VII. Is Conformity with International Intellectual Property Norms Enough?

This thesis has tried to demonstrate that the investment Tribunals should approach the interpretation and application of international IP sources carefully and in limited manner. The thesis has also recognized that conformity with the same international sources of law constitutes just one factor in determining the issues pertaining to legitimate expectations. So, the question remains whether showing a measure is not inconsistent with the international IP law treaty is enough to sway the Tribunal to dismiss it as grounds for legitimate expectations or should other factors be included? As proposed by some authors, IPRs should be perceived not purely from an investment law standpoint but they must be read "in conformity with constitutional rights, HRL and other principles of justice."[318] IPRs have been recognized as policy tools in international treaties in their own right.[319] The TRIPS expressly states in article 8: "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."[320] This notion should be taken into account by the arbitrators. However, it seems that some justification is indeed warranted. Theoretically, even if a state complies with its international IP law obligations it might nevertheless be found in violation of the standards of protection found in an IIA.[321] Therefore justifying the measure on some other

318 Ernst-Ulrich Petersmann, The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication, 4 (1) J. Int'l Dis. Sett., 5, 8 (2013).
319 Okediji, Supra note 5, at 1133.
320 TRIPS, Supra note 20, art. 8.
321 Ho, Supra note 196, at 222.

grounds is sometimes necessary.[322] Both in the *Eli Lilly v. Canada*[323] and the *Philip Morris v. Uruguay*[324] the changes in IP law were defended on public policy justifications. The Tribunal in the *Phillip Morris v. Uruguay* case has very much taken those goals into account.[325] As in any legal dispute the amounting of evidence coupled with prudent argumentation that serves the purposes of the disputing party is crucial. This is particularly important as the broad wording of IIA provisions leaves considerable room for the investment Tribunals to rule both ways.[326] Therefore any changes in IP law would have considerably stronger chances if they have a rational policy argument behind them.

322 Susan L. Karamanian, Balancing Investor Protections, the Environment and Human Rights: The Place of Human Rights in Investor-State Arbitration, 17 Lewis & Clark L. Rev., 423, 432 (2013).

323 Canada justifies the patent utility requirement on the basis of innovation policy. See, Respondent's Rejoinder Memorial, Supra note 137, § 237.

324 *Philip Morris v. Uruguay*, Award, Supra note 107, §§ 74-77.

325 *Philip Morris v. Uruguay*, Award, Supra note 107, § 432.

326 Carloline Henckles, Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP, 19 J. Int't Econ. L., 27, 38 (2016).