International Investment Agreements and Industrial Policy

Aaron Cosbey

ILO/FES Event: Boosting economic dynamics and job growth: The potential of industrial policies

Crozet, France, March 4-5th 2013

iisd International Institute for Sustainable Development / Institut international du développement durable

Better living for all—sustainably

Overview

- Starting points: context, definitions
- Potential problems, solutions:
  - Performance requirements
  - IPRs
  - Broader IP: environmental policy
- Concluding thoughts

iisd

Starting points

- Context: No judgment as to effectiveness of IP instruments; no wider comments at this time about the legitimacy of the regime of IIAs
- Industrial policy: pursuit by governments of national economic excellence in key sectors, with a view to creating globally competitive domestic firms (broad definition)
- International Investment Agreements (IIAs): As found in BITs, FTAs, WTO's TRIMS. Most contain provisions for binding investor-state dispute settlement.

Challenge: performance requirements

- Performance requirements are conditions that include:
  - Demands for use of local content
  - Tech transfer requirements
  - Joint venture requirements
  - Demands for domestic R&D spending
  - Demands for some required level of exports
- Classic instruments of industrial policy
- Some IIAs ban certain performance requirements. Most do not.

iisd

Performance requirements

- WTO's TRIMs Agreement bans:
  - Local content requirements
  - Import limitations (e.g., as percentage of exports)
  - Export limitations
- NAFTA's Chapter 11 (and new EU practice) ban:
  - Local content requirements
  - Export requirements & links to domestic sales
  - Import limitations
  - Technology transfer requirements
  - Exclusive supplier requirements

iisd

Cases: Performance requirements

- **Local content:** Mesa Power v. Canada (UNCITRAL, NAFTA): local content requirement to qualify for feed-in tariff to renewable energy in Ontario. Claim $775 million, Arbitration ongoing.
- **R&D requirement:** Mobil Investments and Murphy Oil v. Canada (ICSID, NAFTA): requirements to invest amount in R&D, E&T, proportional to revenues. Won by claimant: $60 million.
- **Export requirements?** No cases yet. Are these intrinsic to good IP practice?

iisd

Best practice

- **Draft EU language (from CETA):** bans most types of performance requirements, but explicitly allows some requirements:
  - To locate production, provide a service
  - To train or employ workers
  - To construct or expand particular facilities
  - To conduct R&D in territory
- **SADC Model BIT:** explicitly allows certain performance requirements, related to:
  - Employment levels, training
  - R&D and use of new technologies
  - Technology transfer

iisd

Best practice

- **IISD Model Agreement:**
  - Explicitly allows any performance requirements elaborated at pre-establishment – deemed to be compliant.
  - Contains illustrative list.
  - Post-establishment, no prohibition; measures must respect obligations contained in the Agreement (e.g., fair and equitable treatment).

Challenge: IPRs

- Correa argues that TRIPs Agreement allows for compulsory licensing in the event of non-working of a patent, *including lack of local production*. Controversial argument.
- Local production demands may be a tool of industrial policy. If they are so used, and if they are WTO-legal (per Correa), they would likely run afoul of IIA provisions on expropriation.
- All IIAs contain language on expropriation. Must be for public purpose, must be accompanied by compensation.

iisd

Cases: IPRs

- **Phillip-Morris v. Australia (UNCITRAL, HK-Australia BIT):** challenging plain packaging laws on tobacco products as expropriation of intellectual property, arguing that IP is a protected investment. Case ongoing.
- **Eli Lilly v. Canada (NAFTA):** challenging Canada's standards for granting drug patents, claiming that denial of patent is an expropriation of property. Case ongoing. Claimed $100 million.

iisd

Best Practice

- **SADC Model BIT:** Explicitly excludes coverage under expropriation article for compulsory licensing.
- **IISD Model Agreement:** Defines investment so as to exclude intellectual property, so no coverage.

Challenge: Environmental Policy as IP

- Can broad environmental policy be seen as industrial policy? Germany has explicitly pursued environmental policy with industrial policy goals for many years.
- Germany's nuclear energy ban can be seen as an attempt to steer the economy toward excellence in clean energy, as well as achieve other goals. Arguable point – little IP context to the decision.

iisd

Challenge: Environmental Policy as IP

- Can broad environmental policy be seen as industrial policy? Germany has explicitly pursued environmental policy with industrial policy goals for many years.
- Germany's nuclear energy ban can be seen as an attempt to steer the economy toward excellence in clean energy, as well as achieve other goals. Arguable point – little IP context to the decision.

iisd

Environmental Policy as IP

- All IIAs contain provisions on expropriation, including indirect expropriation.
- Indirect (or "creeping") expropriation does not involve a physical taking – it is an economic impact of regulation equivalent to a physical taking.
- Case law under IIAs is completely unpredictable: in some cases pure economic impact is the test; in others a "police powers" carve out is applied.

iisd

Cases: Environmental Policy as IP

- **Vattenfall v. Germany (II) (ICSID, Energy Charter Treaty):** Vattenfall argues that amendments to the Atomic Energy Act amount to expropriation of its investment in two nuclear power plants. Value of losses €1.2 billion.

Best Practice

- **US Model BIT:** Explicitly states that non-discriminatory measures in the public interest (e.g., environment, health) are not indirect expropriation subject to compensation.
- **SADC Model BIT:** Non-discriminatory measure for legitimate public welfare objectives is not indirect expropriation.

Concluding thoughts

- Performance requirement bans are perhaps the most palpable loss of policy space under IIAs.
- Other types (IPRs, environmental policy) are more speculative in terms of risk, but worth watching.
- There are straightforward fixes for future agreements; their value may be limited by MFN provisions. Existing agreements difficult to amend.

iisd

Aaron Cosbey, IISD
acosbey@iisd.ca

http://www.iisd.org

iisd International Institute for Sustainable Development / Institut international du développement durable