Besprechung | Compte rendu

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The Protection of Intellectual Property Rights under International Investment Law

Oxford University Press, Oxford 2021, 592 p., GBP 125.00, ISBN: 9780198712268

In *The Protection of Intellectual Property Rights under International Investment Law,* Simon Klopschinski *et al.* provide an in-depth analysis of the emerging interplay of two bodies of law. In particular, the book evaluates how the protection of intellectual property (IP) may fall within the ambit of international investment law. Supported by the recently emerging jurisprudence, the authors engage in a comprehensive analysis of the current state-of-play, providing law practitioners and students alike a wealth of information, which can certainly serve as a rock-solid reference on the topic. While the book takes into account literature and case law prior to 15 April 2020, the authors have impressively managed to make some initial comments and references to the Covid-19 pandemic. The authors acknowledge that the future of the interface between intellectual property and investment is not yet settled; nevertheless, they provide the reader with a possible outlook, noting that the potential for future Investor-State Dispute Settlement (ISDS) cases involving IP rights remains real.

The book opens with an *introductory chapter* that establishes the overall framework of the book, while at the same time underlying the growing economic importance of IP assets in respect of foreign investments. This assertion certainly seems valid, as modern trade and investment is not merely limited to trading goods and services but is rather about innovation, too. In the era of Industry 4.0, companies' value and their respective competitive edge will hinge on the power of their ideas, innovation and creativity. The authors sum this up nicely: «*In short, foreign investment are reflecting an increasing concentration of intellectual capital invested in knowledge goods, which in turn are often protected by intellectual property rights. Thus, it has been aptly observed that intellectual property rights have never been more economically and politically important or controversial than they are today.*» (p. 2). The authors recall that until 2010, IP rights had not played a prominent role in international investment disputes and hence, as of today, we are still at an early stage of this debate.

Chapter 2 provides the legal background of international investment and intellectual property law. To that effect, the authors point out that the international investment framework, which is comprised of *inter alia* international investment agreements (IIAs) and free trade agreements (FTAs), provides a private investor in principle with the possibility to sue a host state before an international arbitration tribunal. Moreover, a potential IP violation may fall under the scope of an IIA, which in turn means that an investor may avail himself of the respective ISDS arbitration proceedings. In sharp contrast, the WTO TRIPS Agreement is subject to the WTO Dispute Settlement Understanding (WTO DSU) mechanism, which only foresees state-to-state disputes. Hence, under the latter legal framework, an injured party may only rely upon: i) the judiciary of the host country; or ii) on the willingness of its home state to initiate a dispute settlement proceeding under the WTO DSU.

To assess the current interplay between international investment law and international IP law, the authors study and rely upon relevant IPR-related investment cases. In order to achieve this, *Chapter 3* explains the functioning of the ISDS mechanism and notes that international arbitration is increasingly popular for international IP-related disputes. While it may very well be true that the ISDS legal framework is gaining momentum for international IP-related disputes, one may nevertheless note that this is still a relatively new and developing area of law. To that effect and in the second part of this chapter, four early and prominent intellectual property investment disputes are analysed (*Philip Morris v. Australia*; *Philip Morris v. Uruguay*: *Eli Lilly v. Canada*; and *Bridgestone v. Panama*). *Eli Lilly v. Canada* is of course the first IP investment dispute decided under NAFTA Chapter 11 and, as pointed out by the authors, sets standards for the future of litigating patents under international investment law.

In *Chapter 4*, the authors study the conditions needed for an IP-based asset to qualify as an *investment* under an IIA. This is of course at the heart of the debate, as IIAs will only be applicable provided there is a qualifying investment. As such, the authors examine the scope of the term «investment», using various international treaty as examples, such as NAFTA, the European Energy Charter, the US Model BIT, as well as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. They conclude that: «*the reference to intellectual property in IIA as a form of asset or property that may qualify as a protected investment is long-standing and consistent in investment law treaty practice.*» (p. 157). The authors continue by discussing IP as an investment under the ICSID Convention and examining the resulting jurisprudence. This includes an overview of the well-known *Salini* test, the leading test employed by arbitral tribunals to define the term «investment» in Article 25(1) of the ICSID Convention.

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The national treatment (NT) and the most-favoured-national treatment (MFN) principles are examined in *Chapter 5*. Those two relative standards of treatment are indeed equivalent principles that exist in international IP, as well as in international investment law. However, the authors point out that this does not necessarily mean that the respective standards lead to the same result when applied in the IP or investment context. This chapter provides for a comparative approach to the two aforementioned non-discriminatory standards (NT & MFN) in international IP, trade and investment law. To that effect, the authors evaluate the relevant TRIPS provisions (i.e. Articles 3.1 and 4) and throughout this chapter, they comprehensively illustrate the current state-of-play by referencing and explaining the applicable jurisprudence.

As a logical next step, in *Chapter 6*, the authors review the so-called «absolute standards of treatment» for investments; namely the standards on fair and equitable treatment (FET), as well as the standard on full protection and security (FPS). In contrast to the MNF and NT principles, the FET and FPS standards are not contingent on the protection given by a host state to other investors; hence, they are referred to as being «absolute». Before embarking in an in-depth analysis of the protection of IP-based investments under FET and FPS, the authors provide for a very useful introduction by reviewing the historical backgrounds, concepts, context and key debates surrounding FET and FPS. It is worthwhile noting that FET is commonly invoked in arbitration proceedings by complainants and hence, it is not surprising that this matter has caused a lot of ink to flow. Moreover and as part of this chapter, the author address the question on whether an investor can claim that it has made its investments with a legitimate expectation that a host state will comply with its international treaty obligations, notably the TRIPS Agreement. In this regard and in summary, the authors mention that: «*[…] successfully invoking international IP norms in ISDS involves passing several hurdles. Only in exceptional situations where the domestic law allows for the direct effect of an international IP rule affording individual rights that can be exercised without the need for concrete domestic implementation, right holders may, in principle, reply on an international IP rule.*» (p. 346).

Chapter 7 examines the protection from unlawful expropriation, which is a core guaranty of international investment law. This chapter provides for an excellent explanation of the applicable law and concepts in respect of expropriation. As a starting point, the authors recall the general principle that the protection against unlawful expropriation applies to IP-based investments. In this regard, reference is made to a 1926 decision in the *Case Concerning Certain German Interests in Polish Upper Silesia* (Chorzow Factory). In that case, the Permanent Court of International Justice noted that the contractual rights to use and exploit certain patents were entitled to be protected against expropriation. On that premise, the chapter offers an examination as to how expropriation standards may be applicable to IP-based investments. In particular, the authors discuss recent IP-based investment cases, where expropriation claims were raised. This includes a review of *Philip Morris v. Uruguay*, where the tribunal found that trademarks represent property rights capable of being expropriated. However, that case also shows that arbitration tribunals provide host states with considerable space for policy power. In this instance, the arbitral tribunal concluded that Uruguay's measures were implemented for health reasons and thus, they were a lawful exercise of its policy power and did not amount to unlawful expropriation. As accurately pointed out by the authors: «*the tribunal acknowledged that there has been a shift in ISDS decisions and treaty practice, according more recognition and deference to a host state's policy power […]*» (p. 473).

Finally, the question as to whether and when a compulsory licensing could constitute an indirect expropriation is also analysed in this chapter. The answer indeed depends on the scope and coverage of an IIA, namely whether and how a reference to Article 31 TRIPS (on the issuing of compulsory licenses) is made. For instance, in cases where an IIA refers to Article 31 TRIPS and provided that the issuing of a compulsory license meets the requirements thereof, a finding of unlawful expropriation is unlikely. Conversely, should the conditions of Article 31 TRIPS not be fulfilled, an arbitral tribunal may consider that the granting of a compulsory licence amounts to indirect expropriation. In time of Covid-19 and its respective IP discussions, this is of course a highly relevant topic. To that effect, the authors are of the view that the Covid-19 situation: «*should meet the criteria of «national emergency» or «other circumstances of extreme urgency» listed in Article 31(b) of the TRIPS Agreement* (p. 493). Having said this and as noted by the authors, judicial guidance is lacking as an investment case addressing compulsory licences is yet to be raised.

In the concluding *Chapter 8*, the authors provide a cautious outlook of the protection that international investment law may afford to IP rights. Foremost, they note that considering the current state-of-play and the limited cases that have arisen so far: «*it is too early to say whether the protection available under international investment law will leave a substantial footprint on how protecting and enforcing of intellectual property rights operate across borders.*» (p. 498). With that in mind, the authors continue by providing an overview of possible developments in this still evolving area. To that effect, they rightfully point out that in recent years, international investment protection appears to be more on the defensive side with countries thus seeming to have drafted investment treaty provisions in more details and with a possibly narrower scope.

Overall, the book provides an excellent in-depth analysis of the interplay between IP and international investment law, a topic that will likely gain momentum in the coming years. In sum and to close with the word of the authors: «*While several factors […] are likely to ensure that the number of cases will not significantly expand, whenever the monopoly that an IP right confers has extraordinary economic value, its owner might attempt to pursue any possible legal venue, including ISDS* (p. 508).