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BETWEEN SCYLLA AND CHARYBDIS: THEORETICAL REFLECTIONS ON 'THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER INTERNATIONAL INVESTMENT LAW' BY KLOPSCHINSKI, GIBSON AND RUSE-KHAN

INTRODUCTION. *The relationship between investment protection and intellectual property rights is one of the longstanding issues in international investment law — intellectual property rights have long been recognised as a form of 'investment' entitled to protection under bilateral investment treaties and other international investment agreements. The book co-authored by Simon Klopschinski, Christopher Gibson, and Henning Grosse Ruse-Khan, and entitled The Protection of Intellectual Property Rights under International Investment Law [Klopschinski, Gibson,Ruse-Khan 2021] provides a welcome contribution to the debate on the issue by addressing the problem from an informed theoretical standpoint. However, this issue, as correctly pointed out by the authors, is not merely a theoretical one, but rather one with significant consequences in terms of the integration of other concerns and values in investment treaties and arbitral cases, such as intellectual property rights protection.*

MATERIALS AND METHODS. *The materials for the article were the book co-authored by Simon Klopschinski, Christopher Gibson, and Henning Grosse Ruse-Khan, The Protection of Intellectual Property Rights under International Investment Law (2021), in light of the relevant academic literature in the field of international investment law and IP. The methodological basis of the research consists of general scientific and special methods.*

RESEARCH RESULTS. *Without doubt, this book is a comprehensive and stimulating study by the experts in both fields that will deepen understanding of the relationship between IP and investment. The authors masterfully bring together discourses that are taking place between scholars and practitioners in each regime, but frequently in relative isolation from each other.*

DISCUSSION AND CONCLUSIONS. *With regard to the subject-matter, it is clear that no matter how specialised the fields of international law*

already are, and will increasingly become in the future, they maintain common roots and traits. Once this path of mutual exchange is taken, many positive cross-fertilisation effects can be expected in the future. The greatest part of the book consists of an analysis of shared procedural and substantive norms. Klopschinski, Gibson and Ruse-Khan focus on how substantive provisions are articulated across the two legal regimes and identifies commonalities and differences in framing and in how they are interpreted in dispute settlement.

KEYWORDS: *international investment law, intellectual property, intellectual property rights, protection, international investment agreement, TRIPS*

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МЕЖДУ СЦИЛЛОЙ И ХАРИБДОЙ: ТЕОРЕТИЧЕСКИЕ РАЗМЫШЛЕНИЯ ПО МОТИВАМ КНИГИ «ЗАЩИТА ИНТЕЛЛЕКТУАЛЬНЫХ ПРАВ В МЕЖДУНАРОДНОМ ИНВЕСТИЦИОННОМ ПРАВЕ» КЛОПШИНСКИ, ГИБСОНА И РУЗЕ-КХАНА

ВВЕДЕНИЕ. *Взаимосвязь между защитой инвестиций и интеллектуальными правами — одна из старинных тем в международном инвестиционном праве. Вот уже на протяжении многих лет интеллектуальные права признаются определенной формой инвестиций и под-*

лежат защите в соответствии с двусторонними инвестиционными договорами и иными инвестиционными соглашениями. Книга Саймона Клопшински, Кристофера Гибсона и Хеннинга Гроссе Рузе-Кхана «Защита интеллектуальных прав в международном инвестиционном праве» [Klopschinski, Gibson, Ruse-Khan 2021] вносит долгожданный вклад в обсуждение данной взаимосвязи, представляя собой исключительное теоретическое наследие. Вместе с тем, как правильно отмечают авторы, данный вопрос не является сугубо теоретическим, поскольку имеет значение для интеграции различных интересов в инвестиционные договоры и правоприменительную практику.

МАТЕРИАЛЫ И МЕТОДЫ. *Материалом для данной статьи послужила книга Клопшински, Гибсона и Рузе-Кхана «Защита интеллектуальных прав в международном инвестиционном праве» (2021), а также иные публикации в области международного инвестиционного права и интеллектуальной собственности. Методологическую основу исследования составили общенаучные и специальные методы.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Без сомнения, данная книга представляет собой всестороннее и вдохновляющее исследование, которое способно укрепить понимание взаимосвязи между интеллектуальной собственностью и международным инвестиционным правом и проведено экспертами в обеих областях.. Авторам удалось объединить подчас полярные дискурсы как теоретической, так и практической направленности.*

МАТЕРИАЛЫ И ВЫВОДЫ. *Международное инвестиционное право и право интеллектуальной собственности являются специализированными отраслями международного права, чья узкая специализация будет только усиливаться в будущем. Однако обе отрасли сохраняют общие корни и черты, что в дальнейшем способно привести к взаимному обогащению. Книга в основном посвящена анализу общих процессуальных и материальных норм. Внимание авторов сосредоточено в первую очередь на формулировках основных стандартов, принципов и концепций в каждом из правовых режимов. Авторы выявляют их общие черты и различия, а также наглядно показывают последствия толкования тех или иных стандартов защиты интеллектуальных прав при разрешении инвестиционных споров.*

КЛЮЧЕВЫЕ СЛОВА: *международное инвестиционное право, интеллектуальная собственность, интеллектуальные права, защита, международное инвестиционное соглашение, ТРИПС*

ДЛЯ ЦИТИРОВАНИЯ: Лабин Д.К., Соловьева А.В. 2022. Между Сциллой и Харибдой: теоретические размышления по мотивам книги «Защита интеллектуальных прав в международном инвестиционном праве» Клопшински, Гибсона и Рузе-Кхана – Московский журнал международного права. №2. С. 54–65. DOI: https://doi.org/10.24833/0869-0049-2022-2-54-65

Авторы заявляют об отсутствии конфликта интересов.

Introduction

There is no shortage of books on international investment law. Indeed, as Arato noted initial scholarly excitement about the investment regime increasingly cast it as a *bête noire* in international law[1] It is difficult to exaggerate the importance of analogy in international investment law. With many unique characteristics and challenges, international investment law naturally invites comparisons with other, more developed areas of international and domestic law. Yet, while analogies may help us make sense of the field, the way in which they are chosen and employed can have significant and perhaps unintended consequences.

In contrast to IP law that essentially offers right holders private rights which operate in private law relations, investment law protects against State interferences. Investors rely on standards such as fair and equitable treatment (FET), full protection and security (FPS), national treatment (NT), most-favoured-nation (MFN), or limits on expropriation as a means to obtain compensation for measures the host State has taken (or failed to take). This observation con-

[1] Arato J. Toward a Private Law Theory of International Investment Law. Submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the School of Law. Columbia University. 2016. P.2.

stitutes the underlying assumption of Simon Klopschinski, Christopher Gibson, and Henning Grosse Ruse-Khan in *The Protection of Intellectual Property Rights under International Investment Law* and is but one of the reasons why this study is particularly significant. Notwithstanding the relative lack of arbitral practice, several commentators made positive forecasts concerning the future relevance of international investment agreements (IIAs) for the protection of intellectual property rights (IPRs).

The relationship between intellectual property (IP) and international investment law is an issue that is not novel as such, but has received increasing attention since 2010 when the cases emerged that concern various limitations for trademarks used on tobacco packaging, or the invalidation of pharmaceutical patents by domestic courts. Shaken but not stirred, the relationship between the two fields is a relatively new and emerging area of research. Increasing IIAs consisting of IP chapters with dispute settlement provisions are likely to invite more IP disputes in investor–State dispute settlement (ISDS).

To this point the book reflects an orthodox view of the State's central role in defining the scope of IP rights and measures for their protection. In other words, IP rights exist when expressly recognised by States through their domestic legislation, and made subject to defined existential conditions including scope of exclusive rights, territorial limits, and enforcement methods. Neither international investment law itself nor WTO law create IP rights that are eligible for investment protection. Therefore, in the context of the investment dispute only national/regional IP law can inform an arbitral tribunal about the existence, scope, and proprietorship of an IP right. However, the book pushes the limits of orthodoxy somewhat in describing the role of international law in ascertaining an investment. On the one hand, it recognises expressly that the question of proprietary rights underpinning an investment must be addressed to national law. On the other hand, it argues in favour of international law (IIA and principles of international law) to answer the question of whether or not a qualifying investment exists. This is where the dynamics in relationship between national and international law switches and international law takes central stage.

Legal developments in the area of IPR-centered investment dispute

There is a detectable ebb and flow to the entwining of politics, commerce, and law in the history of international investment law and international IP law. Hence, there is one central legal thesis, one central economic thesis, and one central political thesis presented in the book. The one central legal thesis is that the topic raises complex questions as to the interaction between IIAs, national IPR legislation and international conventions dealing with IPRs. It is safe to say that, although the details of how and when this occurs remain the subject of debate, in its broadest conception, IP provisions are gradually now a commonplace in IIAs and create a natural environment with fertile soils for innovative rulemaking. It is important to appreciate, however, that rulemaking can be haphazard, messy and uneven, depending on what is needed and what is feasible in a given constellation of interests and forces. At the same time, IIAs cannot be turned into vehicles to enforce provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

The one economic thesis is that IIAs can help to reduce the damage caused by illegal infringement of IPRs and thereby promote a climate that is favourable to innovation and economic growth. Economists recognise several channels through which IPRs could stimulate economic development and growth. Intellectual property rights could play a significant role in encouraging innovation, product development, and technical change. For instance, protecting trade secrets is beneficial to the extent it encourages the development and commercial use of sub-patentable inventions. Rules protecting trade secrets thus promote adaptive innovation and encourage learning through legal means [Mrad 2017:33-57; Stepanov 2020: 736-758].

The one political thesis is that the protection of IPRs through IIAs adds to the ongoing intense controversy which has never been resolved entirely, which is the debate about the right balance to be struck between, on the one hand, providing effective protection of foreign investments (including intellectual property) and, on the other hand, providing sovereign States with sufficient flexibility to address essential public interests such as health.

Nothing is new under the sun. By far the co-authors of this book had embarked on individual journeys in their attempts to lead intensive discussion on the topic. In 2010 Gibson suggested that 'it is perhaps surprising that there has yet to be a publicly reported decision concerning an IPR-centered investment dispute. Given the trajectory of the modern economy, however, in which foreign investments reflect an increasing concentration of intellectual capital in-

vested in knowledge goods protected by IPRs, this could soon change' (Gibson 2010:359-60). A couple of years later, the first investment cases dealing with IP issues were made public. In this context, the article addressed the conditions that have to be fulfilled in order to bring IP claims in investment arbitration, by touching upon the definition of an investment in theory and in practice. It also tried to give alternative explanations to the implications of arbitral awards touching upon this interaction between IP and investment protection. In 2011 Klopschinski published a German-language PhD thesis on this issue, which quickly became a seminal work in the field. The 2021 publication is an English edition based on that research. It is enhanced with contributions from Gibson and Ruse-Khan, and thoroughly updated with discussions of the legal developments that have taken place over the past 10 years.

Today the same debate exists only in a different form. One such question is to which extent awards handed down in ISDS proceedings can offer useful guidance for resolution of investment disputes involving IPRs. To this end, this twenty-second book in the series by Klopschinski, Gibson, and Ruse-Khan is, as noted by Professor Mistelis, the first comprehensive treatise on the protection of IP under international investment law which is predicted for good reasons to be eminently placed as the undisputed reference book on the topic. The book discusses the treatment of IPRs in the context of ISDS, an area that is attracting increasing interest and attention of governments, lawyers and academics. ISDS effectively means a mechanism through which an investor from one State can initiate arbitral proceedings against a State where it has invested.

The book consists of eight chapters and aims to explore the interaction between IP and investment law and arbitration. The chapters provide an insightful, kaleidoscopic spectrum of State practice in respect of the IP-related disputes. The chapters are structured around the key questions that surround IP-based investment arbitration. In the early pages of the book, the authors mention how litigation of IP-based investment disputes is complicated by the fact that arbitrators often do not have an IP background. This somewhat dramatic statement is significant because this book certainly fills this void for both, an IP specialist with limited knowledge of investment law or an expert on ISDS who needs to familiarise himself with the specificities of IP-based cases.

An overview of the interrelations between international investment law and IP

Chapter 1 and Chapter 2 present an overview of the interrelations between international investment law and IP. The authors explain how, in recent years, enforcement of IP rights is shifting from the WTO adjudicative system and national litigation to investment tribunals. What became clear in analysing this period is how this significant development has created tensions between the Scylla of public policies and Charybdis of international IP law. Of particular note in this issue, is that foreign investment can pose challenges to, for instance, public health, particularly where the products or services in which the foreign investors trade are in some way dangerous to local inhabitants. The challenge to international investment law is to recognise these situations and to make allowances to host States who seek to mitigate these harms by enacting regulations which may transgress the protections they have offered to foreign firms in IIAs. Since such measures may in some cases represent disguised protectionism, this exercise can require a delicate balancing of the public policy goals, the ways in which they are facilitated and the expectations of foreign investors as generated by IIAs and customary international law.

Early IP investment disputes

Chapter 3 addresses procedural matters that arise in an investment claim and briefly considers four early IP investment disputes: *Phillip Morris v. Australia, Phillip Morris v. Uruguay, Eli Lilly v. Canada,* and *Bridgestone v. Panama*. Investment tribunals generated a new and formidable body of jurisprudence for international investment law and IPRs with decisions that are sometimes inconsistent. These four cases, together with the more recent *Einarsson v. Canada,* are reviewed in greater detail in the following chapters of the book. Moreover, the authors continuously draw convenient parallels with non-IP arbitration cases, WTO dispute settlement and the European Court of Human Rights case law, which allows them to interpret provisions that remain untested in IP-based disputes. Here some mention should be made of the waiver clauses which, as the authors argue, become 'more common' in global IIAs whereby the owner of an intellectual property right will need to abstain from pursuing rights in national courts once it has opted to invoke a BIT containing a waiver clause, as this provision is based on the overlap of the allegations with respect to the State measure in question.

The notion of a 'waiver clause' contrasts nicely with the popular reintroduction of the requirement to exhaust local remedies with an eye to soften the impact of investment arbitration. This means that prior to resorting to international arbitration investors must take all possible steps to vindicate their rights before domestic courts and authorities. The requirement to exhaust local remedies received critical coverage in academic literature. As Schreuer noted, 'the removal of local remedies requirement is one of the major achievements of international investment law.' One large factor in this renaissance has been the surge of disenchantment with investment arbitration by host States. Requiring investors to go to domestic courts before instituting international proceedings is, in Schreuer's words, 'an effective strategy to undermine investment arbitration' [Schreuer 2015:1910]. There may be some ground for this exhibition of frustration. One of the often-cited reason for such a repulsion is that addressing a local Femida first would not only delay a definitive decision, but would also increase the investor's costs. In addition to generally worded references to delay and added expenses, a foreign investor might feel truly discouraged from any pursuit of their claims [Zárate et al. 2020:302].

Can IPRs be protected under IIAs?

In Chapter 4 the authors discuss the extent IPRs can be qualified as protected investment under IIAs. Concern has been expressed as to whether BITs require the enactment of new national IP laws when the IIA lists certain proprietary rights as protected investments that are not correspondingly envisaged by the law of the host State. Ruse-Khan argues in broad strokes that if the domestic law of the host State does not recognise an IP right or only in a limited way, international investment law does not enable these rights to 'levitate' to the level of protected investments. Views such as this leave little room for manœuvering. This means that without a firm base in a host State's national law, individual economic rights would remain just an 'empty concept.'

The definition of investment under the *Salini* test (used in ICSID[2] arbitration to define an investment) is discussed as applied to IPRs. Here the authors delve into discussions revolving around the requirement of contribution to economic development of a host State. The requirement lacks stable definition and widespread acceptance. It is probably telling the ease with which this requirement can be swept aside when deciding whether there is an investment. As Klopschinski, Gibson and Ruse-Khan lamented ICSID has not produced a decisive answer as to how many angels can dance on the head of a pin. Neither do we have the answer to this decades-old conundrum. The authors notice that the contribution to the development of the host State can arise, as supported by 'more than a scintilla' of relevant evidence, from various channels, such as raising the tax income of the host State, generating jobs, contributing to the development of delivery and distribution networks, and raising the living standard of the population. To this end, we are tempted to contribute with a reflection from *Malaysian Historical Salvors Sdn Bhd v. Malaysia (MHS)*[3] on whether enhancing the gross domestic product (GDP) of the local economy can be the factor that determines the criterion of economic development. The tribunal stated that the enhancement of GDP will need to be more than a small amount for investment to be protected by the ICSID Convention[4]. Incidentally, the award in MHS was subsequently annulled by an ICSID ad hoc Committee on the issue of whether or not there had been an 'investment'[5]. But one of the members of the ad hoc Committee, Judge Mohamed Shahabuddeen, strongly dissented and highlighted the importance of economic development in the definition of investment under ICSID[6].

In an earlier case, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic (CSOB)*[7] , it was concluded that the investment had to have a positive impact on the host State's development. The tribunal interpreted the preambular language in the IC-

[2] The International Centre for Settlement of Investment Disputes.

[3] ICSID: Malaysian Historical Salvors Sdn Bhd v. Malaysia. Case No. ARB/05/10. Award on Jurisdiction of 17 May 2007. URL: https://www.italaw.com/sites/default/files/case-documents/ita0496.pdf (12.12.2021).

[4] Ibid. Para. 123.

[5] ICSID: Malaysian Historical Salvors Sdn Bhd v. Malaysia. Case No. ARB/05/10. Decision on Annulment of 16 April 2009. URL: https://www.italaw.com/sites/default/files/case-documents/ita0497.pdf (accessed 12.12.2021).

[6] ICSID: Malaysian Historical Salvors Sdn Bhd v. Malaysia. Case No. ARB/05/10. (Dissenting Opinion of Judge Mohamed Shahabuddeen. Paras. 17, 28-29. URL: https://www.italaw.com/sites/default/files/case-documents/ita0498.pdf (accessed 12.12.2021).

[7] ICSID: Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic. Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999. URL: https://www.italaw.com/sites/default/files/case-documents/ita0144.pdf (accessed 12.12.2021).

SID Convention as permitting 'an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention'[8]. In an indirect fashion, this viewpoint had previously been alluded to by the ICSID tribunal in *Amco v. Indonesia*[9]. Thus, if one combines the criteria for determining a contribution to economic development as applied by the ICSID tribunals in *Salini, MHS* and *CSOB*, taken as a whole, these cases would suggest that the investment must: (a) be made for the public interest; (b) transfer know-how; (c) enhance the GDP of the host State; and (d) have a positive impact on the host State's development.

In sharp contrast, other tribunals considering the term 'investment' have taken a decidedly different approach to the element of contribution to economic development. Most significantly, the majority of these cases have one element in common — they have rejected or downplayed the criterion of economic development due to the perceived difficulty or impossibility of ascertaining its scope. At one end of the spectrum, the ad hoc Annulment Committee in *Patrick Mitchell v. Democratic Republic of Congo* watered down the importance of this criterion.[10] An explicit dismissal of the criterion can be found in an illuminating case *L.E.S.I. SpA et ASTALDI SpA v. Algeria* where the tribunal took a position that it did not seem necessary that the investment contribute to the economic development of the country; this was a condition that the tribunal considered to be difficult to establish, and one that was implicitly covered by the other three elements of an 'investment.'[11]

The search for prosperity has always been the main drive behind the development of rules of international investment law [Garcia-Bolívar 2011:602]. When negotiating an IIA the parties are not so greatly disparate in bargaining power: the promise of prosperity is linked to international protection for foreign investments. The residual sense of unease comes from inconsistencies in approaches as to how to define and measure economic development. Rather than failing to give effect to this important criterion by placing it in the 'too-hard basket,' further intellectual engagement with the concept is required. Accordingly, there are ways to ascertain the contribution to economic development of the host State — there are specific tools that can be utilised to assess contributions to the local economy. For instance, the impact of the investment on the host State's GDP is one indicator that can be easily measured by comparing the value of the goods or services produced by the transaction with reliable data on the overall value of goods and services produced in the given country in a given period of time. However, economic growth is distinct from economic development. It is, of course, a *prima facie* indicator of positive contribution. However, there is a looming paradoxical feature when an investment, while enhancing the GDP, may still be detrimental to the economic development of a country (when, for instance, human rights are violated). Therefore, a more sophisticated approach to that criterion requires to take into account such circumstances.

National and Most Favorable Treatment standards

Chapter 5 addresses NT and MFN as relative standards of protection. The analysis looks into how the interpretation of NT and MFN standards in arbitration cases can be informed by the practice developed in international IP law. This is a region where the interaction between international investment law and IP law is often felt as fruitful cross-fertilisation. In this context, the authors also refer to the ill-cited Calvo doctrine which required foreigners to give up their right to receive diplomatic protection from their home State and prohibited access to international arbitration for dispute resolution [Dumberry 2016:63]. The doctrine, despite its achievements, has never become customary international law. The authors give a nice touch to the chapter by providing a welcoming historical background to *raison d'être* for MFN in IP agreements. Of particular significance for those seeking to understand the logic behind the introduction of MFN into the IP system is the reali-

[8] Ibid. Para. 64.

[9] ICSID: Amco Asia Corporation v. Indonesia. Case No. ARB/81/1. Decision on Jurisdiction of 25 September 1983. URL: https://www.italaw.com/cases/3475# (accessed 12.12.2021); ICSID: Amco Asia Corporation v. Indonesia. Case No. ARB/81/1. Award of 20 November 1984. URL: https://www.italaw.com/cases/3475#(accessed 12.12.2021).

[10] ICSID: Patrick Mitchell v. Democratic Republic of Congo. Case No. ARB/99/7. Decision on Annulment of 1 November 2006, Para. 33. URL: https://www.italaw.com/sites/default/files/case-documents/ita0537.pdf (accessed 12.12.2021).

[11] ICSID: L.E.S.I. SpA et ASTALDI SpA v. Algeria. Case No. ARB/05/3. Decision of 12 July 2006. Para. 73(iv). URL: https://www.italaw.com/sites/default/files/case-documents/ita0456_0.pdf (accessed 12.12.2021).

sation that when countries started to enter into IP agreements and were willing to limit additional IP protections, which they committed to, MFN was included as a means to capture those additional protections. This reinforces the limited practical relevance of this principle: MFN has a practical value primarily when additional protections offered to foreign right holders are not passed on to one's own nationals.

Throughout the chapter, the authors also discuss which justification and defences can be invoked by the host State, if the breach of non-discrimination standards is invoked by the investors. A different matter for attention in connection with the defence is the right to regulate. The TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Moreover, as a recognition of the customary international law right to regulate, the interpretative approach to give effect to public interest considerations is not limited to public health. The authors also quite helpfully shed some light on the distinction between the pre- and post-establishment phase of IP-related investments since the measures affecting IP rights and/ or IP right holders do concern both. Evaluated in this light, the scope of NT under IIAs frequently aligns with that of NT under international IP treaties — if the 'centre of gravity' of the investment is in fact the IP right. It is even more troubling that an important exception where NT for IP rights under IIAs is narrower than under for example TRIPS concerns the majority of IIAs that do not cover the pre- establishment phase (i.e., availability and acquisition of an IP right). On the other hand, the scope of NT in IIAs tends to be wider than NT in TRIPS when it comes to matters of the use of IP rights, but does not cover matters outside IP protection.

In another thought-provoking move, the book raises a series of MFN-related questions including whether an IP right holder import from other IIAs rules which define the notion of 'intellectual property rights' as covered investments more broadly, include additional IP rights, or introduce IP rights as a category of covered investment otherwise not eligible under the basic treaty. The authors respond negatively. But it remains an open question whether the investor can invoke the MFN standard in the basic treaty to claim protection in accordance with specific IP rules in IP treaties, such as TRIPS-plus protections in FTAs. Speculating somewhat further on MFN, the authors argue that international IP treaties essentially contain obligations for contracting States — but generally do not provide for directly enforceable direct rights for private parties. Hence, there is usually no protection that follows from an IP treaty which could be extended to a foreign investor under an MFN clause.

Fair and Equitable Treatment and Full Protection and Security standards

Chapter 6 looks into two of the absolute standards of protection: fair equitable treatment (FET) and full protection and security (FPS). The authors first introduce readers to the main elements of the two standards and lament over the evasive nature of a FET standard which has so far escaped a generally accepted definition, and remains maddingly vague, frustratingly general, and treacherously elastic [Salacuse 2021:221]. They then proceed with discussing how recent arbitration practice is drawing attention of States, which are now drafting more detailed provisions on FET and FPS, including closed lists of State actions that may constitute a breach. The magic lies in the ability to marry government control to market forces: the authors show that tribunals have tried various approaches (such as proportionality or reasonableness) to grapple with the difficult issue of weighing investor protection, for example in the form of legitimate expectations, against the host State's right to regulate. Two specific applications of the FET standard are analysed, namely protection of legitimate expectations (including sources of such legitimate expectations) and denial of justice. It is axiomatic that the concept of legitimate expectations in IP is that a trademark is not a promise by the host State to perform an obligation, but merely a part of its general intellectual property law framework. Therefore, a foreign investor should harbour no illusions that the grant of an IP right could give rise to investor expectations other than for a fair (judicial) review if the IP right is challenged in opposition proceedings or domestic courts. Just as in the preceding chapter, Chapter 6 closes with a section where possible justifications and defences for the host States are addressed, as well as the balancing mechanisms that can be useful when drafting future IIAs. It remains, however, open whether the FET standard with its notions of legitimate expectations, stability, predictability, and consistency imposes any limits on the host State's ability to change its domestic IP law.

Protection from unlawful expropriation

Penultimate Chapter 7 singles out another absolute standard in IIAs, that of protection from unlawful expropriation. The breach of this standard was in-

voked by investors in most of the IP-based cases. The chapter addresses direct and indirect expropriation claims, discussing which economic interests are capable of expropriation, when do State measures amount to expropriation, and the level of compensation due to the investor. For indirect expropriation claims, elements relied upon to establish the existence of expropriation are reviewed. The authors then analyse how the expropriation claim has been interpreted in the existing IP-based cases. One of the dominant rationales offered to justify a host State's actions in this regard can be found in the *Philip Morris* case[12], where the arbitral tribunal found that trademarks represent property rights capable of being expropriated, but that the business should be viewed as a whole (for the expropriation analysis) and that Uruguay's measures implemented for public health reasons were lawful exercises of its police powers and therefore did not qualify as an expropriation. In a separate section, the authors most effectively discuss whether compulsory patent licensing may be regarded as indirect expropriation (a question especially salient during the challenging COVID-19 setting).

Further developments

Chapter 8 closes the book with a forward-looking analysis: the authors look at the paths that investment arbitration in general, and IP-based cases in particular might take in the future. They review developments on the procedural level, including ISDS reform, which is currently underway under the auspices of UNCITRAL, and the EU aspirations to create a multilateral investment court. The discussions in this book have shown how investments with a significant IP component — where the 'centre of gravity' of the investor's engagement in the host State forms an IP right, perhaps combined with activities exploiting that right — can be protected under the standards international investment law has to offer. This analysis is a complex one, primarily because of the interplay of the three distinct bodies of rules that impact on the protection available. These are the applicable standards in IIAs. Since those standards do not create IPRs, domestic (IP) law forms the body of rules from which the existence, scope, and limits of IP rights emanate. Those elements in turn are informed by international IP treaties, which set increasingly detailed minimum standards of protection that need to be implemented in domestic IP laws. Thus, international law-makers and adjudicatory bodies can no longer ignore the various interactions between international investment law and IP law — this is the quintessential idea put forward by the three co-authors. Matters cannot simply be left to run their course. While the domestic IP law serves as an essential reference point for constructing the rights protected by the tools international investment law has to offer, international IP law with its much more detailed standards can be utilised as a guide to interpret those investment tools. This implies a challenging responsibility for academics and practitioners alike who are involved in negotiating, applying and interpreting the international treaties [Abbott, Cottier, Gurry 2019:64]. This book has also shown that determining the amount of weight (1) the domestic IP rules as reference point, or (2) the international IP norms as interpretative guidance will have in this — accurately labelled as — 'trialogue' of legal regimes depends on the individual circumstances at issue. What however is unlikely to change in the foreseeable future is that protecting IP rights under investment law will be essentially driven by this interplay. Though it is always hazardous to write about the future as the international investment regime is in constant flux and its evolution does not follow a preordained trajectory.

Many of the convincing discussions in this book have also indicated the unique guidance that international investment law can derive from IP treaties whenever IP-based investments are at issue. Intellectual property law is the only field of property law which is characterised by a significant body of international law dealing specifically with this special kind of property. What is at the core of the issue in this book is that this body of law and its underlying policies cannot be ignored by international investment tribunals, even though arbitral tribunals established under an IIA are not called upon, for example, to decide on issues of the TRIPS Agreement, but only to adjudicate a case on the basis of the standards of treatment of the relevant IIA. The more the minimum standards under international IP treaties relate to, or even mirror, the standards of investment protection, the more the latter should be construed with the former in mind. Non-discrimination standards such as NT and MFN exist in both international IP and investment law, and several aspects of FET and FPS are reflected in the enforcement provisions of the

[12] ICSID: Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) v. Oriental Republic of Uruguay. Case No. ARB/10/7. URL: https://www.italaw.com/cases/460 (accessed 12.12.2021).

TRIPS Agreement. State practice in IIAs has already recognised some of these linkages. The authors also contemplate how the approaches of ISDS tribunals to IP-based cases might change in the future to reflect underlying IP public policies. But the past is not always the guide to the future. As more investment cases relating to IP emerge, State and ISDS practice will continue to draw guidance from international IP treaties. The authors also conclude with a discussion on how investors may soon start challenging the decisions of regional IP bodies, such as the EPO[13], the EUIPO[14] and any future UPC[15].

Just to pour some water into the wine, the authors seem to have fallen into a popular trap by the frequent, but fleeting references to the treaty between Germany and Pakistan signed in 1959 which only encourages the misconception that this is the starting point of international investment law. As if to prove the point, Collins suggests that the earliest known indicia of foreign investment can be traced back to the era of Phoenicians, a civilization that flourished from 1500 BC in todays' Israel and Palestine [Collins 2017:6]. The signing of a treaty does not reset the clock forwards.

Moving further, the authors state that by initiating proceedings against the host State, the foreign investor accepts the host State's offer included in the BIT (or a free trade agreement) and consent according to Article 25.1 of the ICSID Convention between the two parties is established. Technically, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor, is an indispensable requirement for a tribunal's jurisdiction. Participation in treaties plays an important role for the jurisdiction of tribunals, but cannot, by itself, establish jurisdiction. Both parties must have expressed their consent. Schreuer notes that in practice consent is given by a direct agreement, through host State legislation, or through bilateral investment treaties.

On a separate note, the authors mention the post-award annulment proceedings that can be pursued following an ICSID case. In fact, there is no traditional appellate mechanism or hierarchy of awards in ICSID [Chen 2019:47]. There are suggestions, sometimes seen in publications and heard in the UNCITRAL corridors, that more predictability and consistency of the jurisprudence can be reached by establishing a second instance for appeal[16]. The idea was floated, when some years ago, ICSID had a general consultation with its Member States on possible improvements of its system. Back then, the vast majority of States were not in favour of this idea. The vacillating stance of some States on the appeal in investment arbitration only serves to deepen existing doubts over the need for one in light of the ongoing UN discussions over ISDS reform [Labin, Soloveva 2018:205-206; Soloveva 2019:32, 35]. The institution of an appeal mechanism has for good reason not been accepted in practice [Zarra 2018: 137-185]. First, after the parties' and the institutions' efforts to select the very best arbitrators, it is hard to see how more a qualified person could ever be found for such an appeal body. And second, one of the reasons to opt for arbitration is that it leads to an expedite decision contrary to the domestic court procedures with their two or three layers of instances resulting in considerable delays. This consideration is still valid [Grenness 2018:145; Puig, Shaffer 2018:361-409; Wang 2021:149-184]. Despite the criticism levied against appeal, to avoid really major faults of a tribunal in procedure or substance, investment arbitration does provide options for corrective actions such as the annulment procedures in the ICSID Convention. But though there may be room for improvement in detail, the approach is exceptionally limited to only a few grounds for revision, mainly technical ones. Even there, many feel that the scope of review has been widened too much in practice by some annulment committees.

On a short note, the book extensively discusses NAFTA, but gives no mention of USMCA which 'establishes a legal framework of minimum standards for the protection and enforcement of IP rights in North America' [Meade 2019:7]. Chapter 20, which deals with Intellectual Property, is itself some 63 pages in length, and refers to some dozen other international treaties on IP law. Moreover, USMCA Chapter 20 is the most important change IP Mexican law has ever encountered. It is, therefore, beyond doubt that the present analysis could have benefited from the discussions orbiteering around USMCA [Gervais 2021:53].

No one, surely, would be so unjust as to belittle the authors' great performance by reference to these minor omissions or points of discussions. There

[13] European Patent Office.
[14] EU Intellectual Property Office.
[15] Unified Patent Court.
[16] Another suggestion is to establish a permanent tribunal, but this discussion is outside the contours of this article.

is much to be praised in this book. Its claims, supported by ample and accurate research, are compelling and its approach is quite innovative, as it goes beyond an investigation of the concept of analogy in international legal reasoning, rather focussing on how such analogical and comparative reasoning are to take place in the context of international investment arbitration. If some minor criticism may be offered, it would perhaps be addressed towards what the very linear and systematic outline of the book and the discussion of different angles of the same issues in different chapters, which might at times seem to dilute the force of the arguments. Yet, this is perhaps unavoidable — indeed, reiteration is often the price of exhaustiveness — and derives from the need to engage with the prior scholarly and judicial analysis of the phenomenon discussed by the book.

Conclusion

In conclusion, this is an inspiring and rich study. Whilst not exactly novel, the subject matter covered in the book is definitely of importance, timely, interesting, and a valuable addition to existing academic literature. Throughout the work, the authors maintain a balanced outlook and a clear, strictly objective voice that matches their lifetime worth of rigorous research and solid scholarship. Through a masterfully crafted analysis, Klopschinski, Gibson, and Ruse-Khan guide the readers through the intricacies of this topic, investigating the tensions between the concepts of international investment law and IP law and rights, and ultimately reminding international lawyers that the use of analogies and paradigms is not to be regarded simply as an inconsequential academic pursuit, but has implications of considerable magnitude. This book seems to be quite a piece of excellent and dedicated research and scholarship shown by the authors. Despite that the relationship between intellectual property law and investment law will most likely develop slowly, the cases that will eventually be litigated will have important implications for policy and practice. In the process, the book will provide invaluable guidance as a standard volume and point of reference for practitioners and academics.

The book is a joy to read and does not have the pretentious tones of a tedious text, despite its apparent scholarly nature. The market for this book is quite broad, principally university libraries and the academic community. It may also be useful to policy makers and government departments. Since the book is written in an academic yet accessible language, it is suitable for a wider audience including government officials, officials of global and regional organisations, members of non-government organisations, researchers, the media and the general public, and also anyone who loves reading outstanding pieces of work.

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