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The Untapped Potential of Investor-State Dispute Settlement involving Intellectual Property Rights and Expropriation in Free Trade Agreements

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Abstract

Much has been written about numerous aspects of investor-state dispute settlement, and the literature grows larger with the release of every publicly available arbitral ruling. One exception, however, is intellectual property provisions in international investment agreements. The absence of scholarly literature in this area is surprising given not only the voluminous amount of literature written on Intellectual Property Chapters of FTAs but more importantly due to the potential effect the provisions may have on intellectual property rights (IPRs) and on governments to adequately protect areas of domestic interest such as public health.

The aim of this article is to draw attention to the potential effect of intellectual property provisions in FTA Investment Chapters on governmental regulatory sovereignty as well as to highlight potential issues and inconsistencies between FTAs and other intergovernmental and multilateral agreements. The article is narrowly focused on recent FTAs, as opposed to longstanding BITs, in order to highlight the modern trends in international trade agreements such as regard for TRIPs standards of IP protection and the recent appearance of TRIPS-Plus provisions. Particular attention is focused on FTAs involving the US, South Korea, Switzerland, China, Australia and Chile. Where applicable, the recently negotiated but not yet implemented South Korea-US FTA (KORUS) will be used as an illustrative example. Both South Korea and US FTAs demonstrate a pro-active approach to negotiating international investment agreements and both nations also have an interest in protecting and enforcing IPRs.

This paper can be downloaded from the [Social Sciences Research Network at Abstract No. 1806822](#).

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