁷ See Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press, 2016).

⁸ Drahos (n 2) 791.

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

¹⁰ *Philip Morris v. Uruguay* (n 1), Request for Arbitration, 19 February 2010.

¹¹ *Eli Lilly v. Canada* (n 1), Notice of Arbitration, 12 September 2013.

¹² James Gathii and Cynthia Ho, 'Regime Shift of IP Lawmaking and Enforcement from WTO to the International Investment Regime' (2017) 18(2) *Minnesota Journal of Law, Science & Technology* 430.

including an IP chapter in the investment agreement. In their view, such inclusion will ‘dramatically [increase] corporate power’,¹³ allowing the investor to enforce IP-related claims and restricting governmental regulatory rights. Similarly, many scholars have expressed concern about and interest in the emerging interactions between IP and ISDS.¹⁴

In light of these developments, this essay aims to understand IP-ISDS through the lenses of Third World approaches to international law (TWAIL)¹⁵ and how a reformist TWAIL approach might be used to address concerns related to IP-ISDS disputes. This essay has three objectives. First, this essay discusses TWAIL and its readings of IP. Using the TWAIL framework, this essay demonstrates that TWAILers’ positions on the TRIPS Agreement are an ideologist project that aims to transplant IP norms to developing countries and the role of actors, particularly industrialist lobbying in the making of international IP norms. Despite such views, the compromise that was made in the form of TRIPS’ flexibilities are threatened by ISDS mechanisms. Thus, the second objective of this essay is to demonstrate the implications that recent IP-related ISDS disputes could potentially undermine the balance achieved through TRIPS. The last objective is to demonstrate how the Global South is re-gaining its sovereign regulatory control through a reformist approach.

2. Third World Approaches to International Law (TWAIL)

TWAIL emerged as a theory and methodology for analysing and challenging international law and its institutions.¹⁶ One reason for the rise in TWAIL scholarship is that the Third World people have become concerned about power-relationship

¹³ Brook K. Baker and Katrina Geddes ‘Corporate Power Unbound: Investor State Arbitration of IP Monopolies on Medicines-Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement’ (2015) 23 (1) *Journal of Intellectual Property Law* 57.

¹⁴ For background of various positions and arguments on IP and ISDS interactions, see Christophe Geiger (ed), *Research Handbook on Intellectual Property and Investment* (Edward Elgar Publishing, 2020); Simon Klopschinski, Christopher Gibson and Henning Grosse Ruse-Khan, *The Protection of Intellectual Property Rights Under International Investment Law* (Oxford University Press, 2020); Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and International Dispute Resolution* (Kluwer Law International, 2019).

¹⁵ In this article, the term ‘third world’ refers to the developing world, the post-colonial world of the global south.

¹⁶ Obiora C Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?’ (2008) 10 *International Community Law Review* 371, 376.

dynamics between states and that 'any proposed international rule or institution will actually affect the distribution of power between states and peoples'.¹⁷

Thus, TWAIL's objective is to deconstruct and expose international law that is transformative and regressive.¹⁸ Hence, the transformation of 'international law from being a language of oppression to a language of emancipation'¹⁹ is needed to achieve and promote global justice.²⁰ This can be achieved by bringing interest to the Global South and developing a narrative that is based on colonial history, power, identity and concerns of Third World countries. In doing so, TWAIL scholarship does not challenge the existing institutional structure or reject international law itself,²¹ rather, 'TWAIL...[is] committed to the idea of an international normative regime largely based on existing institutional structures'.²²

TWAIL scholarship is not rigid or confined to one issue related to the Global South. The scholarship has evolved at different stages and has advocated for several issues concerning the Global South.²³ This is due to the term 'Third World', which is varied and evolving since the 'Third World' consists of several countries and their interests.²⁴ TWAIL scholarship's diversity is one of its most striking features.²⁵ Several scholars have used TWAIL to represent the Third World position of international legal regimes, whereas a few others have examined 'international law impact upon systems of

¹⁷ Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) *Chinese Journal of International Law* 78

¹⁸ James Thuo Gathii, 'TWAIL: A Brief History of Origins, its Decentralized Network, and a Tentative Bibliography' (2011) 26 *Trade, Law and Development* 37.

¹⁹ Anghie and Chimni (n 17) 79.

²⁰ *Ibid.*

²¹ Wang Tieya, 'The Third World and International Law' in Ronald St J Macdonald and Douglas M Johnston (eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (Brill, 1983) 961-962.

²² Luis Eslava and Sundhya Pahuja, 'Beyond and the (Post) Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 (2) *Journal of Law and Politics in Africa, Asia and Latin American* 206.

²³ For different phases of TWAIL scholarship, see Balakrishnan Rajagopal, 'International Law and Its Discontents: Rethinking the Global South' (Vol 106, Proceedings of the Annual Meeting, American Society of International Law, 2012) 176-181.

²⁴ Gus Van Harten, 'TWAIL and the Dabhol Arbitration' (2011) 3 (1) *Trade, Law and Development* 135-136.

²⁵ Mohsen al Attar, 'TWAIL: A Paradox within a Paradox' (2020) 22 (2) *International Community Law Review* 163-196.

categories... that both reify and legitimize Third World Subordination'.²⁶ TWAIL is not perfect, and some have presented views against it.²⁷ That said, TWAIL is a movement that helps to examine broader issues through the narrative that focuses on the Global South.

3. TWAILers' Readings of Intellectual Property

First, IP as colonial transplant. International IP evolved through the agency of colonial rule.²⁸ The colonial transplants of IPRs were designed to expand commercial relations²⁹ by controlling the colonial markets³⁰ and achieving uniformity in territories under colonial rule.³¹ Later, colonial powers negotiated on behalf of their colonies at the Paris and Berne Conventions to affirm their imperial control over IP within their expanding empires.³² Later, the emergence of 'neo-liberalism' post World War II called for unity among countries that fought war for economic co-operation for trade and investment. As a result, strong private property rights, free markets become primary aim of the state and international community that persisted and persuaded to create an institutional framework.³³ As a result, intellectual property was linked to trade through TRIPS Agreement that endorsed the Paris and Berne Conventions, creating a global minimum standard on IP.

²⁶ Ibid.

²⁷ Muhammad Azeem, 'Theoretical Challenges to TWAIL with the Rise of China: Labor Conditions under Chinese Investment in Pakistan' (2019) 20 *Oregon Review of International Law* 395.

²⁸ Susan Sell and Christopher May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property' (2001) 8 (3) *Review of International Political Economy* 479-480.

²⁹ Ruth L. Okediji, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) 7 *Singapore Journal of International & Comparative Law* 321-323.

³⁰ Alexander Peukert, 'The Colonial Legacy of the International Copyright System' in Mamadou Diawara and Ute Rosenthaler (eds), *Staging the Immaterial Rights, Style and Performance in Sub-Saharan Africa* (Sean Kingston).

³¹ Seville Catherine, *The Internationalization of Copyright Law* (Cambridge University Press, 2006) 139.

³² Sam F. Halabi, *Intellectual Property and the New International Economic Order: Oligopoly, Regulation, and Wealth Redistribution in the Global Knowledge Economy* (Cambridge University Press, 2018) 35.

³³ John D. Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 (2) *Canadian Journal of Law and Jurisprudence* 389.

Second, Internationalisation of [intellectual] Property Rights. TWAILers have questioned the propertisation of IP for monopolizing knowledge, which has been further commodified through the TRIPS Agreement.³⁴ Particularly, the TWAIL scholarship argues that international law has elevated the national regulation of property rights to the international level. Chimni argued that international law and its institutions have internationalised property rights.³⁵ Chimni drew attention to how TRIPS transformed the national property [IP] regime into an international platform to directly regulate property rights.³⁶ Similarly, Braithwaite and Drahos noted that ‘TRIPS marks the beginning of the global property epoch... represent [in] the beginning of property globalization’.³⁷ Therefore, for TWAILers, TRIPS is an idealistic project that strengthens private property rights at the international level. Some have also argued that private rights to exclude are inherently based on incentive theory to rationalise IP protection to achieve the public good.³⁸ Essentially, TWAILers believe that elevating property regulations to the international level will result in a loss of state control over property regimes. Furthermore, IP as private rights has historically been legitimised by the Paris Convention since the members of the Paris Convention had colonised Asia and Africa.³⁹

Third, the role of Industrialist Lobbyist Coalitions. One key position that TWAILers have taken is against the universalization of IP through a hegemonic power of developed countries. The history of TRIPS negotiations illustrates the immense lobbying efforts made by private industries that were supported by some developed countries.⁴⁰ In pursuance of private sectors in early 1988, the US adopted a trade-based approach to IP through Section 301 of the Tariff Act of 1930,⁴¹ which allowed private parties to file

³⁴ Ugo Pagano, ‘The Crisis of Intellectual Monopoly Capitalism’ (2014) 38 (6) Cambridge Journal of Economics 1409-1429.

³⁵ B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 International Community Law Review 8.

³⁶ Ibid.

³⁷ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 63.

³⁸ Rochelle Cooper Dreyfuss, ‘In Praise of an Incentive-Based Theory of Intellectual Property Protection’ in Rochelle Copper Dreyfuss and Elizabeth Siew-Kuan Ng (eds) *Framing Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, Culture and Human Rights* (Cambridge University Press, 2018) 1.

³⁹ Okediji (n 29).

⁴⁰ Susan K. Sell, *Private Powers, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003) 96-101.

⁴¹ Tariff Act of 1930 (Pub. L. No 93-618, 88 Stat. 2011), codified as amended at 19 U.S.C.

trade complaints. By utilizing 'Section 301 Reports', the US and its industrial lobbyists bullied developing countries by forcing them to change their national IP laws and created fear among the developing countries of trade retaliation, which placed pressure on countries to support multilateral agreements on IP.

Fourth, TRIPS Agreement as a compromised text. The bargain narrative highlights that, despite the existence of unequal bargaining power between developed and less developed countries, most of the countries were able to fulfil their self-interests.⁴² The coercion narrative is based on the premise that the TRIPS Agreement was the result of a cohesive strategy formed by developed countries that did not consider the interest of less developed countries.⁴³ In a nutshell, multinational companies and domestic and foreign industry associations, among others, were successful in injecting their IP objectives into all venues to define IP as a trade issue.⁴⁴ The developing countries had the option of either accepting the trade sanctions, which could have meant they were denied market access, or accepting the TRIPS Agreement. They opted for the latter since they perceived it to be the lesser of two evils.⁴⁵

4. TWAIL and Intellectual Property Scholarship

In the past, several contributions from scholars including Peter Drahos, Shamnad Basheer, Ruth L. Okediji, Peter K. Yu and others have critically examined international IP treaties and have overwhelmingly argued to use TRIPS' flexibilities to achieve desirable social and economic goals in developing countries. However, TWAIL as a framework or methodology has not been explored enough in international IP scholarship. Recently, Cadogan also used TWAIL as a critique to understand the socio-legal construction of IP and its development by taking a Caribbean experience as a case study.⁴⁶ Cadogan emphasised the necessity to use TWAIL as a methodology for the reason that the TWAIL 'critique of international IP rights pinpoints how actor's

⁴² Peter K. Yu, 'TRIPS and Its Discontents' (2006) 10 (2) *Marquette Intellectual Property Law Review* 372.

⁴³ *Ibid*, 373.

⁴⁴ Sell (n 40) 8.

⁴⁵ Graeme B. Dinwoodie and Rochelle C. Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford University Press, 2012) 33.

⁴⁶ Marsha S. Cadogan, 'A TWAIL-Constructive Critique of the IP and Development Divide in the Age of Innovation- Has the Protection of Place-Based Goods changed the Narrative for the Caribbean?' in Susy Frankel (ed) *The Object and Purpose of Intellectual Property* (Edward Elgar Publishing, 2019) 57-89.

identifies and interest impacts how IP functions in the global South. The framework is also relevant in understanding whether IP reform of IP rules can be aligned with sustainable developments goals and vice versa'.⁴⁷ TWAIL is a reformist methodology that addresses IP counterhegemony from the Global South's viewpoint. Vanni used TWAIL as a framework to understand how pharmaceutical patents in Brazil, India and Nigeria were conceptualised, resisted and reformed according to their legal policies within the structural framework of TRIPS.⁴⁸ Thus, TWAIL in general could be a useful framework to rethink the role of IP at the local and grass- root levels. In this case, the TWAIL framework might demonstrate how different actors function at local levels, as well as their viewpoints on IP and their functions *vis a vis* international IP rules. To some extent, Adebola took this challenge by viewing TWAIL as a framework for understanding how the rights of farmers to collect, store and benefit from their own seeds has been undermined with structural inequalities.⁴⁹

Another issue that has received attention is developing a human rights framework for IP.⁵⁰ Current European IP scholarship and CJEU practices are leading this endeavour.⁵¹ However, the main question surrounding this issue concerns whether a human rights IP framework would essentially lead to innovation and development in the Global South. Okediji has expressed her doubts as she finds a human rights framework 'problematic for the development interests and aspirations of most people living in the Global South'.⁵² Her reservations mainly come from the traditional Western liberal tradition view of human rights that emphasises civil and political rights.⁵³ If one analyses CJEU case laws in which courts have emphasised that IP must be balanced against the protection of fundamental rights, one will notice that these laws are

⁴⁷ Ibid, 61.

⁴⁸ Amaka Vanni, *Patent Games in the Global South: Pharmaceutical Patent Law-Making in Brazil, India and Nigeria* (Hart Publishing, 2020).

⁴⁹ Titilayo Adunola Adebola, *The Regime Complex for Plant Variety Protection: Revisiting TRIPS Implementation in Nigeria* (PhD Thesis, University of Warwick, 2017).

⁵⁰ Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (eds) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, 2015) 661.

⁵¹ Christophe Geiger and Elena Izyumenko, 'Shaping Intellectual Property Rights Through Human Rights Adjudication: The Example of the European Court of Human Rights' (2020) 46(3) *Mitchell Hamline Law Review* 527-612.

⁵² Ruth L. Okediji, 'Does Intellectual Property Need Human Rights' (2018) 51(1) *New York University Journal of International Law and Politics* 4.

⁵³ Ibid, Okediji 5.

focused mainly on the right to privacy and freedom of expression.⁵⁴ In a nutshell, the point that Okediji emphasised is that while considering a human rights framework for IP, the right to development, which is an inalienable human right, should not be left out. Another point that Okediji raised concerns whether the freedom that international IP provides to achieve a balance between rights and obligations would be the same if those rights are complemented by a human rights framework.⁵⁵ To investigate this, one can use the TWAIL framework as a methodological framework to understand whether a human rights framework for IP would be a sustainable option for developing countries that wish to achieve innovation and development.

Thus, moving ahead the TWAIL can be a useful methodology for addressing IP intersection with different regimes including international investment law and recalibrating the legal theory and socio-economic rationale upon which traditional IP law was imagined.

5. Intellectual Property Disputes in Investor-State Dispute Settlement

Three cases exemplify the debate of IP and ISDS: *Philip Morris v. Uruguay*, *Eli Lilly v. Canada* and *Bridgestone v. Panama*, which has received greater attention. In *Philip Morris v. Uruguay*, the dispute was related to tobacco plain packaging measures that restricted the use of trademarks, which resulted in the expropriation of Philip Morris's property and destroyed the commercial value of IP and goodwill. The tribunal decided in favour of the state and reaffirmed the state's sovereign right to regulate matters of public interest; they also held that public health measures do not amount to expropriation or a violation of fair and equitable treatment under international investment law.⁵⁶ In *Eli Lilly v. Canada*, a dispute arose after the Canadian Supreme Court invalidated patents on the grounds that they failed to meet the Canadian patent law requirement of utility. The dispute was decided based on facts, as the tribunal did not find a dramatic change in Canadian patent utility doctrine.⁵⁷

In the case of *Bridgestone v. Panama*, the Panamanian Supreme Court held that the trademark opposition proceedings had been carried out in bad faith, and they

⁵⁴ Geiger and Izyumenko (n 51).

⁵⁵ Okediji (n 52) 35-36.

⁵⁶ *Philip Morris v. Uruguay* (n 1) paras 295-305.

⁵⁷ *Eli Lilly v. Canada* (n 1) para 351.

awarded Bridgestone with heavy damages.⁵⁸ The dispute was brought to ISDS against a domestic judicial measure on the grounds that the domestic court decision was unjust and arbitrary, which violated Panama's obligations under the investment agreement. After examining the evidence, the arbitral tribunal found that the Panamanian Supreme Court had erred in assigning undue weight to the evidence to conclude that the trade mark opposition proceedings were carried out in bad faith, but such judgment was not so egregious that no component or honest court could be made.⁵⁹ Thus, the tribunal decided against the investors.

In all three cases, the tribunals decided in favour of the states. However, a careful examination of these cases demonstrates a potential threat to IP. These implications are examined carefully in the next section.

6. Implications of Intellectual Property-Related Investor-State Dispute Settlement Cases

6.1 Diminishing Regulatory Power

The *Philip Morris* and *Eli Lilly* disputes demonstrate how investors are likely to undermine a state's regulatory space that is guaranteed by TRIPS. This threat is imminent because of vague and diverse interpretations of investment standards such as expropriation and fair and equitable treatment, which allows investors to make their cases.

In *Philip Morris v. Uruguay*, the question about IP concerned whether the tobacco plain packaging measures expropriated the claimant's trademarks. In analysing this question, one can note that the issue of the positive *right to use trademarks versus negative rights* was discussed. International IP provides grounds on which trademarks may not be registered, and once they are registered, the registrants of the trademarks have the negative right to prevent others from using their marks. This right does not afford registrants an affirmative right to use. Against this view, Uruguay argued that 'the act of registering a trademark cannot be used as a shield against government regulatory action that restricts the use of such marks or the products with which they [are] associated'.⁶⁰

⁵⁸ *Bridgestone v. Panama* (n 1), Decision on Expedited Objections, paras 68-79

⁵⁹ *Bridgestone v. Panama* (n 1) paras 505-530.

⁶⁰ *Philip Morris v. Uruguay* (n 1) para 232.

The *Philip Morris* tribunal examined the TRIPS provision on the right to use and found that the ‘provision.. does no more than simply acknowledging that trademarks have some form of use in the course of trade... [and] nowhere does the TRIPS Agreement assuming its applicability, provide for a right to use...[The relevant provision] provides only for the exclusive right of the owner of a registered trademark to prevent third parties from using the same mark in the course of trade’.⁶¹ However, the arbitral tribunal rightly observed that IPRs are negative rights; therefore, claims of the positive right to use are excluded from their scope of protection.⁶² Similarly, the tribunal agreed with the Uruguayan government by stating that the plain packaging measure was implemented to protect public health. Phillip Morris questioned the policy objective,⁶³ the measure against the reasonable expectation of respecting IP, capitalising on assets and allowing the investor to enjoy its property rights.⁶⁴ Therefore, the regulation of tobacco packaging with health pictograms created an unstable legal framework that eviscerated the investor’s expectations. The tribunal did not agree with Philip Morris’ arguments and relied on state police power to regulate public interest to conclude that states are within their rights to adopt measures that are necessary to protect public health. In doing so, the tribunal observed the following:

[R]equirements of legitimate expectations and legal stability as manifestations of the FET [fair and equitable treatment] standard do not affect the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances..... if they do not exceed the exercise of the host State’s normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment ‘outside of the acceptable margin of change’.⁶⁵

The question that stems from the preceding paragraph concerns what measures and how they are ‘outside of the acceptable margin of change’ are determined. On one hand, the tribunal rightly found that investors’ fair and equitable treatment do not supersede states’ regulatory freedoms. The unclear notion of ‘outside of the acceptable margin of change’ can be viewed as contradictory to their reaffirmation of state’s

⁶¹ *Philip Morris v. Uruguay* (n 1) para 262.

⁶² *Philip Morris v. Uruguay* (n 1) paras 260-267

⁶³ *Philip Morris v. Uruguay* (n 1) para 197 (arguing measure lacked ‘serious, objective and scientific assessment’).

⁶⁴ *Philip Morris v. Uruguay* (n 1) para 341.

⁶⁵ *Philip Morris v. Uruguay* (n 1) para 422-423.

regulatory freedoms. The larger threat is investors' reliance on this notion to argue that they might exceed these regulatory freedoms. From an IP perspective, changes in regulatory frameworks to accommodate public interest are essential. TRIPS universalized IP but derived its legality at the national level. TRIPS only provides a minimum foundation for this. Therefore, IP rights are inherently domestic, which means that the scope of IP protection depends on a national level⁶⁶ that considers social, economic, political and legal statuses. Moreover, the flexibilities provided to member states to formulate standards based on their national needs is an essential characteristic that ensures the role of national laws and courts in developing sound IP regimes. To do so, legislative measures might require changing and adopting laws that are required to adapt to social and technological changes in society. Of course, it is a state's sovereign right to change laws, but when does a change become 'outside of the acceptable margin of change'? It is unclear whether one could assess such a margin of change.

In *Eli Lilly v. Canada*, the claimant fundamentally challenged the invalidation of a patent by the Supreme Court for the non-fulfillment of the Canadian version of patent utility. The *Eli Lilly* case challenged the Supreme Court's decision on the grounds that the promise utility doctrine had been applied arbitrarily, which resulted in uncertainty in applying the doctrine.⁶⁷ After examining the evolution of the promise utility doctrine, the tribunal concluded that the promise doctrine 'does not demonstrate a dramatic transformation of the utility requirement in Canadian law'.⁶⁸ The question raised by this case concerns how one would assess a regulatory change if it is not a dramatic transformation. A tribunal would likely rely on a subjective assessment to determine a change in the law. Considering the lack of precedence in the ISDS system and existing biases resulting from the possibilities of being an arbitrator in one dispute and pleader in another, it is likely that investors would leverage this advantage towards them to form investor pro findings.⁶⁹

⁶⁶ Keith E. Maskus, 'The International Regulation of Intellectual Property' (1998) *Weltwirtschaftliches Archiv* 186.

⁶⁷ *Eli Lilly v. Canada* (n 1) para 236.

⁶⁸ *Eli Lilly v. Canada* (n 1) para 351.

⁶⁹ See Horatia Muir Watt, 'The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal' (2012) <https://hal-sciencespo.archives-ouvertes.fr/hal-00972976/document> accessed 20 January 2021.

The issue is more pertinent from an IP perspective. The TRIPS Agreement aims to protect the interests of rights holders and users.⁷⁰ However, the primary objective of TRIPS is to ensure minimum standards for IP protection, but TRIPS did not aim to harmonise national laws.⁷¹ TRIPS provides several standards that are not well defined and, therefore, allows members to determine the scope of those standards. For example, patentability standards involve novelty, new inventions and inventive steps.⁷² Flexibility allows countries to address their local needs and enables them to pursue their own public policies by establishing institutional conditions that support economic development.⁷³ Naturally, the application of flexibilities results in differences in legal systems.

Therefore, if one relies on investors' arguments and arbitral tribunals' observations as discussed previously for *Philip Morris* and *Eli Lilly*, one is likely to undermine the regulatory space provided by TRIPS. Despite the few cases on IP-related ISDS disputes, the *Philip Morris* and *Eli Lilly* cases created a vulnerability in the TRIPS flexibilities and challenges under the ISDS. This is worrisome, particularly because there are increasing views on using TRIPS flexibilities to safeguard public interest aspects of IPRs.⁷⁴ Investors have used ISDS as a tool to threaten host states to bring about changes in domestic laws to fulfil their interests. It has been reported that, when *Eli Lilly v. Canada* was pending before the tribunal, pharmaceutical companies in Colombia⁷⁵ and Ukraine⁷⁶ threatened to file ISDS claims to block measures related to

⁷⁰ TRIPS, Art. 7.

⁷¹ Ibid.

⁷² TRIPS, Art. 27.

⁷³ 'Public Policy-related Assistance-Flexibilities' (WIPO)

<https://www.wipo.int/ip-development/en/policy/flexibilities.html> accessed 20 January 2021.

⁷⁴ Moses Nkomo, 'The Under-Utilization of TRIPS Flexibilities by Developing Countries: The Case of Africa' (WIPO-WTO Colloquium Papers, Volume 1, 2010) 125-138.

⁷⁵ Public Eye, 'Compulsory Licensing in Columbia: Leaked documents show aggressive lobbying by Novartis' (12 April 2017)

<https://www.publiceye.ch/en/media-corner/press-releases/detail/compulsory-licensing-in-colombia-leaked-documents-show-aggressive-lobbying-by-novartis/> accessed 20 January 2021.

⁷⁶ Luke Eric Peterson and Zoe Williams, 'Pharma Corp Withdraws Investment Arbitration after Ukraine Government agrees to settlement of dispute over monopoly rights to market anti-viral drug' (IA Reporter, 16 March 2017) <https://www.iareporter.com/articles/pharma-corp-withdraws-investment-arbitration-after-government-agrees-to-settlement-of-dispute-over-monopoly-rights-to-market-anti-viral-drug/> accessed 20 January 2021.

public health. Notably, Colombia⁷⁷ and Ukraine both had to compromise their measures to accommodate the interests of pharmaceutical giants who were threatening to initiate ISDS.⁷⁸ Likewise, the influence of multinational companies over public health policymaking is detailed in the report of British American Tobacco (BAT). The BAT report suggests that Uzbekistan was influenced to drop its intended advertising ban on tobacco, which was later replaced by a code that was drafted by the tobacco industry.⁷⁹

To conclude, the *Philip Morris* and *Eli Lilly* disputes represent an attempt to erode and control state's regulatory powers. TWAILers have questioned the TRIPS Agreement and its advantages for developed countries. However, developing countries ensured a way to infuse balance and created a mechanism to curate the social objectives of IP through flexibilities incorporated in TRIPS. Therefore, multinational companies' attempts to bring IP issues into ISDS represent a continuing desire to transform IP into one-way traffic by extensive IP protections without regarding societal welfare.

6.2 Treating Intellectual Property as Investments: Two Concerns

One fundamental question that recent IPRs-related disputes in ISDS have introduced concerns whether IP is an investment. The starting point of jurisdictional requirements in ISDS is based on the assessment of IPRs as investments.⁸⁰ Arbitral tribunals have established investment criteria for assessing whether a dispute arises out of an investment. The arbitral assessment of investment is popularly known as the *Salini test* and mainly focuses on the following aspects: contribution, duration, risk and economic development in a host state.⁸¹ Since the *Salini test* has been broadly interpreted and does not require all criteria to be fulfilled simultaneously, IP likely falls under the

⁷⁷ See *Novartis Knocks Colombia Over Leukemia Drug Price Control* <https://www.law360.com/articles/868104/corrected-novartis-knocks-colombia-over-leukemia-drug-price-control> accessed 20 January 2021.

⁷⁸ Brook K. Baker and Katrina Geddes, 'The Incredible Shrinking Victory: *Eli Lilly v Canada*, Success, Judicial Reversal, and Continuing threats from Pharmaceutical ISDS' (2017) 49 (2) *Loyola University Chicago Law Journal* 508-512.

⁷⁹ Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States* (Hart Publishing, 2018) 171-172.

⁸⁰ ICSID Convention, Art. 25.

⁸¹ *Salini Costruttori S.p.A and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001.

arbitral practice of assessing investment. This does not mean that IP is an investment. Okediji argued that the nature of IPRs does not allow investors to equate IP with investment as defined and assessed under international investment law.⁸² Additionally, some have called for the role of national and international IP law in assessing IPRs as investments.⁸³ However, according to a broader context, treating IPRs as investments (even if they fulfil the arbitral criteria of investment) would likely raise questions that would challenge the IP system. Two potential concerns are addressed in the next sections.

6.2.1 First concern: Investment Protection Inclusive to Exclusive Rights?

The first concern is, if IP is equated with investment, the fundamental presumption would be whether the investment function is part of exclusive rights guaranteed by the protection of IP. This presumption is more pertinent in relation to trade marks.

IPRs are primarily exclusive rights that empowers owners of IP rights to exclude others. Whether exclusive rights include investment protection is a relevant question. This point is systematised by analysing the investment function of trademarks recognised in *L'Oréal v. Bellure*.⁸⁴ Since investment protection is recognised as a function of trademarks, one may assume that those are part of exclusive rights. In *L'Oréal v. Bellure*, the dispute was related to trademark confusion and the passing of action against 'smell-alikes' perfumes marketed in packaging under a different name, which took unfair advantage of *L'Oréal* brand. Then European Court of Justice (ECJ) (now known as the Court of Justice of European Union [CJEU]) was of the view that 'investment' is one of the functions of trademarks.⁸⁵

⁸² Ruth L. Okediji, 'Is Intellectual Property "Investment"?' *Eli Lilly v. Canada and the International Intellectual Property System* (2014) 35 (4) *University of Pennsylvania Journal of International Law* 1121-1138.

⁸³ Carlos Correa and Jorge E. Viñuales, 'Intellectual Property Rights as Protected Investments: How Open are the Gates?' (2016) 19 (1) *Journal of International Economic Law* 91-120; Pratyush Nath Upreti, 'The Role of National and International Intellectual Property Law and Policy in Reconceptualising the Definition of Investment' (2021) 52 *International Review of Intellectual Property and Competition* 103-136.

⁸⁴ *L'Oréal SA v. Bellure NV* (C-487/07, 18 June 2009) [*L'Oréal v. Bellure*].

⁸⁵ *Ibid*, para 63.

This brings us to an important question concerning whether investment protection is a part of the concept of exclusive rights guaranteed by IP protection. The ECJ in *L'Oréal v. Bellure* upheld that investment protection is one of the functions of trademarks.⁸⁶ However, nowhere in the decision hinted investment protection is also a primary function of trademark or those function are considered under exclusive right scheme of IPRs. The ECJ's opinion has created complexity and questioned the rationale for introducing such a function of trademarks in addition to the original indicator.⁸⁷ Much has been written on the ECJ's opinion on the case, but a clearer picture is drawn in the more recent case of *Mitsubishi v. Duma*.⁸⁸ Yet again, the CJEU confirmed several functions of trademarks, as the relevant paragraph reveals:

[The] essential function of the mark which is to guarantee to consumers the origin of the product or service, but also the other functions of the mark, such as, in particular, that of guaranteeing the quality of the product or service, or those of communication, investment or advertising.⁸⁹

Similarly, the CJEU has explained that the nature of the investment function of trademarks can be used as follows:

[The] possibility for the proprietor of [a] mark to employ it in order to acquire or preserve a reputation capable of attracting customers and retaining their loyalty, by means of various commercial techniques. Thus, when the use by a third party, such as [a] competitor of the trade mark proprietor, of a sign identical to the trade mark in relation to goods or service[s] identical with those for which the mark is registered substantially interferes with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty, the third party's use adversely affects that function of the trade mark.⁹⁰

This quote makes clear that the investment function is linked with the use of the trademarks. In other words, the use of a trademark generates value that is created through investment, but this is not to indicate that investment is part of the exclusive

⁸⁶ *L'Oréal v Bellure* (n 84) para 58.

⁸⁷ Michel Vivant, 'Intellectual Property Rights and Their Functions: Determining Their Legitimate 'Enclosure' in Gustavo Ghidini et al., (eds), *Kritika: Essays on Intellectual Property* (Edward Elgar Publishing, 2017) 55-56.

⁸⁸ *Mitsubishi Shoji Kaisha and Mitsubishi Caterpillar Forklift Europe v. Duma Forklifts NV*, (CJECU Case C-129/17, 25 July 2018).

⁸⁹ *Ibid*, para 34.

⁹⁰ *Mitsubishi v. Duma* (n 88) para 36.

right of the trademark. Since the use of trademarks generates value, investors might likely rely on the use of IPRs to claim a breach of investment standards. Therefore, it is relevant to clarify the nature of the right to use in the IP system.

Since IPRs are negative rights, the expectations of the positive right to use does not fall under the scope of protected rights. The domestic courts has clarified that the investment function of a trademark is part of owners' rights to preserve reputations that are capable of attracting and retaining consumer loyalty against unauthorised third-party use.⁹¹ Therefore, an investor cannot legitimately expect to have a positive use of a trademark based on 'investment' as a function of trade marks.⁹² The question of positive rights is dead and buried in the *Philip Morris dispute* and *WTO Tobacco Plain Packaging disputes*,⁹³ but this might not restrict or eliminate investors from bringing similar claims.

A careful examination of the *Philip Morris* arguments hints that the clarification on the positive rights to use does not restrict investors from arguing that the value generated through the use is protected since the investment function is linked to the use. The *Philip Morris* tribunal concluded that trademarks are property rights and '[i]t must be assumed that trademarks have been registered to be put to use, even if a trade mark registration may sometime only serve the purpose of excluding third parties from its use'.⁹⁴ This means that even the right to exclude has a value that could be expropriated. However, the tribunal did not assess the value of individual investments (for example, different trademarks of a claimant), but rather assessed the business as a whole⁹⁵ and found that there were no substantial losses of value.⁹⁶ One thing is clear that investment function is not a part of exclusive rights. However, a reading of the *Philip Morris* award provides the impression that value is part of the right to exclude because the use of exclusive rights enables owners to generate revenue.

⁹¹ Ibid.

⁹² Anselm Kamperman Sanders, 'Intellectual Property as Investment and the Implications for Industrial Policy' in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and International Dispute Settlement* (Kluwer Law International, 2019) 161.

⁹³ Panel Report, *EC- Trademarks and Geographical Indications (US)*, paras 7.209-7.210 and Panel Report, *EC- Trademarks and Geographical Indications (Australia)*, paras 7.245-7.246 (emphasizing IPRs as negative rights).

⁹⁴ *Philip Morris v. Uruguay* (n 1) para 273.

⁹⁵ *Philip Morris v. Uruguay* (n 1) para 283.

⁹⁶ *Philip Morris v. Uruguay* (n 1) para 284.

Similarly, in *Bridgestone v. Panama*, the tribunal concluded that the mere registration of a trademark in a country does not amount to an investment because the effect of registering of a trade mark is negative, which means that it prevents competitors from using that mark on their products. This is not enough to be protected as an investment; the trade mark should be exploited and generate value. In other words, the value is not part of the right to exclude but must be protected as an investment. IPRs should possess value contributing to economic development. The *Bridgestone* tribunal was right to determine that IPRs are investments only if they contribute to economic development in the host state. One should also remember that the *Bridgestone* tribunal's assessment was made at the jurisdictional level. At the merit stage, a tribunal tends to give importance to the value and expectations of investments. Thus, despite clarification, it is likely that investors will bring value generated from IPRs to claim violations of investment treaties.

One looming issue that has not been foreseen is the 'use' of investment. This author believes that IP protection and value generated using IPRs are different. However, arbitral tribunals tend to view the use of investment as one component of the bundle of property rights. In *Hochtief v. Argentina*,⁹⁷ the tribunal considered the phrase 'the use and enjoyment of investment' in Germany-Argentina BIT (1991) to conclude, 'the enjoyment of an investment does include recourse to dispute settlement, as an aspect of the management of investment. Indeed the ("procedural") right to enforce another ("substantive") right is one component of the bundle of rights and duties that make up the legal concept of what property is'.⁹⁸ This is not where the problem lies; the concern is when arbitral tribunals treat the value of investment in pursuance of use as an investment.⁹⁹ Particularly, when it comes to IP, the value generated through use cannot be relied on to define IPRs as investments. In the *Hochtief* dispute, the claimant argued that the use of investment cannot be the basis for investment arbitration. Responding to the argument, the tribunal stated the following:

⁹⁷ *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (Decision on Jurisdiction, October 24, 2011) [hereinafter *Hochtief v. Argentina*].

⁹⁸ *Ibid*, para 66.

⁹⁹ Zachary Douglas, 'Property, Investment and the Scope of Investment Protection Obligations' in Zachary Douglas et al., (eds), *The Foundations of International Investment Law* (Oxford University Press, 2014) 363-405.

[I]f one considers... claim... having an economic value... to be within the definition of an investment, or of intellectual property rights, addressed in Article 1(d) [referring to the definition of investment containing IPRs]. The argument that although a State could not cancel such claims or intellectual property rights without violating the BIT, it could cancel the right to pursue the claims or enforce the intellectual property rights through litigation or arbitration without violating the BIT is nonsensical. It is nonsensical because the right to enforcement is an essential component of the property rights themselves, and not a wholly distinct right.¹⁰⁰

This paragraph emphasises that the economic value generating from the use of investment (IP as an investment) is likely to be the basis for investment arbitration. It seems the fundamental problem is the relationship with a value that IP generates *vis-à-vis* investment protection. The value generated for assets is likely to be considered an investment. Given this information, the value generated from IPRs is not necessarily predictable. Moreover, the emphasis on value would likely result in extra-territorial claims. For example, Bridgestone argued that domestic court decisions would result in a reduction in the trademark value in other South American countries. It was based on the ground that other South American countries would follow the Panama court's decision. Even if we consider hypothetically that such an argument has merit, it is hard to understand how economic impact would be evaluated, particularly if those are not felt? In other words, losses can't be based on value rather should be on royalties in case of trademark licensing. Moreover, how can investors claim that the courts in other jurisdictions would deal similar to that of the Panamanian court? Such perceived risk cannot be legally materialized, if done, it would result in extra-territorial claims of IPRs.

Considering the contingent nature of IPRs, along with the limitations and exceptions enriched in national laws, it is likely that the generated value may be affected. That does not mean that value generated by IPRs *per se* is expropriated; it is the result of the inherent nature of IPRs. If investors have decided to engage with IPRs based on their investments, then those investors must accept the nature and fundamentals of IPRs. Thus, in Giger's words, 'equating IP with investment protection is... misleading and ill-conceived'.¹⁰¹ Indeed, IPRs should not be equated with investment, but treating

¹⁰⁰ *Hochtief v. Argentina* (n 97) para 67.

¹⁰¹ Christophe Geiger, 'Regulatory and Policy Issues Arising from Intellectual Property and Investor-State Dispute Settlement in the EU: A Closer Look at the TTIP and CETA' in

IPRs as investments with limits and exceptions would create a more systematic integration and acceptance of IP-ISDS interactions.

6.2.2 Second Concern: Devaluing the Incentive Rationale

An asset may be an investment, but if it does not meet the requirements of national IP law, then such assets cannot be viewed as an IP investment. This is due to the strict territorial presumption. Importantly, the territorial principle that is incorporated in international IP allows countries to define patentability criteria. Therefore, an invention that is protected in one country may not be protected in another country. The protection of technology by patent rights prohibits others from using such patented technologies. Patents enable technology to achieve value and a return on investment. However, there might be inventions and technology that may not be protected by some countries, as justified under the realm of the territoriality principle of patentability requirements. Once a patent either expires or is revoked, the value of the patented product does not diminish completely; only control of accessibility will be lost by the owner (i.e., at the moment a patent expires or is revoked, it enters the public domain). This does not mean that those expired patents are not assets. Therefore, those excluded inventions or technology are likely to fall under the definition of an investment and thus qualify for protection as a foreign investment. Hence, inventions excluded from IP protection are likely to be enforced through direct access to the international arbitral tribunal, without considering the domestic enforcement mechanism.¹⁰²

While the above-mentioned scenario is possible, whether it is legitimate and how far it is likely to succeed are separate questions. The academic writing have shown that the property metaphor is linked to assets, which means ownership is the essence of assets.¹⁰³ One key concern is that the territorial patent law might exclude some technology/inventions from IP protection. In such cases, those inventions as ‘assets’

Christophe Geiger (ed), *Research Handbook on Intellectual Property and Investment Law* (Edward Elgar Publishing, 2020) 520.

¹⁰² Yi Shin Tang, *The International Trade Policy For Technology Transfers: Legal and Economic Dilemmas on Multilateralism Versus Bilateralism* (Kluwer Law International, 2009) 126-127.

¹⁰³ Ole-Andreas Rognstad, *Property Aspects of Intellectual Property* (Cambridge University Press, 2018).

may qualify for protection as an investment (i.e., what is not protected by IP is protected as an investment through IIA).

Generally speaking, such an approach should not be a problem. However, it would be alarming if the current investment dispute settlement continued to remain a powerful tool that enables private investors to challenge any regulatory change or decision of a domestic court. There is a reason to say so. One key rationale for granting IP protection is to incentivise innovation by granting exclusive monopoly rights. Previously, stronger IP protection was considered an incentive to encourage technology flows and provide protection from imitations through exclusive rights. Through direct accessibility to arbitral tribunals that are pro investors and capable of granting breathtaking damage, the investor would prefer opting for investment protection rather than IP that consists of strict patentability criteria, which defeats the very purpose of IP laws. If potential inventors are likely to receive stronger protection than domestic law with the possibility to walking with huge compensation, perhaps the urge for IP protection or the motivation to create a novel invention will not remain the same. The argument demonstrated here seems somewhat implausible, but it can have far-reaching consequences.

7. Overcoming the Concerns of IP-Related ISDS Disputes through the TWAIL Reformist Approach

Generally, TWAILers view linking trade and IP as a way to privatise knowledge and disseminate information. In an era when re-orientation of globalization is being discussed, the practical relevance of TWAIL might be questioned.¹⁰⁴ Given this information, TWAIL reminds us that historical development has allowed us to correct mistakes in a more inclusive manner both from a geopolitical and socio-economic perspective. One should remember that TWAILers are not against the international system *per se* but have rather positioned themselves as reformists to improve the system.

¹⁰⁴ Arpan Banerjee, 'Intellectual Property Scholarship and the New Legal Realism Movement: Reflections from Bollywoodland' (2016) 6 <http://atrip.org/wp-content/uploads/2016/12/Banerjee-ATRIP-Essay-first-prize-2015.pdf> accessed 20 January 2021.

This author acknowledges the relevance of TWAIL scholarship but also embraces a liberal view of TWAIL. Within the reformist approach of correcting international IP law, TWAILers must embrace the existing balancing tools and flexibilities enshrined in TRIPS. This is not to argue against TWAIL's vision, however; the point to emphasise is that one must embrace the value that international IP has already created. Colonial supremacy and industrialist lobbyists backed by developed countries have indeed played influential roles in creating a regime that has benefitted developed countries the most. That does not mean that one should give away the seeds of social value that international IP has incorporated.

Therefore, the starting point for TWAILers' analysis should focus on how balancing tools in the form of the flexibilities, exceptions and limitations of TRIPS should be safeguarded. In other words, how can we safeguard principles that allow countries to develop their national IP policies based on their needs in a way that would result in innovation and development? Subsequently, TWAILers should engage in debate and discussion to transform international IP rules by questioning whether TRIPS rules foster innovation and ensure wealth creation in the Global South through empirical evidence. Therefore, considering ISDS as a threat to regulatory freedom, the TWAIL reformist approach would be useful to regain regulatory control by creating a restrictive door for investors to reach IP related disputes in ISDS.

Critics have also called for taking a TWAIL approach to international investment law.¹⁰⁵ One reason for this is the ongoing legitimacy crisis around ISDS. Over the years, ISDS has spawned various controversies,¹⁰⁶ and it has been criticised for a lack of transparency and a pro-investors approach, which limits the regulatory powers of states. The list continues. The increasing disagreement on ISDS and the states' refusals to endorse and withdraw from ISDS¹⁰⁷ have further highlighted the legitimacy crisis

¹⁰⁵ Antonius R. Hippolyte, 'Aspiring for a Constructive TWAI Approach Towards the International Investment Regime' in Stephan W. Schill, Christian J. Tams and Rainer Hofmann (eds) *International Investment Law and Development: Bridging the Gap* (Edward Elgar Publishing, 2015) 180-222.

¹⁰⁶ Roberto Echandi, 'The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987-2017) and Policy Implications' (2019) 34(1) *ICSID Review-Foreign Investment Law Journal* 32-61.

¹⁰⁷ Sergery Ripinsky, 'Venezuela's Withdrawal From ICSID: What it Does and Does not Achieve?' <https://www.iisd.org/itn/fr/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/> accessed 20 January 2021.

of the system.¹⁰⁸ Against this background, this section will analyse the approach taken by the Global South to regain state regulatory control.

7.1 Safeguarding Domestic Court Decisions

One commonality between *Eli Lilly v. Canada*, *Bridgestone v. Panama* and *Philip Morris v. Uruguay* is that these disputes reached ISDS after adjudication in domestic courts. In other words, the investors were not satisfied with the decisions of the domestic courts, which resulted in investment arbitration. The grounds for bringing domestic court decisions before investment arbitration is not clear.¹⁰⁹ Understanding this is essential because IPRs are territorial rights, and the role of domestic courts becomes essential in shaping national IP regimes. Given the structural biases in ISDS, if investors threaten to challenge domestic court decisions on national IP issues, it is likely that less advanced countries will be forced to change their national laws. Therefore, one must ask how judicial sovereignty can be safeguarded in IIAs.

Some developing countries have incorporated innovative treaty language in their IIAs to ensure that investors do not challenge or bring claims based on domestic judicial systems. There could be situations in which investors are likely to question the structure of the judicial system. One possible way to mitigate such claims is by placing explicit exclusions in treaties. The Brazil-Mozambique BIT (2015) is an excellent example of this. The preamble of the BIT incorporates the following language: ‘reaffirming judicial autonomy’.¹¹⁰ Such a reference would ensure that arbitral tribunals must adhere to the preamble as the objective and purpose of the text per the Vienna Convention on the Law of Treaties (VCLT) when analysing claims based on national courts.

Another example is the Model India BIT (2016), which has incorporated broad language to safeguard judiciary autonomy. First, ‘order or judgment sought or entered in any judicial, administrative or arbitral proceedings’ is not considered to be an

¹⁰⁸ See Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

¹⁰⁹ Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration* (Cambridge University Press, 2018) 161.

¹¹⁰ Brazil-Mozambique BIT (2015), preamble.

investment.¹¹¹ Second, the Model BIT adopts an interesting approach: the agreement defines 'law' to include decisions, judgments, orders and decrees made by courts, regulatory authorities and judicial and administrative institutions that have the force of law within the territory of a party.¹¹² The relevance of defining 'law' as consisting of judgement and judicial order is twofold. Throughout the Model BIT, limits to investors' claims refer to 'in accordance with [the] law'. For example, the starting sentence in the definition of investment refers to '[an] enterprise constituted, organized and operated in good faith.... in accordance with [the] law of the party in whose territory the investment is made'. If one reads the definition of investment and meaning of law defined in the agreement, one could conclude that any decision or order of a national court cannot be treated as an investment *per se*, which precludes investment arbitration.

Similarly, Article 5 of the Model BIT argues that a party may 'expropriate an investment.... [e]xcept for reasons of public purpose, in accordance with due process of law...'.¹¹³ This indirectly limits the claims on judicial expropriation. Additionally, the Model BIT ensures submission before the national courts as a pre-condition to submission of claims to arbitration.¹¹⁴ Additionally, it also obliges a tribunal to consider domestic courts' decisions concerning the issue of expropriation claims.¹¹⁵ These approaches are timely and relevant if they are curated better and would likely become a benchmark for future investment agreements and likely to safeguard national court's decision on IPRs.

7.2 Redefining the Meaning and Content of the Definition of Investment

Essentially, the gate to ISDS is establishing that disputes in question arise from investment. The starting point for assessment is a treaty's definition of investment, followed by arbitral practices for assessing investment. Therefore, new approaches in defining investment are designed to ensure that frivolous claims are not entertained and to further strengthen state control over ISDS. One such approach is the 'enterprise-

¹¹¹ Model Indian BIT (2016) Art. 1.4 (vii).

¹¹² Model Indian BIT (2016) Art. 1 (1.6).

¹¹³ Model Indian BIT (2016) Art. 5 (5.1).

¹¹⁴ Model Indian BIT (2016) Art. 15.

¹¹⁵ Model Indian BIT (2016) Art. 5 (5.6).

based' definition of investment. The Indian Model BIT of 2016 has incorporated such a definition of investment. Article 1.4 of the Indian Model BIT states:

[I]nvestment means an enterprise constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made.... has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made.¹¹⁶

In addition to this definition, copyright, know-how and IPRs such as patents, trademarks, industrial designs and trade names are referenced to the extent that they are recognised under the law of a party.¹¹⁷ An enterprise is defined as 'having its management and real and substantial business operations in the territory of the Host State'.¹¹⁸ The reference to 'real and substantial business operations' would require more than the mere registration of IPRs. In other words, only those IPRs that have substantially contributed to the economic development of a host state can be determined to be an investment. The Brazil Model BIT and African Model BIT have also incorporated enterprise-based definitions of investment.¹¹⁹ This approach will ensure state control over the gate of ISDS by determining the scope of investment as defined in IIAs.

An alternative way to further safeguard IP objectives is by bringing national and international IP content into the definition of investment. One approach would be to reconceptualise the definition of investment by including national exceptions and limitations and balancing tools that are enshrined in TRIPS.¹²⁰ This can be done by modifying treaty language that defines the term 'investment'. In most cases, any reference to IP or categories of IP rights is included in the definition of investment; thus, incorporating the limitations and exceptions of national IP laws or general references to TRIPS would be possible. Alternatively, one could also create a protocol for the definition of investment that consists of national IP limitations regarding

¹¹⁶ Indian Model BIT (2016) Art. 1.4.

¹¹⁷ Indian Model BIT (2016) Art. 1.4 (f).

¹¹⁸ Indian Model BIT (2016) Art. 1.3.

¹¹⁹ See Brazil Corporation and Facilitation Investment Agreement (2015) Art 3 (1) (1.3), Brazil-Mozambique BIT (2015) Art. 3; See also Draft Pan-African Investment Code (December 2016) Art 4.

¹²⁰ Upreti (n 83) 125-128.

TRIPS.¹²¹ The relevance of such an approach is that it would enable the transfer of national IP limitations and exceptions. Therefore, at the jurisdictional level, if an arbitral tribunal is required to assess whether a dispute arises out of an investment (i.e., IP as an investment), the tribunal's first assessment would be to ensure that the investment in question fulfils all national limitations.¹²² This becomes more relevant as international IP treaties provide minimum standards for IP protection. This means that countries may adopt minimum standards through domestic legislation or practices.¹²³ In other words, relevant TRIPS provisions act as a tool for achieving flexibilities that facilitate opportunities for the 'creative implementation' of the agreement¹²⁴ to address national social and economic needs. Thus, the inclusion of national exceptions and limitations would strengthen existing policy goals that TRIPS guarantees. To summarise, the approach discussed will ensure whether a dispute arises from an investment at the time of assessment and will ensure that the tribunal considers the exceptions and limitations of TRIPS. Since, TRIPS is not directly applied in an assessment, an arbitral tribunal must follow the rules established by national laws and courts. Even though the approach discussed here has not been adopted, it is worth discussing at the policy level.

8. Conclusion

International IP as a system has evolved over the years and has been shaped by national practices. The development of international IP treaties has arisen in the backdrop of colonial history, the liberalization of trade and their marriage with IP through TRIPS. This essay explored TWAIL and its position on IP. TWAIL is far from perfect, but the relevance of TWAIL cannot be underestimated in the emerging evolution of IP where norm-setting is moving beyond multilateralism. As emphasised in this essay, one should embrace a liberal sense of TWAIL that looks beyond challenging the TRIPS Agreement rather than acknowledge the 'balance' achieved in TRIPS and find ways to strengthen them. This has become even more relevant as the number of multinational companies suing states in ISDS has increased.

¹²¹ Ibid. Practically this is possible, for example German-Algeria BIT (1996) has incorporated a protocol into its definition.

¹²² Upreti (n 83) 131.

¹²³ Ibid.

¹²⁴ Mohammed K El. Said, 'Public Health related TRIPs-Plus Provisions in Bilateral Trade Agreement: A Policy Guide for Negotiator and Implementers in the WHO Eastern Mediterranean Region (WHO Publications, 2010) 90.

A few cases in which IPRs have been challenged in ISDS have created concerns and challenges related to safeguarding IPRs objectives in IIAs. This essay has highlighted two main concerns. First, despite decisions made in favour of states, investors' arguments and arbitral tribunals' reasoning would likely invite more cases on IPRs that challenge regulatory autonomy. Second, treating IPRs as investments might lead to the assumption that investment protection is part of exclusive rights. This essay has clarified that investment protection is not part of exclusive rights guaranteed by IP protection. The recent initiative taken by developing countries to safeguard their regulatory rights by restricting investors' reach to ISDS is worth noting. Therefore, it seems that one possible way to safeguard regulatory autonomy is to define the content of IIAs. To conclude, this essay generate discussion on TWAIL and how we can use a reformist TWAIL approach as a framework to re-orient challenges concerning international IP.