

# The protection of intellectual property rights under international investment law

## La protección de los derechos de propiedad intelectual bajo el derecho internacional de inversiones

*Juan Manuel Rivero Godoy\** 

\* Secretaría del Tribunal Permanente de Revisión, Paraguay.

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The present book is a masterpiece on both international arbitration and intellectual property features where the authors<sup>1</sup> have achieved to address the attention to substantial and procedural elements when an international conflict arises between different actors such as states, companies, individuals, etc. Writing a book is not an easy task, but the authors have managed to accomplish it exceedingly. A glimpse of stunning effort is noticed when the topic seems ambiguous at the beginning, but then efforts are made to clarify it in the end.

The book is divided in eight parts -all of them quite interesting- due to the extent of the issues they cover. Intellectual property rights are a very well-known feature in international and national courts -especially in commercial law- although their scope and meaning are not quite clear to those who are not familiar with them.

The introduction describes the important connection between Foreign Direct Investment (FDI) and IP rights, but a deep insight is needed in order to disclose the interconnection in both fields, as well as their interdisciplinary approach. It shows the high increase in number of IIA around the world, and how arbitration proceedings under ICSID tribunals have improved along after 1990. It is important to quote the following:

As this powerful trend continues, a similar change is occurring in FDI: increasingly, cross border investments are comprised of various intangible assets, including contract rights, bonds, notes, equity shares, technology, know-how, brands, goodwill, creative works, and other intangible assets—and importantly, this includes the intellectual

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E-mail: [manuelrivero@tprmercosur.org](mailto:manuelrivero@tprmercosur.org)

<sup>1</sup> SIMON KLOPSCHINSKI, Christopher S. Gibson and Henning Grosse Ruse-Khan.



property rights securing many of these categories.

The second section covers the background between International Investment Law and Intellectual Property. Moreover, the authors illustrate us

on the previous litigation standard review before ICSID's arbitration tribunals. On the basis of the principles around the IIA granted to foreign parties, this section shows the problems of interconnection between IP rights and those principles as national (anti-discrimination) treatment; – most-favored-nation (MFN) treatment; – certain minimum standards of treatment, including fair and equitable treatment (FET), full protection and security, and treatment in accordance to international law, etc., particularly when some AII do not cover IP rights and only national courts are the available mechanisms for investors as seen in both *Philips* or *Novartis* cases.

The third section called "Investor–State Dispute Settlement and Review of New IP-Related Investment Cases" deals with some leading cases, which cover IP rights under a new approach as *Philip Morris vs. Uruguay*, *Philip Morris v. Australia*, *Eli Lilly v. Canada* or *Bridgestone v. Panama*. This section takes into account some background on contract claiming, IPR Companies violation of their entitlements, types of IP rights claims, etc.

The fourth section includes an Intellectual Property Investment approach when deciding whether IP rights have passed the previous assessment or not in order to be considered as an "investment". On the other hand, it would be useful to examine the protective standards under international law (from AII and customary international law) to evaluate a substantial basis protection to IP rights against the host state. The attention is addressed to the investment scope and whether IP rights are treated as investments to get international protection, if that is the case.

The fifth section is quite interesting because it underlines the "Relative Treatment Standards: National Treatment and Most-Favored-Nation". The basis of this chapter involves features such as discriminatory actions from host-states against investors and their IP rights. Furthermore, a full understanding of the way in which foreign investors receive an outlaw treatment in comparison to the state nationals is extremely important in order to assess the ongoing claim from those foreign investors.

The sixth section sheds light on the following: "Absolute Standards of Treatment, Fair and Equitable Treatment, Full Protection and Security" provided to IP investors. The authors address the readers' attention to the best applicable principles like fair and equitable treatment (FET), full protection and security: a) how the aforementioned have been applied by decisions from investments tribunals, b) the observation of specific applications of the standards that appear most relevant to IP claims, and c) how this background has shaped and motivated the states' behavior to draft new treaties which contemplate IP rights.

The seventh chapter assumes the figure of “Expropriation” as one of the most relevant topics in investment arbitration. Protection from unlawful (direct or indirect) is another international standard that foreign investors seek when they decide to allocate risk at investing. Herein an illustrative quotation:

For IP-based investments, an expropriation might arise from the state’s transfer to itself of the legal title for an IP-right; however, apart from seizure of physical assets underpinned by IP rights (e.g. patented technical equipment), it is more likely that state measures impacting IP-based investments would involve instances of invalidation of an IP right, exercising a compulsory license over the IP right, failing to offer protection for the IP right, or severely restricting use of the IP right.

The eighth and last section keeps track on the most important features that the authors have delivered through their magnificent work. It can be summarized in two main ideas. First, the linkage between international investment law and the domestic legal regime for protecting IP rights in the host state, despite the interplay of domestic IP laws with international IP treaties to which the host states are party. Second, the relationship there is between investment treaties and international agreements for the protection of IP rights.

To all those who are interested on IP rights and their connection to international arbitration, this book turns out to be mandatory, not only to scholars, practitioners, and politicians, but also to anyone who loves reading outstanding pieces of work that convey strong ideas over topics that never end.

## **BIBLIOGRAPHIC REFERENCE**

KLOPSCHINSKI, Simon; GIBSON, Christopher S.; GROSSE RUSE-KHAN, Henning. *The protection of intellectual property rights under international investment law*. Oxford, 2021.

## **RESUMEN BIOGRÁFICO**

*Juan Manuel Rivero Godoy* es actual Secretario de la Secretaría del Tribunal Permanente de Revisión del MERCOSUR.