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Article

THE ROLE OF TRADEMARKS

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Abstract[2]

Conventionally, it has been argued that by protecting trademarks by intellectual property rights, unfair competition is avoided, and consumer choice is ensured. Nevertheless, it has been recognized that trademarks also have an investment function. Put differently, these rights serve to develop, advertise and invest in brands. This change of paradigm could provide trademark owners with powerful tools to shield their investments. Though it is necessary that legal frameworks acknowledge this function of trademarks, the latter should not jeopardise higher public interests.

Key words
Trademarks, Investment, Bilateral Investment Treaties.

Resumen

Tradicionalmente, se ha dicho que, al escudar las marcas con derechos de propiedad intelectual, se evita la competencia desleal, y se protege a los consumidores y su capacidad de elegir. Sin embargo, se ha reconocido que las marcas también pueden usarse como inversiones. En otras palabras, estos derechos sirven para desarrollar, promocionar e invertir en nombres comerciales. Este cambio de paradigma podría dar a los titulares de dichas marcas poderosas herramientas para proteger sus inversiones. Ahora bien: aunque es necesario que los ordenamientos jurídicos reconozcan esta función de las marcas, esto no debería poner en riesgo otros intereses públicos.

Palabras clave
Marcas, Inversiones, Tratados Bilaterales de Inversión.

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Table of Abbreviations

BIT(s):	Bilateral Investment Treaty (ies)
CJEU:	Court of Justice of the European Union
Contracting party (ies):	Each of the Member States from an international treaty.
DFI(s):	Direct Foreign Investment(s)
e.g.:	For example
EU:	European Union
i.e.:	That is
ICSID:	International Centre for Settlement of Investment Disputes
IP:	Intellectual Property
IPR(s):	Intellectual Property Right(s)
Philip Morris:	Philip Morris International Inc., and its subsidiaries Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos.
TRIPS:	Agreement on Trade-Related Aspects of Intellectual Property Rights
WHO:	World Health Organisation
WTO:	World Trade Organisation

I. Introduction

Trademarks are signs (i.e. words, phrases, pictures, logos, sounds, colours, or smells) or combinations of signs, which identify undertakings' goods and services.[3] It is said that the IP protection given by a trademark is a negative right, as the owner can prevent others from copying the protected signs.[4]

Traditionally, it has been argued that by protecting trademarks by IPRs, unfair competition is avoided, and consumer choice is ensured. Nevertheless, it has been recognized that trademarks have an investment function, and serve not only to protect consumers from confusion, but also to develop, advertise and invest in brands. This change of paradigm could provide trademark owners with powerful tools to shield their investments.

This paper will claim that, although it is necessary that legal frameworks acknowledge the investment function of trademarks, this should not jeopardise higher public interests -e.g. employment, education, public health, environmental protection, and security, among others-.

In order to do so, firstly, this paper will question why it is said that trademarks have an investment function. Then, it will name two examples in which these IPRs have legally been treated as investments. Afterwards, it will summarise and analyse the Philip Morris Brands Sàrl v. Oriental Republic of Uruguay case, in which the claimant considered the value of its trademark investments had reduced as a result of specific regulation by the Uruguayan government. Finally, new challenges arising from recognising the investment function of trademarks will be explored.

II. The Objectives of Trademarks

Trademarks have conventionally served to protect the interests of consumers. Unlike other IPRs, they do not incentivise innovation; instead, they solve the market failure of information asymmetry. They identify products and their origins, allowing consumers to recognize the goods and services they will eventually buy, so that they are not deceived or

[3] Shilling, D, Essentials of Trademarks and Unfair Competition (John Wiley & Sons, Inc., New York, 2002), pg. 1, para. 2.
[4] "Trademarks", WIPO- World Intellectual Property Organization, <http://www.wipo.int/trademarks/en/> Accessed 11 May 2017.

defrauded by wrong or duplicate goods.[5] This implies that trademarks reduce search costs, and foster a rational purchasing, increasing efficiency in the market place. Furthermore, a strong trademark system enhances competition, as it generates incentives for firms to manufacture and market products of desirable qualities, in order to improve their reputation and create consumer loyalty.[6]

Still, trademarks are more than information signals for consumers. It has become clear that trademarks have a dichotomous nature: not only do they avoid confusion, but they are also business investment assets, for they eliminate or minimize sales expenses by making the purchase of the product habitual.[7] While trademarks always fulfil the function of indicating the origin of the products they identify, they might also serve as investments, if their owner uses them to that end.[8]

As Philipp Sandner and Joern Block assert, brands acquire their value as a result of a company's marketing activities: "The brand has a value for the firm if it gives the firm a strong, sustainable and differentiated advantage over competitors leading to a higher volume or a higher margin of its product sales compared to the situation if the firm would not have the brand."[9] Advertising helps to build up capitalizable brand value, because it fosters the creation of a good brand reputation.[10] Once a firm has used advertising to build-up a good brand reputation, the undertaking can set its prices above its marginal costs, owing to the big influence trademarks have on purchasing behaviour: consumers make careful decisions, often reverting to "tried and trusted" brands;[11] they regularly want to avoid buying another rival's good or service if they do not know the origin of the product, even if the two goods or services are functionally identical.

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[5] Sreenivasulu N.S., Law Relating to Intellectual Property (1 ed., Partridge India, 2013), pgs. 39-42.
[6] Leaffer, M.A., "The New World of International Trademark Law" (1998). Articles by Maurer Faculty. <http://www.repository.law.indiana.edu/facpub/545> Accessed 09 May, 2017. Pg. 6, par. 1.
[7] Acheson A, Trade-Mark Advertising as an Investment (The New York Evening Post, 1917), pg. 9, para. 1.
[8] Case C-323/09 *Interflora Inc. v Marks & Spencer plc* [2011] par.40.
[9] Sandner, P. and Block, J. "The market value of R&D, patents and trademarks" (2011). Elsevier <www.elsevier.com/locate/respol> Accessed 10 May 2017, pg. 971, par. 1.
[10] Acheson A, *Ibid.*, pg. 11.
[11] Jewell, C., "Trademarks: Valuable assets in a changing world" (2009), WIPO Magazine, <http://www.wipo.int/wipo_magazine/en/2009/04/article_0002.html> Accessed 17 May 2017.

This benefits trademark owners, particularly, since their brand's value may have an impact on the value of the whole corporation. In the market value approach, investors estimate an undertaking's value according to the prospective returns that they expect from its tangible and intangible assets.[12] If a trademark positively affects a market's structure –e.g. leading to greater loyalty from customers, a more inelastic consumer response, an elevated willingness to pay, and/or higher effectiveness of marketing communication- it will be more valuable, as a higher income can be attributed to it. As companies advertise more, the revenues from their brands increase, and so does their value. Apple, the most valued brand world-wide, is worth approximately 154.1 billion dollars, which almost doubles the price of the second most valuable brand in the world, Google, which has an estimated value of 82.5 billion dollars.[13]

Trademarks have become critical assets for corporations in a global economy increasingly based upon international networks.[14] Seeing that they grant their holders the right to exclude others from the use of protected signs, these IPRs serve as a means for protecting undertakings' marketing assets, wherever they are registered.[15] In other words, a stable trademark system protects marketing assets avoiding free riding, as a result of the exclusion rights given to trademark owners; for instance, no company in the technology market can use Apple's brand without this company's permission to do so, so only Apple will benefit from its marketing. The latter reduces the risks of unfair competition taking place.

III. The Acknowledgement of the Investment Function of Trademarks

a. The CJEU

The CJEU recognized the investment function of trademarks in the *Interflora v. Marks & Spencer* ruling, where it stated:

> In addition to its function of indicating origin and, as the case may be, its advertising function, a trade mark may also be used by its proprietor to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty. […] In a situation in which the trade mark already

[12] Sandner, P. and Block, J., *Ibid.,* pg. 971, par. 4.
[13] "The World's Most Valuable Brands" [2016] Forbes, <https://www.forbes.com/powerful-brands/list/3/#tab:rank> Accessed 16 May 2017.
[14] Vanhonnaeker L., Intellectual Property Rights as Foreign Direct Investments: Form Collision to Collaboration (Edward Elgar Publishing Limited, 2015), pgs. 1-3.
[15] Block J.H., De Vries G., Schumann J.H. and Sandner, P. "Trademarks and venture capital valuation" (2013) Journal of Business Venturing, 29, pgs. 525-526.

> enjoys such a reputation, the investment function is adversely affected where use by a third party of a sign identical with that mark in relation to identical goods or services affects that reputation and thereby jeopardises its maintenance.[16]

In this case, the CJEU argued that the investment function of trademarks is not always fulfilled. Whether it is the case or not, depends entirely on the behaviour of the owner.

b. BITs

On the other hand, several BITs have explicitly qualified IPRs as FDIs, and, hence, IPR owners as investors. These treaties have habitually defined the term "investment" as economic assets, owned or controlled directly or indirectly by investors of one of the contracting parties in the territory of the other contracting party, including, among others, IPRs, such as manufactures' brands and trademarks, and trade names.[17]

Some of these agreements incorporate additional requirements for IPRs to be considered as FDIs; for instance, the US Model BIT only protects investments that entail "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".[18] Nonetheless, it is important to bear in mind that, while the CJEU has clearly stated that the investment function of trademarks is fulfilled only occasionally, BITs generally consider all trademarks as investments.

Unlike TRIPS, which regulates trade-related aspects of IP, BITs protect IPRs as investment assets. This means that they have different objectives, and protect different interests: while TRIPS protects IPRs insofar as they intervene with trade, BITs protect their worth. Hence, BITs are not necessarily coordinated with TRIPS.

BITs are one of the most widely used types of international agreements for protecting foreign investment.[19] These instruments have allowed IP owners to guard their intangible assets in other countries and to reduce the risks

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[16] Case C-323/09, *Ibid.,* par. 60 and 63.
[17] Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia. Bogota, 17 March 2010. Dolzer R. and Stevens M., Bilateral Investment Treaties (1 ed., Kluwer Law International, 1995), pg. 176.
[18] 2012 U.S. Model Bilateral Investment Treaty, Article 1,. <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> Accessed 09 May 2017.
[19] Vanhonnaeker L., *Ibid.*, pgs. 1-3.

associated with conducting businesses abroad. They provide foreign investors with powerful new rights to protect their investments against expropriation and other forms of discrimination, and with the ability to sue governments directly through arbitration tribunals.[20] BITs have also set protection standards against State interference. In the absence of such agreements, investors must necessarily rely on the law of the host country, with the risks that the latter entails.

BITs have an emphasis on protecting investors' rights and safeguarding them. Although some BITs (such as the 2012 US Model BIT) specifically state that the contracting parties are not to pay compensation for "the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement[21]",[22] these treaties usually provide guarantees for IP owners against direct or indirect expropriation without compensation. As a result, several ICSID decisions awarded undertakings with compensations for takings that earlier would have been characterized as regulatory measures:[23]

> Expropriatory environmental measures – not matter how laudable and beneficial to society as a whole – are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[24]

The position that there was an obligation to compensate if a measure affected the benefits arising from a foreign investor's assets was maintained by the ICSID until recently. There was no need to do a taking, as such, of the property: inasmuch as the value of the IPR as a FDI was affected, "arguments about indirect or *de facto* expropriation could be

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[20] Vanhonnaeker L., *Ibid.*, pg. 2.
[21] According to article 20 of the TRIPS, the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements.
[22] 2012 U.S. Model Bilateral Investment Treaty, *Ibid.*
[23] Sornarajah, M. The International Law on Foreign Investment (3rd edition, Cambridge University Press, 2010), pg. 374.
[24] ICSID, Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (2003), at para. 121. As quoted by: Davarnejad L., "The policy framework for investment: the social and environmental dimensions" (2008) OECD Global Forum on International Investment, <http://www.oecd.org/investment/globalforum/40352144.pdf> Accessed 10 May 2017.

made, unless otherwise specified in the agreement". [25] This broad interpretation led investors to expect the payment of benefits if public measures affected their investments –even if these measures pursued public purposes such as the protection of the environment or public health. That is why Phillip Morris, the global cigarette and tobacco company, sued Uruguay before an arbitration tribunal in an attempt to receive compensation for the implementation of two measures which might have reduced the value of its trademarks. This case will be analysed next.

IV. Philip Morris Brands Sàrl et. al. v. Oriental Republic of Ururguay

a. The Facts

Back in 1988, the Swiss Confederation and the Oriental Republic of Uruguay signed a BIT, which entered into force in 1991. This agreement protected investors from the impairment of the use and enjoyment of investments, denial of justice, and expropriation, among others.

Between 2008 and 2009, the Uruguayan government adopted several tobacco-control measures, including (i) a single-presentation requirement that precluded tobacco manufacturers from marketing more than one variant of cigarette per brand family, to prevent the false impression that a particular tobacco product was less harmful than other tobacco products, and (ii) the increase in the size of graphic health warnings appearing on cigarette packages which established that only 20% of the cigarette pack could be used for trademarks, logos and other information, and that the remaining 80% should contain health warnings (the "80/80 regulation"). These measures had the purpose of protecting public health.

Philip Morris is a cigarette and tobacco company, which owns several trademarks that are valued at several billions of dollars, for being key to its marketing strategies and global activities. [26] This undertaking sued Uruguay before the ICSID, through its Swiss subsidiaries, in an attempt to obtain compensation for the supposed decline of the value of its trademarks, which it considered to be a consequence of the single-presentation requirement and the 80/80 regulation, as:

a) Philip Morris used to use multiple product variants under each of its brands -e.g. "Marlboro Red", "Marlboro Gold",

[25] Davarnejad L., *Ibid.*
[26] Marlboro is valued at 21.9 billion dollars, according to "The World's Most Valuable Brands", *Ibid.*

"Marlboro Blue" and "Marlboro Green"-, and has ceased to sell all but one of the variants of each of its brands -e.g. "Marlboro Red"- due to the single-presentation requirement. Ultimately, this undertaking eliminated seven of its thirteen variants, which accounted for about 20% of its domestic sales.

b) Additionally, this undertaking considered that the fact that it could only use 20% of the cigarette pack for trademarks since the 80/80 regulation was issued, limited its right to use its legally protected trademarks.

It was Philip Morris's position that by imposing the tobacco-control measures, Uruguay expropriated their investment, violating the BIT this country had signed with Switzerland. Uruguay argued, on the other hand, that these measures were not expropriatory, since they were a legitimate exercise of the State's sovereign police power to protect public health.

b. ICSID's Ruling

The ICSID deemed the single-presentation requirement and the 80/80 regulation not to be arbitrary, as Phillip Morris had argued, but rather reasonable, since Uruguay's decision to implement them was in accordance with the WHO's Framework Convention on Tobacco Control. Based on some of its recent decisions,[27] it recognized that the requirements of legitimate expectations and legal stability as manifestations of a fair and equitable treatment did not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances:

> On this basis, changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard 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

[27] International Centre for Settlement of Investment Disputes (2016) Washington D.C. Philip Morris Brands Sàrl et. al. v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7). Footnote 607 of the decision mentions the following: "Parkerings-Compagniet (RLA-177), 327-28; BG Group v. Argentina, UNCITRAL, Final Award, 24 Dec. 2007, (CLA-084), 292-310; Plama (CLA-222), 219; Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008, (CLA-096), 258-61; EDF (CLA-224), 219; AES v. Hungary, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010, (RLA-100), 9.3.27-9.3.35; Total (RLA-190), 123,164; Paushok v. Mongolia, UNCITRAL, Award, 28 Apr. 2011, ("Paushok") (RLA-75), 302; Impregilo v. Argentina, ICSID Case No. ARB/07/17, Award, 21 June 2011, (RLA-061), 290-291; El Paso (CLA-102), 344-352, 365-367."

> regulatory framework relied upon by the investor at the time of its investment "outside of the acceptable margin of change."[…] Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.[28]

Furthermore, the ICSID argued that BITs such as the one signed between Uruguay and Switzerland did not preclude governments from enacting novel rules, provided these had rational basis and were not discriminatory. Suppliers should not have legitimate expectations that no such rules will be enacted:

> Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed […] The Uruguayan State enjoys unquestionable and inalienable rights to protect the health of its citizens. And it is in this framework of the essential duty to protect public health that the State has the authority to prevent, limit or condition the commercialization of a product or service.[29]

The tribunal found none of these measures to deprive Philip Morris of its trademarks' negative rights, since they could still exclude third parties from their use. As a result, this company still had a legal title to its investment. The tribunal found the single presentation requirement not to cause a substantial deprivation of the value of the claimant's investments. On the other hand, the 80/80 regulation still allowed distinctive elements of tobacco brands to be shown in a smaller space of the packaging. Thus, neither the 80/80 regulation nor the single-presentation requirement, amounted to an indirect expropriation of the claimant's investments nor a denial of this undertaking's right to fair and equal treatment under the BIT.

Consequently, Philip Morris's claims were dismissed.

c. Analysis

The *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* precedent was criticized for allowing corporate actors the power to freeze government regulations due to the threat of expensive and lengthy

[28] International Centre for Settlement of Investment Disputes (2016) *Ibid.,* par. 423 and 426.
[29] International Centre for Settlement of Investment Disputes (2016) *Ibid.*, par. 429 and 432.

litigation.[30] The financial burden from these litigations has led States (particularly developing nations) to hesitate on whether or not to enact regulations that may provoke such a challenge. Setting aside this precedent, it was key for the States to exercise their sovereign power to protect their citizens, enacting laudable and beneficial regulations.

Ascertaining a limit for the rights of investors and for the obligations from BIT contracting parties is crucial to uphold important regulations whose goal is to protect citizens. As was stated in the Harvard Law Review:

> Though international arbitration opinions are not binding precedent, adjudicators do look to the core principles of past decisions for guidance. Thus, the tribunal's approach in this case may disincentivize ISDS challenges, at least by tobacco companies in developing nations. […] [R]egulatory chill might subside in an arbitration climate that favors states over multinational corporations.[31]

Particularly regarding trademarks, States should be allowed to limit their use with a reasonable and non-discriminatory regulation, especially if that regulation aims to protect public interests. If this is the case, there is no reason to argue an indirect expropriation has taken place. Trademark owners, however, should maintain negative rights regarding their investment, so that only authorized parties could use the protected symbols.

V. New Challenges for Regulation Authorities

Trademarks themselves can serve to protect both, public and private interests, by protecting both, consumers and producers. These interests can go hand in hand; however, if the proprietary aspects of trademarks are highly emphasized, the public interest can be jeopardized.[32] For that reason, it is important to take into account that private remuneration should not be given more weight than social welfare.

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[30] "Philip Morris Brands Sàrl v. Oriental Republic of Uruguay: Tribunal Holds that Uruguay's Anti-Tobacco Regulations Do Not Violate Philip Morris's Investment Rights" [2017] Harvard Law Review <https://harvardlawreview.org/2017/05/philip-morris-brands-sarl-v-oriental-republic-of-uruguay/> Accessed 17 May 2017.

[31] "Philip Morris Brands Sàrl v. Oriental Republic of Uruguay: Tribunal Holds that Uruguay's Anti-Tobacco Regulations Do Not Violate Philip Morris's Investment Rights" *Ibid.*

[32] Vadi, V., Public Health in International Investment Law and Arbitration (Routledge, 2013), pg. 113, par. 2.

It is clear that high profits can result from trademark ownership and exploitation. Owning a trademark and investing in it can result in billionaire revenues. Governments around the world must recognise realities such as this one and regulate accordingly. These regulations should not give investors many rights and no obligations, as BITs do, because this can create an unbalance. In fact, giving trademarks an investment status does not necessarily entail granting trademark owners excessive rights.

As investments are often regulated with more traditional regulatory regimes, limitations from those regimes can apply to them. A more robust regulation can result from the latter.[33] For instance, the use of trademarks associated with dangerous products, such as cigarettes, can be controlled. As Doris Estelle Long puts it, "[i]n freeing trademarks from the focus on consumer confusion, they may ultimately have freed their marks to be regulated more robustly to meet even broader consumer protection interests".[34]

Balancing between diverging interests from citizens, on the one hand, and IP owners as investors, on the other hand, is a challenge of regulating authorities. Public interests cannot lose ground to the expanding interests of trademark owners. Governments should weigh the public interest while limiting –or expanding- the uses of trademarks.

VI. Conclusions: Overview

Trademarks have a dichotomous nature: They protect the public interest, by giving consumers information about the goods or services they will receive, and the private interest of undertakings, by reducing sales expenses and creating an inelastic consumer response. As they can be highly profitable, it has been said that they have an investment function.

Many international actors have recognised trademarks as investments, either with internal decisions (such as the CJEU's *Interflora v. Marks & Spencer* ruling), or by signing international, bilateral agreements that consider trademarks and other IPRs as investments (i.e. BITs).

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[33] Long, D.E., "Be Careful What You Wish For: When Trademarks Become "Investment" Properties" <http://1x937u16qcra1vnejt2hj4jl.wpengine.netdna-cdn.com/wp-content/uploads/Long-Trademark-Investments-Abstract.pdf> Accessed 17 May 2017.

[34] Long, D.E., *Ibid.*

These agreements often allow private parties to sue either one of the contracting parties if they fail to comply with the commitments made in the treaty. Hence, if, for instance, there has been an indirect expropriation (i.e. a measure which entailed a substantial deprivation of the value, use, or enjoyment of one's investment), the affected party could bring forward a claim against the responsible State.

For a long time, the ICSID held the position that, where property was indirectly expropriated, the State had to pay compensation, even if the measures that led to the deprivation of the reasonably-expected benefits of the property had been beneficial to society as a whole. This created a perverse incentive for governments, as they preferred not to further regulate on issues that affected public interests in order to avoid potential litigation costs.

Nevertheless, the ICSID changed that precedent. In a 2016 decision, an ICSID tribunal found that two tobacco-control regulations adopted by the Uruguayan government did not amount to an indirect expropriation of the claimant's investments –the claimant, in this case, was Philip Morris. Here, the tribunal upheld the State's regulatory powers over the private interests of the company. Hopefully, this decision will foster the creation of laudable regulation that weighs the public interest.

A harmonious balance between the unaligned interests of IP owners, who wish to increase the value of their property, and consumers, who wish to acquire more information about the products they want to buy, needs to be struck. The protection of public interests should never be threatened by the protection of private interests.

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