

# THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS THROUGH INTERNATIONAL INVESTMENT AGREEMENTS: ONLY A ROMANCE OR TRUE LOVE?

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International investment agreements ("IIAs") are designed to protect foreign investments against certain political risks arising in the host state. While the number of IIAs and investment disputes thereunder have been steadily growing, to date only very few claims have directly addressed protection of intellectual property rights ("IPR" or "IPRs").<sup>2</sup> The apparent lack of activity in this area is surprising for several reasons. First, of the more than 2,600 IIAs concluded in the last fifty years, the majority of those treaties expressly lists IPRs as a form of protected investment.<sup>3</sup> Second, most IIAs offer the attractive option of permitting an aggrieved investor to have its claim resolved by a neutral arbitral tribunal. Finally, complaints about the ineffective protection of IPRs give rise to intense debates at both an international level and domestically. Hot button topics that make headlines today include attempts to combat counterfeiting and piracy, the need for effective judicial sanctions

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<sup>2</sup> Only a small number of IPR-related IIA conflicts have become public. None of them has been decided so far. The authors of this Special Issue report on six known conflicts only. Notably, four of them have emerged under the NAFTA and concerned measures of the U.S. or Canada, see Valentina M. Vadi, *Mapping Unchartered Waters: Intellectual Property Disputes with Public Health Elements in Investor-State Arbitration*, at 9 ff.; Lahra Liberti, *Intellectual Property Rights in International Investment Agreements: An Overview*, at 26 f., and Julian Davis Mortenson, *Intellectual Property as Transnational Investment: Some Preliminary Observations*, at 10. Vadi further cites a licensing and expropriation dispute against an Eastern European country, *id.*, at 12, and Liberti and Mortenson recall the settled case between Shell and Nicaragua, Liberti, *id.* at 26, and Mortenson, *id.*, at 3. Due to the confidential nature of arbitrations, however, further cases might have been brought without entering into the public domain.

<sup>3</sup> While most IIAs expressly list IPRs as a covered investment, the question whether a specific IPR is indeed covered by a particular IIA can only be answered based on the circumstances of each case. An empirical analysis of the wording of more than 400 IIAs can be found in Lavery's article in this Special Issue, see Rachel S. Lavery, *Coverage of Intellectual Property Rights in International Investment Agreements: An Empirical Analysis of Definitions in a Sample of Bilateral Investment Treaties and Free Trade Agreements*. On some of the issues related to the coverage of IPRs as investments under IIAs, see also Mortenson, *id.*

against IPR infringers<sup>4</sup> and the issuing of compulsory licenses to provide access to essential medicines.<sup>5</sup>

Whether there are inherent characteristics of IPRs that limit the usefulness of IIA protections will be explored below. But two observations might provide some explanation for the relative lack of attention to this topic. First, the group of people deeply familiar with both intellectual property and international investment law is probably rather small.<sup>6</sup> Second, the question of whether and to what extent IIAs can be an effective tool for the protection of IPRs has received only limited academic attention.<sup>7</sup> Hence, there has been insufficient analysis of the opportunities for IPR protection in IIAs, either from the perspective of investment law practitioners or of policy-makers.

Inspired by discussions with the late Professor Thomas Wälde, this TDM Special Issue on *The Protection of Intellectual Property Rights through International Investment Agreements* is intended to help overcome the shortcomings identified in the preceding paragraph. The following articles have been prepared by a well-qualified and diverse group of authors, ranging from up-and-coming PhD students to well-established professors, including officials with international

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<sup>4</sup> As recently as August 12, 2009, a World Trade Organization (“WTO”) panel upheld the U.S.’s complaint that China’s copyright law was inconsistent with its international IPR obligations. Keith Bradsher, *W.T.O Rules Against China’s Limits On Exports*, New York Times, Business, August 13, 2009 (<http://www.nytimes.com/2009/08/13/business/global/13trade.html?pagewanted=1&r=1&adxn1=1&ref=business&adxn1x=1250208091-FHqSqWPaVuZ7NE//0Ra%20hg>). The WTO panel also found that China violated other trade obligations by requiring U.S. movie producers to distribute their works in China through limited, designated Chinese operators. However, commentators questioned whether this ruling would be of any real effect given China’s failure to prosecute infringers who trade in bootlegged copyright material.

<sup>5</sup> The most prominent example of public debate on this topic centers on the negotiations and discussions in the WTO’s Doha Round on TRIPS and public health. A good overview of the complex process can be found on the WTO’s homepage at [http://www.wto.org/english/tratop\\_e/trips\\_e/pharmpatent\\_e.htm#declaration](http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm#declaration). On the important topic of public health, see also the following articles in this Special Issue: Rosa Castro Bernieri, *Compulsory Licensing and Public Health: TRIPS-Plus Standards in Investment Agreements*; Vadi, *supra* note 2; also dealing with the topic: Christopher S. Gibson, *A Look at the Compulsory Licence in Investment Arbitration: The Case of Indirect Expropriation*; Carlos M. Correa, *Intellectual Property Rights as an Investment: Options for Developing Countries*.

<sup>6</sup> Vadi points out that IPRs are a highly technical subject that has entered the international law agenda only recently, Vadi, *supra* note 2, at 6.

<sup>7</sup> Most articles published so far deal with specific aspects of the general problem, such as the public health issue, see for example Rosa Castro Bernieri, *Intellectual Property Rights in Bilateral Investment Treaties and Access to Medicines: The Case of Latin America*, 9 *The Journal of World Intellectual Property* 548 (2006); Carlos Correa, *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, 26 *Mich. J. Int’l L.* 331 (2004); Valentina Vadi, *Access to Essential Medicines & International Investment Law*, 8 *The Journal of World Investment & Trade* 505 (2007). General overviews can be found by Carlos Correa, *Bilateral Investment Agreements: Agents of New Global Standards for the Protection of Intellectual Property Rights*, 1 *TDM No. 4* (2004); Burkhard Schoebener, & Markus Jobst, *Der Schutz des geistigen Eigentums durch Bilateral Investment Treaties*, *Wirtschaft und Verwaltung*, 2009/1, 49; UNCTAD, *Intellectual Property Provisions in International Investment Arrangements*, *IIA Monitor No. 1* (2007).

organizations and practitioners in international law firms. Together, the articles paint a complex picture of the interplay between IPRs and IIAs and will hopefully give rise to further discussion and debate concerning this under-explored subject.

In order to lay the groundwork for the topics covered in the Special Issue, this article begins with an introduction into the basic problem of global IPR protection (Part 1) and identifies the fundamental features of both IPRs and IIAs (Part 2). It then provides a roadmap to the articles that follow by distilling some of the most significant issues that arise in applying IIAs to IPRs (Part 3) before offering a short conclusion (Part 4).

## **1. Introduction - The Basic Problem of Effective International IPR Protection**

IPRs can be described as the backbone of the economy. Nearly every good produced, service rendered or work of art consists of or is related to at least some IPR, be it a patent, an industrial design, a trademark or a copyright. But the reality of the modern economy and the legal protection granted by IPRs diverge at one decisive point – their territorial scope:

Modern IPRs, on the one hand, are a "creation" of national legal orders. National intellectual property laws determine the different kinds of protected IPRs, their registration process (if any), the exact scope of the rights granted to the right-holder, the lifetime of the protection and the procedures to enforce IPRs against infringers. The effect of such IPRs grounded in domestic laws is limited to the relevant national territory, *i.e.*, while the good can cross the border with ease, the associated IPR does not necessarily follow.<sup>8</sup>

In today's global economy, this divergence between economic needs and the legal situation obviously creates problems and risks for IPR-holders. First, they have to ensure that their rights are adequately protected in every jurisdiction that is of economic interest to them. This can be a long, burdensome and expensive process. The procedure is further complicated by the fact that intellectual property laws differ with regard to possible registration formalities, the scope of rights granted and the lifetime of an IPR. Second, even if formal protection has been granted in various countries, IPR-holders still face the risk that the protection is not effective, *i.e.*, either that national laws do not grant an adequate level of protection or that they are not enforced in an efficient way. An obvious risk is that national enforcement agencies might treat complaints of foreigners differently from well-connected local counterparts.

In order to bridge the gap between territorially limited IPRs and a globally integrated economy, various international treaties have been concluded since the end of the 19<sup>th</sup> century. The most comprehensive treaty – both with regard to the number of its members and the detail of its provisions – is the *Agreement on Trade-Related Aspects of Intellectual Property* ("**TRIPS**") that has

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<sup>8</sup> The concept of territoriality is complex and has various aspects. For an introduction, see Alexander von Mühlendahl & Dieter Stauder, *Territorial Intellectual Property Rights in a Global Economy – Transit and Other 'Free Zones'*, 2009, at. 1 ff. with further references at n. 2, available at <http://www.springerlink.com/content/n868652q8u47n1r5/fulltext.pdf>; with regard to enforcement issues see also Christopher Wadlow, *Enforcement of Intellectual Property in European and International Law*, 1998, at 7 - 14.

been concluded under the aegis of the World Trade Organization ("WTO").<sup>9</sup> TRIPS provides minimum standards for protection of IPRs, which must be implemented in national legislation, as well as containing provisions on the enforcement of such standards.

Despite the numerous efforts that have been undertaken over the past century, these problems are far from being solved. To take just one example, the Organization for Economic Co-operation and Development ("OECD") estimates that counterfeit and pirated goods caused damage of approximately US\$ 200 billion in 2005 alone.<sup>10</sup>

## 2. Overview: The Basic Concepts of IPRs and IIAs

A very broad-brush overview of the basic features of IPRs and IIAs may be useful to better understand the specific areas of contention discussed in more detail in the articles that comprise this Special Issue.

### 2.1 *Intellectual property rights*

The term "*intellectual property rights*" covers a wide range of assets. While they all are intangible, and therefore share certain legal particularities, they also differ considerably.

At a general level it is possible to divide IPRs into two categories:<sup>11</sup>

- Industrial property, consisting of, *inter alia*, inventions (patents), trademarks, and industrial designs; and
- copyright, which, for example, can be embodied in literary and artistic works such as novels, poems and plays or paintings, sculptures, and architectural designs.

In consideration of these commonalities and differences, the following section begins with a brief history of IPRs in national legal orders (2.1.1) and the economic justification for the recognition of IPRs (2.1.2). Against this background, the article then introduces a short discussion of the legal particularities of IPRs compared to tangible property rights (2.1.3), and common forms of IPRs found in most national legal orders (2.1.4). The section ends with a short description of the international conventions on IPRs (2.1.5).

#### 2.1.1. History of IPRs

The Roman poet Marcus Valerius Martialis accused Fidentinus, having passed Martialis' poems off as his own, of kidnapping.<sup>12</sup> Notwithstanding this early complaint about copyright violations, the ancient

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<sup>9</sup> The text is available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

<sup>10</sup> See the reference in Mendenhall's article in this Special Issue. James E. Mendenhall, *Fair Treatment of Intellectual Property Rights under Bilateral Investment Treaties*, at n.1.

<sup>11</sup> Both the WTO and the WIPO use this differentiation, see only <http://www.wipo.int/about-ip/en/>.

<sup>12</sup> Manfred Rehinder, *Urheberrecht*, 15<sup>th</sup> ed. 2008, at para 12, citing Marcus Valerius Martialis, *Epigrams*, I, 29, 52: "Report says that you, Fidentinus, recite my compositions in public as if they were your own. If you

world recognized neither industrial property nor copyrights in literary or artistic works.<sup>13</sup> This lack of recognition continued in medieval times, in which the guild system created an atmosphere that discouraged inventions.<sup>14</sup> The situation began to change in the early modern age when local sovereigns tried to encourage inventions by granting various kinds of *privileges* to inventors.<sup>15</sup> These privileges awarded the inventors monopolies either on the use of their invention or on the exercise of a business related to it.

Building on the practice of granting trade monopolies as an exception to the general freedom of trade, England enacted the *Statute of Monopolies* in 1624, which set forth guidelines for the grant of patent rights.<sup>16</sup> Influenced by this practice and other theories on the protection of intellectual property, states began as of the late 18<sup>th</sup> century to enact national laws on copyrights, patents and other IPRs, thereby providing the basis for modern IPR laws.

### 2.1.2 Economic justification for the protection of IPRs

The need to adopt measures to protect innovations results from their intangible nature, which bears two traits of a public good: It is non-rivalrous (*i.e.*, it can be enjoyed simultaneously by an unlimited number of users) and, to a large extent, non-excludable through private means.<sup>17</sup> This second characteristic means that it is not possible to exclude others from copying or otherwise enjoying the benefits of the innovation, so that they get a “free ride” without incurring the costs borne by the initial innovator. This in turn weakens the incentive for the innovator to create the good in the first place.<sup>18</sup>

IPRs were conceived of as a way to overcome this problem.<sup>19</sup> They are used to assign property rights associated with the creation to its creator or inventor. These rights function like

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allow them to be called mine, I will send you my verses gratis; if you wish them to be called yours, pray buy them, that they may be mine no longer. (...) To you, Quinctianus, do I commend my books, if indeed I can call books mine, which your poet recites. If they complain of a grievous yoke, do you come forward as their advocate, and defend them efficiently; and when he calls himself their master, say that they were mine, but have been given by me to the public. If you will proclaim this three or four times, you will bring shame on the plagiarist." Cited according to Roger Pearse, *Early Church Fathers - Additional Texts*, available at [www.tertullian.org/fathers/index.htm#Martial\\_Epigrams](http://www.tertullian.org/fathers/index.htm#Martial_Epigrams).

<sup>13</sup> Reh binder, *id.*, at para 12; Heinrich Hubmann & Horst-Peter Götting, *Gewerblicher Rechtsschutz*, 7<sup>th</sup> ed. 2002, at para 1.

<sup>14</sup> Hubmann & Götting, *id.*, at para 2.

<sup>15</sup> A more detailed description on the historical development can be found *id.*, at paras 6 ff.

<sup>16</sup> A more detailed description of the developments in England and other Western countries can be found in Zorina Khan, *An Economic History of Patent Institutions*, 16 March 2008, available at <http://eh.net/encyclopedia/article/khan.patents>.

<sup>17</sup> Keith E. Maskus, *Intellectual Property Rights in the Global Economy*, 2000, at 3.

<sup>18</sup> See the general explanation by the WTO, which also focuses on individual IPRs, at [http://www.wto.org/english/tratop\\_e/intel1\\_e.htm](http://www.wto.org/english/tratop_e/intel1_e.htm).

<sup>19</sup> Two alternatives, the socialist concept and the free-market concept, are introduced in Frank Emmert, *Intellectual Property in the Uruguay Round – Negotiating Strategies of the Western Industrialized Countries*, 11 Mich. J. Int'l L. 1317, 1319 (1989 – 1990).

property rights for tangible assets. They protect – subject to limitations due to overriding public interests – the creations of the mind against their unauthorized use by others, *i.e.*, they give the right-holder the right to prevent others from using the creation and provide him or her – for a certain period of time – with the authority to determine whether or not, and under which conditions, others can use the innovation.<sup>20</sup> Conceptually, the expected return for this protection is the publication of the innovation, which leads to the dissemination of knowledge and stimulates further innovation by others.<sup>21</sup>

Therefore, while not without debate, it is generally considered as economically beneficial for a state to establish a system for assigning IPRs so as to capture the creative potential of its citizens.

### 2.1.3 Legal particularities of IPRs

As intangible rights, IPRs differ from other property rights, in particular with respect to their recognition, their scope, their enforcement, and finally their temporal and territorial limitations.<sup>22</sup>

First, IPRs have to be affirmatively recognized by states by application of their IPR legislation. This means that an IPR exists positively only once legislation has established that the IPR in question is generally recognized in the national legal order and has defined the conditions for its existence.<sup>23</sup> These conditions vary considerably between IPRs. While copyrights normally do not depend on a registration, patents require a formal application and only come into being once the application has been approved and the patent been granted by the national patent authorities.<sup>24</sup>

The rights granted to an IPR-holder are comparable to those related to tangible property, *i.e.*, entitlement to exclude others from using, reproducing, selling or distributing the protected innovation. The right-holder is also entitled to license, assign or transfer his or her right by succession.<sup>25</sup> Limitations that can be imposed on IPRs might be linked to the prevention of anti-competitive

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<sup>20</sup> See WIPO, *World Intellectual Property Handbook, Policy, Law and Use*, 2<sup>nd</sup> ed. 2004, at para 1.2, available at <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf>; see also the WTO homepage at [http://www.wto.org/english/tratop\\_e/trips\\_e/intel1\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm).

<sup>21</sup> *Id.*

<sup>22</sup> These issues are, among others, addressed in TRIPS, *supra* note 9. See also the general overview of its content available [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm).

<sup>23</sup> TRIPS obliges its members to introduce legislation on the IPRs covered, *i.e.* "Copyright and Related Rights, Trademarks, Geographical Indications, Industrial Designs, Patents, and Layout Designs of Integrated Circuits". Further, TRIPS deals also with "Protection of Undisclosed Information" and "Control of Anti-Competitive Practices in Contractual Licenses".

<sup>24</sup> With regard to copyright, see Art. 5 (2) of the Berne Convention for the Protection of Literary and Artistic Works ("**Berne Convention**"), available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P85\\_10661](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P85_10661); with regard to patents, see only Art. 4 of the Paris Convention for the Protection of Industrial Property, available at [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html).

<sup>25</sup> The minimum rights that have to be vested in a patent are listed in Art. 28 TRIPS.

practices or other issues that create an overriding public interest, such as public health or ethics.<sup>26</sup> Again, the exact scope depends on the form of the IPR. For some, the right-holder is sometimes required to publish the invention and to pay a maintenance fee.

Disputes about IPRs might give rise to civil lawsuits, criminal investigations or other proceedings, some before specialized courts or other bodies with exclusive jurisdiction over the relevant IPR.<sup>27</sup> Claims by the IPR-holder against private parties for infringement are generally resolved in normal civil lawsuits before civil courts unless they are subject to arbitration. If the infringement has been committed intentionally, it might also give rise to criminal proceedings.<sup>28</sup> Claims against the IPR-holder concerning the validity of an IPR might also be prosecuted in civil courts or, depending on the IPR and the national legislation, in special courts with exclusive jurisdiction.<sup>29</sup> Whether a claim to invalidate an IPR is arbitrable depends on the national jurisdiction in which it is brought.<sup>30</sup>

Finally, the scope of IPRs is limited in time and space. Most IPRs are temporary rights. After the term of the IPR has expired, the invention, trademark, design or work of art is publicly available for use by anyone. According to TRIPS, the minimum term for a patent should be 20 years and for a copyright the lifetime of the author plus fifty years, or, in some circumstances (such as for an example an anonymous publication), fifty years after publication.<sup>31</sup>

Furthermore, as such rights are recognized by domestic laws, IPRs exist on a territorial basis only.<sup>32</sup> Thus, a given innovation may be subject to disparate protections across different states. A given use can be protected in one jurisdiction, but not necessarily in another.

#### 2.1.4 Different kinds of intellectual property rights

As has already been stated above, IPRs differ considerably. But at a general level, they can be divided into two categories: industrial property and copyright.

Industrial property is linked to the commercial/industrial applicability of the protected creation. Its most important forms are patents, trademarks, and industrial designs.

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<sup>26</sup> See *e.g.* Art. 31 of TRIPS that determines the conditions under which a compulsory license on a patent can be issued.

<sup>27</sup> Arts. 41 – 61 of TRIPS set minimum standards for the enforcement of IPRs.

<sup>28</sup> According to Art. 61 of TRIPS, criminal procedures have to be available, at a minimum, in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.

<sup>29</sup> On the possible consequences of patent revocation claims under IIAs see Seelig in this Special Issue. Marie Louise Seelig, *Can Patent Revocation or Invalidation Constitute a Form of Expropriation?*

<sup>30</sup> An overview can be found in Frank-Bernd Weigand (ed.), *Practitioner's Handbook on International Arbitration*, 2002, Part I, at para 96.

<sup>31</sup> See Art. 33 (patents) and Art. 9, 12 (copyright) of TRIPS in connection with Art. 7 (1) of the Berne Convention.

<sup>32</sup> See references in *supra* note 8.



Patents protect inventions, *i.e.*, new solutions to technical problems. Patentability is generally subject to conditions, consisting of industrial applicability (utility), novelty, non-obviousness (inventive step) and patentable subject matter.<sup>33</sup> The latter varies from one country to another. Many countries exclude from patentability such subject matters as scientific theories, mathematical methods, plant or animal varieties, discoveries of natural substances, methods for medical treatment (as opposed to medical products), and any invention prohibited from commercial exploitation in order to protect public order, good morals or public health.<sup>34</sup>

Since patents are subject to approval and registration, most countries have established patent offices that are responsible for the grant and administration of national patents. Further, some countries differentiate between patents and utility models and protect the latter as an independent form of IPR, the structure of which is comparable to patents.

A trademark is a sign, or a combination of signs, which distinguishes the goods or services of one enterprise from those of another.<sup>35</sup> Such signs may use words, letters, numerals, pictures, shapes and colors, as well as any combination of the above. Broadly speaking, a trademark performs four main functions consisting of (i) distinguishing the marked goods or services from products of competitors, (ii) determining their commercial origin, (iii) ensuring their quality and (iv) facilitating their promotion in the market place.<sup>36</sup>

The typical ways to establish a trademark are either by its commercial use in a certain region or its formal registration with national trademark offices, or sometimes both.

An industrial design, in general terms, is the protection afforded to new and original ornamental or aesthetic aspects of a useful article.<sup>37</sup> The protection may depend on the shape, pattern or color of the article, provided that the design (i) has visual appeal, (ii) performs its intended function efficiently and (iii) is capable of industrial reproduction. Industrial designs can generally be protected if they are new or original.<sup>38</sup>

Depending on the national legislation, IPRs associated with an industrial design might arise by mere use or require a registration with a competent national agency.

Copyright, in contrast to industrial property, relates to artistic creations, such as poems, novels, music, paintings, and cinematographic works.<sup>39</sup> It is not concerned with the industrial applicability of the creation, even though it can be of great commercial value.

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<sup>33</sup> See Art. 27 of TRIPS.

<sup>34</sup> *Id.*; see also WIPO, *Understanding Industrial Property*, at 6, available at [http://www.wipo.int/freepublications/en/intproperty/895/wipo\\_pub\\_895.pdf](http://www.wipo.int/freepublications/en/intproperty/895/wipo_pub_895.pdf).

<sup>35</sup> See *e.g.*, Art. 15 of TRIPS.

<sup>36</sup> See WIPO, *Understanding Industrial Property*, *supra* note 34, at 12 f.

<sup>37</sup> See Art. 25 of TRIPS.

<sup>38</sup> See WIPO, *Understanding Industrial Property*, *supra* note 34, at 9 f.

<sup>39</sup> See *e.g.*, Art. 2 of the Berne Convention, *supra* note 24.



While most industrial property rights require at least a formal registration and – *e.g.*, in the case of patents, a thorough examination ensuring the fulfillment of the conditions for patentability – a copyright comes into existence "automatically", *i.e.*, with the creation of the work (provided, of course, that a copyright law exists in the given territory).<sup>40</sup>

### 2.1.5 International conventions on intellectual property rights

As early as from the late 19<sup>th</sup> century, the need for cross-border protection of IPRs was recognized and prompted calls for the conclusion of international conventions. The first such major international treaty was the *Paris Convention for the Protection of Industrial Property* of 1883, which currently has 173 contracting parties.<sup>41</sup> The Paris Convention deals with all kinds of industrial property such as patents, utility models, marks, and industrial designs. It embodies three essential principles: (i) national treatment for foreign IPR applicants and/or owners; (ii) recognition of priority dates of applications made in other member states<sup>42</sup>; and (iii) common rules for IPRs which all contracting states must follow.<sup>43</sup>

In the same vein, the need for a uniform system on copyrights led to the adoption of the *Berne Convention for the Protection of Literary and Artistic Works*<sup>44</sup> of 1886, which currently has 164 contracting parties. The *Berne Convention* (i) provides also for national treatment of works originating in other member states, (ii) ensures the principle of an "automatic" (*i.e.*, registration-free) protection and (iii) determines certain minimum standards of treatment that must be implemented in national legislation.<sup>45</sup>

Further important treaties are the *Madrid Agreement Concerning the International Registration of Marks* dating from 1891<sup>46</sup> and the *Hague Agreement Concerning the International Registration of Industrial Designs* dating from 1925, which together provide (as amended) for the international registration of trademarks and industrial designs to have effect in each of the contracting states designated by the applicant.

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<sup>40</sup> In the past, further formalities were required under U.S. law, *i.e.* the publication with a copyright notice. Registration of copyright is possible in the U.S., but is not required for protection. See U.S. Copyright Office, *Copyright Basics*, 10/2008, available at <http://www.copyright.gov/circs/circ01.pdf>.

<sup>41</sup> *Supra* note 24.

<sup>42</sup> *I.e.* the date of the first application for a covered IPR in one member state is, within a certain period of time, also the decisive date for the determination of priority with regard to applications made by other persons in other member states.

<sup>43</sup> See WIPO's official summary, available at [http://www.wipo.int/treaties/en/ip/paris/summary\\_paris.html](http://www.wipo.int/treaties/en/ip/paris/summary_paris.html).

<sup>44</sup> *Supra* note 24.

<sup>45</sup> See WIPO's official summary, available at [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html).

<sup>46</sup> Madrid Agreement Concerning the International Registration of Marks, available at <http://www.wipo.int/treaties/en/registration/madrid/>. It was later supplemented by the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, which was adopted in 1989, available at [http://www.wipo.int/treaties/en/registration/madrid\\_protocol/](http://www.wipo.int/treaties/en/registration/madrid_protocol/).

In 1967, the *World Intellectual Property Organization* ("WIPO") was established in Geneva as a special organization of the United Nations. It administers the major conventions on IPRs and aims to foster the recognition and development of IPRs worldwide.<sup>47</sup>

In 1994, the WTO adopted TRIPS that covers both industrial property and copyrights as an integral part of the WTO's multilateral trade rules.<sup>48</sup> By incorporating parts of the earlier conventions, it builds on them and requires its members to adopt, at a minimum, a certain level of national IPR legislation that also has to ensure the enforcement of IPRs.<sup>49</sup> Therefore, it "constitutes a floor and not a ceiling as to adequate IPR protection".<sup>50</sup>

Since then and after the failure of the WTO's Doha Round, the trend in international rule-making on IPRs has shifted from the multilateral to the regional and bilateral level. Modern Free Trade Agreements ("FTAs") contain chapters on IPRs that either incorporate TRIPS provisions, for example with regard to criminal enforcement, or go beyond them. As is discussed below, these heightened TRIPS standards are commonly referred to as "TRIPS-plus" obligations.<sup>51</sup>

## 2.2 *International investment agreements*

IAs protect certain types of property owned by a national of one state but invested in a foreign state against undue interference by public authorities of the host state.<sup>52</sup> In order to attract these protections, the subject property must typically qualify as an "*investment*" for purposes of the relevant treaty. Most (but not all) IAs explicitly include IPRs in the definition of covered "investments".<sup>53</sup>

The following sections provide a very brief introduction to the rationale for IAs (2.2.1) and their historical background (2.2.2). The article goes on to identify the different kinds of IAs (2.2.3.) and their most important material and procedural provisions (2.2.4). Finally, the last section summarizes the recent dramatic increase in the practical significance of IAs (2.2.5).

### 2.2.1 The rationale for IAs

The commonly advanced *raison d'être* for IAs is to encourage foreign direct investment so as to "stimulate the flow of private capital and economic development of the parties," which will

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<sup>47</sup> For a comprehensive list of WIPO-administered treaties, see <http://www.wipo.int/treaties/en/>.

<sup>48</sup> *Supra* note 9.

<sup>49</sup> On the content of TRIPS, see *supra* section 2.1.4.

<sup>50</sup> Liberti, *supra* note 2, at 6.

<sup>51</sup> The term "TRIPS-plus" actually encompasses at least three ideas concerning how the subject IIA expands upon TRIPS obligations, being where the IIA: (1) implements a more extensive standard than in TRIPS; (2) eliminates an option to apply a TRIPS standard; or (3) sets a standard on an issue not covered in TRIPS. See further Peter Drahos, *Bilateralism in Intellectual Property*, Oxfam 2001, at 4.

<sup>52</sup> Mendenhall stresses that while IPR treaties are prescriptive, *i.e.* they provide a set of rules that have to be implemented in the national legal orders, IAs are result-oriented, *i.e.* they are focused on the actual application of a given law. See in this Special Issue, Mendenhall, *supra* note 10, at 2 f.

<sup>53</sup> See references in *supra* note 3.

“maximize effective utilization of economic resources and improve living standards” in both countries.<sup>54</sup> The medium by which this is to be achieved is the creation of a stable legal framework for foreign investments that is guaranteed by a set of international law obligations existing independently of the national legal order of the host state.<sup>55</sup>

The legal framework combines *relative* standards that connect treatment of the foreign investor with treatment of the host state’s own nationals or that of protected investors of other nationalities, as well as *absolute* standards that determine, for example, a minimum standard of treatment for the foreign investor notwithstanding the way other investors are treated. Most IIAs also provide for the right of the investor to commence arbitration against the host state in case of treatment that falls short of these standards.<sup>56</sup>

IIAs historically were concluded between developed states as capital exporting nations on the one hand and developing states as capital importing nations on the other. However, it has to be stressed that IIAs are reciprocal, *i.e.*, investors from the developing nation will enjoy the protection offered by the treaty should they invest in the developed country. Further, IIAs have taken on increasing significance in protecting and promoting investments between developing nations and also play a role between developed nations.<sup>57</sup>

## 2.2.2 The historical background to IIAs

The duty to protect foreigners’ property rights is not a new subject of international law.<sup>58</sup> In the late 19<sup>th</sup> century, many countries, particularly the U.S. and the states in Europe, had accepted that an

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<sup>54</sup> Preamble to the 2004 U.S. Model Bilateral Investment Treaty; and see also the Preamble to the Bilateral Investment Treaty between Germany and China, available at <http://www.dis-arb.de/materialien/bgbl/part2/20050803-2005-II-732.pdf>. Whether IIAs really promote foreign investments is subject to considerable debate, see *e.g.* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int’l L. J. 67 (2005); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit ... and They Could Bite*, World Bank 2003, available at [www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946\\_03091104060047/Rendered/PDF/multi0page.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf).

<sup>55</sup> As with the overall effectiveness of IIAs, the relative advantages of the legal framework are also disputed. A critical assessment of the system of investor-state arbitration can be found, for example, in Gus van Harten, *Investment Treaty Arbitration and Public Law*, 2008.

<sup>56</sup> A more detailed description follows *infra* at section 2.2.4.

<sup>57</sup> UNCTAD, *Recent Developments in International Investment Agreements (2008-June 2009)*, U.N. Doc UNCTAD/WEB/DIAE/IA/2009/8, at 5: “Developed countries were party to 38 new BITs signed in 2008, extending their share of worldwide BITs to 63 per cent (or a total of 1,687 BITs) (...) The number of BITs between developing countries also continued to grow in 2008. Out of 59 new BITs signed during the year, 13 were among developing countries, pointing to the continuing importance of South-South cooperation on investment issues.”

<sup>58</sup> An excellent overview of the history of protection of property in international law can be found in Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties*, 2009, Chapter 1.

obligation existed to protect foreigners and their property located within the subject state.<sup>59</sup> This general principle had at least two important characteristics: First, expropriation was only allowed against the payment of "*adequate, effective and prompt*" compensation.<sup>60</sup> Second, foreigners had to be treated according to certain minimum standards.<sup>61</sup> Redress could, however, not be had by a direct action by the foreign party against the state, as in investor-state arbitration created by contemporary IIAs, but only by the means of diplomatic protection, *i.e.*, only the foreigner's home state was entitled to pursue the right *vis-à-vis* the host state.

The Russian Revolution of 1917, the expansion of communism to Central and Eastern Europe after World War II and the independence of former colonies in the 1950s tested the validity of the duty to compensate for expropriations. The new states and regimes requested, in particular through various resolutions of the United Nations' General Assembly, the adoption of a New International Economic Order.<sup>62</sup>

As a consequence of these uncertainties, representatives of the industrialized nations started to develop a new type of treaty to ensure the protection of their nationals' foreign investments – the prototype of the modern IIA. On 25 November 1959, Germany and Pakistan signed the first IIA. Other states followed and the OECD published a "*Draft Convention on the Protection of Foreign Property*" in 1967.<sup>63</sup> While never promulgated, it became the blueprint for future model IIAs, thereby creating at least some degree of standardization across future IIAs.

By 1989, approximately 400 bilateral investment agreements had been concluded. After the collapse of the socialist economies and the shift towards market economy policies in developing states, the number of IIAs sky-rocketed in the 1990s. Today, approximately 2,600 IIAs exist.<sup>64</sup>

### 2.2.3 Different kinds of IIAs

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<sup>59</sup> The Latin American states disputed the validity of these rules. According to the *Calvo Doctrine* prevailing in this region, foreigners enjoyed only the relative right to national treatment, *i.e.* they had to be treated in the same way as nationals, but were not entitled to better treatment, see *id.*, at para 1.8.

<sup>60</sup> The so-called "Hull-Rule", formulated by the then U.S. Secretary of State Cordell Hull in 1938, *id.*, at para 1.13.

<sup>61</sup> While the exact content of these minimum standards was never precisely defined, it was accepted that it encompassed basic aspects of the rule of law, such as the right to life, equality before the law and due process, see *id.* at para 1.7.

<sup>62</sup> See *id.*, in particular at paras 1.14 and 1.20.

<sup>63</sup> Reprinted in 7 I.L.M. 117 (1968).

<sup>64</sup> The total number of BITs rose to over 2,600 at the end of 2008, see UNCTAD, *supra* note 57. The number includes only IIAs that provide for firm standards on investment protection. International instruments dealing with soft law or other aspects of international investments are excluded. On these weaker forms of international instruments, see Newcombe & Paradell, *supra* note 58, at paras 1.23 – 1.26; Peter Muchlinski, *Policy Issues*, in Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law*, 2008, at 3, 16-18.

IAs, as that term is used herein, can be broadly divided into two groups: bilateral investment treaties ("BITs") focused only on the encouragement and protection of foreign investments and the FTAs, focused more broadly on trade, that have already been touched upon in connection with international conventions on IPRs.

Stand-alone BITs are the predominant form of IAs and constitute probably more than 90% of all treaties of this kind.<sup>65</sup> As described above, BITs have historically been entered into between a developed state and a developing state. Germany has by far concluded the most BITs with 139, of which 126 are in force. China follows as second with more than 100 such treaties. Although perhaps at first surprising, this position in fact demonstrates China's changing role from a capital importing to a capital exporting country that tries to ensure an effective protection for its own nationals' investments abroad.<sup>66</sup>

All attempts to enter into a global multilateral treaty focused only on investment have failed. The negotiations of a Multilateral Agreement on Investments ("MAI") among the OECD member states from 1994 to 1998 collapsed, *inter alia* after a negative public campaign had made the project unattractive for developing countries to join. The efforts to put the topic on the agenda of the WTO's Doha Round equally failed, since the member states could not even reach a consensus on the mandate for such negotiations.<sup>67</sup>

As discussed, FTAs can either be bilateral or multilateral (typically, on a regional basis).<sup>68</sup> Many FTAs contain a chapter on investment protection that sets out standards broadly commensurate

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<sup>65</sup> The easiest accessible source is the search engine on the UNCTAD homepage that allows to access all BITs available per country or to search for a specific BIT between two countries, available at [http://www.unctadxi.org/templates/DocSearch\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_779.aspx). Most developed nations publish the list with their BITs and further references on the homepage of the respective governmental departments. For example, a list with all German BITs can be downloaded at <http://www.bmwi.de/BMWi/Navigation/aussenwirtschaft,did=194058.html> (full texts are available at the homepage of the Deutsche Institution für Schiedsgerichtsbarkeit, <http://www.dis-arb.de/materialien/indexbiinvest.html>). Full texts of all U.S. BITs can be found at [http://tcc.export.gov/Trade\\_Agreements/Bilateral\\_Investment\\_Treaties/index.asp](http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp).

<sup>66</sup> Chinese BITs are analyzed in Norah Gallagher & Wenhua Shan, *Chinese Investment Treaties*, 2009.

<sup>67</sup> Friedl Weiss, *Trade and Investment*, in: Muchlinski, Ortino & Schreuer, *supra* note 64, at 183; M. Sornarajah, *The International Law on Foreign Investment*, 2<sup>nd</sup> ed. 2004, at 26-28; Jessica S. Wiltse, *An Investor-State Dispute Mechanism in the Free-Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 Buffalo L. Rev. 1145, 1181 (2003), cited in Christopher Dugan, Don Wallace, Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration*, 2008, at 74.

<sup>68</sup> A good overview of the recent U.S., European and Japanese Free Trade Agreements is contained in Liberti's article in this Special Issue, Liberti, *supra* note 2, at 3 and Annex 1. The texts of the U.S. FTAs are published at <http://www.ustr.gov/trade-agreements/free-trade-agreements>. The text of the Japanese FTAs is accessible through <http://www.mofa.go.jp/policy/economy/fta/index.html>.

with those found in BITs.<sup>69</sup> Other chapters of these FTAs will deal with a range of other trade-related topics, one of which normally is the incorporation of TRIPS or TRIPS-plus obligations.

Prominent examples of regional FTAs are the North American Free Trade Agreement ("NAFTA") between Canada, the U.S. and Mexico of 1994, and the more recent Dominican Republic – Central American Free Trade Agreement ("DR-CAFTA") between the U.S. and certain Central American states. Chapter 11 of NAFTA and Chapter 10 of DR-CAFTA, the latter of which is based on the U.S. Model Investment Treaty of 2004, contain provisions dealing with subject matter similar to that found in a BIT. In addition to DR-CAFTA, the U.S. has also signed a number of bilateral FTAs, for example with Latin American states (Chile, Peru and Colombia) and also with Australia, Singapore, Korea and Oman.

Another unique treaty is the Energy Charter Treaty ("ECT") of 1994.<sup>70</sup> The ECT aims to promote energy security through the creation of open and competitive energy markets. Therefore, in addition to dealing with issues such as free trade, transit and energy efficiency, the ECT has a chapter on investment protection that covers the same substantive ground as most BITs.<sup>71</sup>

#### 2.2.4 The content of IIAs

This very broad-brush summary outlines, with respect to typical IIAs, the (a) scope of their application with regard to IPRs, (b) substantive provisions for protection of investments, and (c) mechanisms for resolution of disputes between foreign investors and host states.

In considering this summary, it is important to note that volumes can be (and have been) written on the topics discussed. Moreover, while there is a basic similarity in the structure and content of many IIAs, the treaties in fact can differ to a considerable extent and, in any event, each IIA is an independent treaty that has to be interpreted in its own right. Further, the growing body of investment treaty awards and decisions, many of which are referred to herein, while potentially important as being of persuasive value in interpreting IIAs, are not *stricto sensu* precedents. Accordingly, the following comments are intended only to lay the foundation for discussion of the contents of IIAs in the Special Issues' articles.

##### a.) The scope of IIAs

IIAs are not applicable to every property right, but only to those that qualify as investments. Most IIAs therefore provide a detailed definition of this crucial term, typically consisting of (i) a general part defining investments as "*every kind of asset*" and (ii) a non-exhaustive list of covered assets that

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<sup>69</sup> As of 2003, the U.S. had FTAs containing IPR provisions with more than 43 states; the EU had more than 27. See David Vivas-Eugui, *Intellectual Property Provisions in Regional Trade Agreements and the TRIPS Agreement*, International Centre for Trade and Sustainable Development (ICTSD) Nov. 2003, at 3.

<sup>70</sup> Text and further information available at <http://www.encharter.org/>.

<sup>71</sup> For further information see Graham Coop & Clarisse Ribeiro, *Investment Protection and the Energy Charter Treaty*, 2008; Thomas W. Wälde, *Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation*, 12 Arb. Int'l 429 (1996).

more often than not explicitly includes IPRs. For example, Art. 1 sec. 1 of the 2003 German – Chinese BIT reads in its relevant parts:

*(T)he term "investment" means every kind of asset (...) and in particular, though not exclusively, includes:*  
*(...)*  
*(d) intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will;*  
*(...).*

Accordingly, the wording covers a wide range of tangible and intangible assets, explicitly including all major kinds of IPRs. It is noteworthy that the wording not only includes the IPRs described above, but also other concepts like trade secrets, know-how and goodwill.

The jurisprudence on IIAs that has emerged over the last years has shown, however, that the question whether a certain asset is indeed covered as an investment might also be influenced by factors that are not necessarily included in the IIA's wording, such as the object and purpose of the treaty or its context. Whether an IIA protects an IPR can therefore not be answered in the abstract, but requires careful analysis in light of the specific purported investment and the specific potentially applicable treaty.<sup>72</sup>

b.) Material provisions of IIAs

There are five major kinds of provisions included in nearly all IIAs:

The first set of provisions contains so called relative standards prohibiting discrimination against foreign investments, be it in comparison to investments by nationals of the host state ("national treatment") or to investments from third countries' nationals ("most-favored-nation treatment", see Art. 3 sec. 2 and 3 of the Germany – China BIT).<sup>73</sup>

The second group concerns the treatment of foreign investments in general and imposes absolute standards of treatment on the host states, *i.e.*, standards that have to be obeyed notwithstanding the way in which other investors are treated. These standards have their genesis in the already mentioned minimum standards found in customary international law, although the relationship of such treaty-based principles to customary international law norms is hotly debated. These standards typically require the states to accord to foreign investments "*fair and equitable treatment*" (*e.g.*, Art. Art. 3 sec. 1 of the Germany – China BIT) and to grant them "*full protection and security*" (*e.g.*, Art. 4 sec. 1 thereof).

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<sup>72</sup> Of course, IIAs are to be interpreted in accordance with Art. 31 of the Vienna Convention on the Law of Treaties. For an in-depth discussion of what constitutes an "investment" see Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration*, 2007, at paras 6.01 ff. See also *supra* note 3 for further articles in this Special Issue addressing this topic.

<sup>73</sup> See also McLachlan, Shore & Weiniger, *id.*, at paras 7.152 ff.



While the relationship between both standards is not entirely clear, it is generally assumed that the obligation of fair and equitable treatment requires the state to act in a non-arbitrary manner and that full protection and security relates to physical protection. Of relevance to this Special Issue, the first standard also is employed in the context of procedural failures that lead to a denial of justice and the second one can contain a duty to protect the foreign investors' property against infringements from private parties.<sup>74</sup>

The third type of provision deals with expropriations and covers both direct and indirect expropriations (*e.g.*, Art. 4 sec 2 of the Germany – China BIT). Both forms are allowed only where they are (i) in the public interest, (ii) realized on a non-discriminatory basis and (iii) accompanied by prompt, adequate and effective compensation. As is discussed by several authors in this Special Edition, one of the vexing problems lies in distinguishing between a compensable indirect expropriation and a non-compensable regulatory interference with investments.<sup>75</sup>

The fourth type of substantive protection, although not included in every IIA, is present in a majority of treaties. It obliges states to obey any kind of other obligation they have entered into with regard to foreign investments (a so called "*pacta-sunt-servanda*" or "*umbrella clause*", see *e.g.*, Art. 10 sec. 2 of the Germany – China BIT). These clauses differ in their scope and potential application. Of the many unresolved issues they have thrown up, in the context of this Special Issue, one can note questions about whether the obligation relates only to mutually bargained for (*i.e.*, contractual) duties or to unilateral promises as well, and whether it is only applicable when the obligation is related to the exercise of some kind of governmental authority.<sup>76</sup>

The last of the typical standard protections is a guarantee to permit the free transfer of capital that obliges the states to allow the unrestricted movement of capital between the investment and the investor's home base (see *e.g.*, Art. 6 of the Germany – China BIT).

c.) Direct enforcement of IIA rights by an investor

The final substantive provision to note deals with dispute resolution mechanisms, which offer an important distinguishing feature compared to treaties such as TRIPS.

It is expected that an international treaty will contain provisions for the resolution of disputes between states that are parties to the treaty. Private entities are only rarely entitled to rely on the provisions of a treaty *vis-à-vis* the infringing state. For example, TRIPS provides for state-state dispute settlement according to the WTO's Dispute Settlement Understanding (see Art. 64 of TRIPS). The remedies typically available for a breach are that the infringing state is ordered to bring its

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<sup>74</sup> For a more detailed discussion, see McLachlan, Shore & Weiniger, *id.*, at paras 7.01 ff, in particular at paras 7.76 (on fair and equitable treatment) and at paras 7.141 (on full protection and security). With regard to possible applications of both standards to IPR related issues such as counterfeit goods, see in particular Mendenhall's article in this Special Issue, *supra* note 10.

<sup>75</sup> For a more detailed discussion, see McLachlan, Shore & Weiniger, *supra* note 72, at paras 8.01 ff, in particular at paras 8.71 ff. With regard to IPRs, see the articles by Seelig, *supra* note 29, and by Gibson, *supra* note 5, in this Special Issue.

<sup>76</sup> Dugan, Wallace, Rubins & Sabahi, see *supra* note 67, at 541 ff.

legislation in line with its material obligations and, if it fails to do so, the prevailing state is allowed to impose proportional trade sanctions.<sup>77</sup> No compensation is granted to the aggrieved private parties.

Most IIAs, by contrast, provide for direct investor-state arbitration (see *e.g.*, Art. 9 of the Germany – China BIT). This means that the foreign investor can seek direct redress for an alleged violation of the standards guaranteed in the IIA by submitting the dispute to binding arbitration before a neutral international tribunal. This has two major advantages. First, the investor does not depend on the willingness of his or her home state to enforce the claim. Second, any remedy awarded by a tribunal – typically monetary damages – goes directly to the investor.<sup>78</sup>

The exact provisions on investor-state arbitration vary between IIAs. Dispute resolution provisions commonly contain (i) cooling-off periods during which the investor and the state should try to find an amicable solution and/or (ii) so-called "fork-in-the road" rules under which the investor has to choose whether to pursue the relevant claim before a domestic court or an international arbitral tribunal.<sup>79</sup> Depending on the wording of the relevant IIA, the dispute will be resolved by binding arbitration before the World Bank's International Centre for Settlement of Investment Disputes ("ICSID"), or by an arbitral tribunal administered by another international arbitral institution or on an *ad-hoc* basis.

#### 2.2.5 The practical application of IIAs

IIAs did not gain much attention until the second half of the 1990s. Since then, however, investor-state arbitration has become an important tool for the resolution of disputes between foreign investors and host states.<sup>80</sup>

With respect to FTAs, a turning-point was the entry into force of NAFTA in 1994.<sup>81</sup> In the following years, several investors from the U.S., Canada and Mexico launched arbitral proceedings alleging breaches of the investment commitments found in Chapter 11 of the NAFTA. These same states found themselves defending a wide array of claims, including justifying certain regulatory measures alleged to be in breach of NAFTA obligations or denying claims of denial of justice.<sup>82</sup>

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<sup>77</sup> On dispute settlement in the WTO, see [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm#intro](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#intro).

<sup>78</sup> See the general introduction to investor-state arbitration by McLachlan, Shore & Weiniger, *supra* note 72, at paras 3.01 ff.

<sup>79</sup> *Id.*, at paras 3.16 ff. and at paras 3.30 ff. With regard to the suitability of the remedies available under IIAs for aggrieved IPR-holders, see the article by White and Szczepanik in this Special Issue, Brian A. White & Ryan J. Szczepanik, *Remedies Available under Bilateral Investment Agreements for Breach of Intellectual Property Rights*.

<sup>80</sup> All publicly available awards can be found at <http://www.investmentclaims.com/> or at <http://ita.law.uvic.ca/>.

<sup>81</sup> All publicly available documents on claims filed under the NAFTA are accessible at <http://www.naftaclaims.com/>.

<sup>82</sup> Cases concerned, for example, a Canadian export-ban on hazardous waste (*SD Myers v. Canada, Partial Award*, 13 November 2000), taxes levied on soft drinks producers in Mexico (*Archer Daniels Midland*

Investors under other IIAs started to take advantage of their rights under these treaties by either invoking them in their negotiations with the host government and/or commencing arbitral proceedings. Examples of typical disputes brought under IIAs include those arising out of Argentina's economic crisis of 2002,<sup>83</sup> the disintegration of the YUKOS Group in Russia,<sup>84</sup> and the failures of complex privatization schemes in Central and Eastern Europe.<sup>85</sup>

The exact number of pending and concluded cases is hard to tell. ICSID registers on average 25 – 30 new cases per year. Other institutions do not publish their cases and ad-hoc arbitrations are not registered at all. Cases therefore become public only when the parties agree on publication, upon enforcement litigation or if information leaks to the media.

### 3. Issues Regarding Protection of IPRs under IIAs

Having outlined the basic concepts of IPRs and IIAs, this article turns now to an overview of some of the issues likely to arise in protecting IPRs through the use of IIAs. In sketching the landscape of such issues, the reader is also directed to the articles that follow in this Special Issue addressing these topics. As already mentioned in the beginning, the articles are not homogeneous, but provide different views on the topics analyzed.

#### 3.1 To what extent are IPRs an “investment” covered by the relevant IIA?

As an obvious starting point of any analysis, one should consider whether the specific IPRs at issue in fact constitute an “investment” covered by the relevant investment agreement. While this inquiry is likely to focus at first on the meaning of “investment” in the IIA, there are also other definitions, exclusions and jurisdictional requirements that may come into play. For example, if ICSID arbitration is chosen, the investor must also consider the jurisdictional prerequisites of Art. 25 of the ICSID Convention. This provision uses the term “investment” independently from the definition found in the relevant IIA.

Looking first at the IIA, most investment treaties specifically include IPRs in the list of assets included within the definition of “investments” covered by the treaty. However, as Rachel Lavery shows in her article, this is not always the case and, moreover, many definitions go on to provide a list of the *specific types* of IPRs contemplated as being within the scope of the treaty.<sup>86</sup> Ms. Lavery’s

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Company v. Mexico, *Award*, 21 November 2007) or the resolution of a commercial dispute between a U.S. company and its Canadian competitor before a State Court in Mississippi (Loewen Group v. USA, *Award*, 26 June 2003). All decisions are published on the websites listed in note 80 and 81.

<sup>83</sup> See, for example, CMS v. Argentina, *Award*, 12 May 2005 and *Annulment Decision*, 25 September 2007; LG&E v. Argentina, *Award*, 25 July 2007 ; or BG Group v. Argentina, *Award*, 24 December 2007, all available *id.*

<sup>84</sup> RosInvest v. Russia, *Award on Jurisdiction*, October 2007; and Renta 4 S.V.S.A. v. Russia, *Award on Preliminary Objections*, 20 March 2009, all available *id.*

<sup>85</sup> For example Eureko v. Poland, *Partial Award*, 19 August 2005; Saluka v. Czech Republic, *Partial Award*, 17 March 2006; ADC v. Hungary, *Award*, 2 October 2006, all available *id.*

<sup>86</sup> Lavery, *supra* note 3.

quantitative analysis of a sample of some 435 treaties from five key jurisdictions, evidences the lack of standardization across treaties and even amongst IIAs entered into by the same state. She notes that this divergence creates ambiguities that may provide fertile ground for dispute.

The meaning of "investment" is also addressed by Julian Davis Mortenson in his article. Taking a big picture approach to BITs, he concludes that "the default presumption must be that [intellectual property] would be included in any broad definition of "investment."<sup>87</sup> Mr. Mortenson goes on to identify, however, the rise of a more "restrictive" approach to what constitutes an "investment" covered by Article 25 of the ICSID Convention. While the cases on this point to date have not addressed intellectual property, he enumerates the indicia of an "investment" as identified by leading ICSID panels and makes the case that – depending on the specific right at issue – these intangible assets also meet the test: "intellectual property is every bit as much an engine in today's economy as commodities and production lines."<sup>88</sup>

Other contributors to this symposium also touch on this fundamental issue.<sup>89</sup> While more than one notes the long history of including IPRs within international investment law, Ms. Bernieri refers to the view held by some commentators that "knowledge and information, the objects of IPR protection, are public goods" and as such have "intrinsic differences" with the tangible assets that are more frequently the subject of investment treaty disputes.<sup>90</sup> She suggests that if one accepts that differences exist between these types of property, it might be desirable to have "special rules of interpretation, especially with regard to exceptions and limitations" that apply to the application of IIAs to IPRs.<sup>91</sup>

### 3.2 *The relationship between IIAs and international treaties concerning IPR*

Assuming that IPRs fall to be treated as investments within the ambit of the relevant IIA, it is worth considering the interplay between IIAs and the international legal framework governing IPRs. As discussed above, an understanding of the limitations of, and frustrations with, these contemporary multilateral IPR treaties helps explain how we have arrived at a situation where there is such a complex overlay of bilateral and/or regional "TRIPS-plus" obligations. The history of this development and the socio-political dynamics driving it are explored by several authors, and set out in detail in the article by Alan Anderson and Bobak Razavi<sup>92</sup> and in the contribution from Lahra Liberti.<sup>93</sup>

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<sup>87</sup> Mortenson, *supra* note 2, at 5-6.

<sup>88</sup> Mortenson, *supra* note 2, at 9.

<sup>89</sup> See Liberti, *supra* note 2, at 5-11; White & Szczepanik, *supra* note 79, at 3-4; Seelig, *supra* note 29, at 1-4; Correa, *supra* note 5, at note 2.

<sup>90</sup> Bernieri, *supra* note 5, at 16.

<sup>91</sup> *Id.*, at 16-17.

<sup>92</sup> In this Special Issue: Alan M. Anderson & Bobak Razavi, *International Standards for Protection of Intellectual Property Rights Post-TRIPS: The Search for Consistency*.

<sup>93</sup> See Liberti, *supra* note 2.

Messrs. Anderson and Razavi discuss the search for “consistency” across the various standards for international IPR protection. But in painting the picture of a patchwork of bilateral and regional treaties layered on top of the TRIPS “baseline of minimum protections,”<sup>94</sup> they observe that this inconsistency is really a product of contemporary international relations. The authors note that “the history of international IPR protection has been profoundly influenced by power struggles between developed and developing nations which in turn have fueled a periodic rewriting of the rules of the game.”<sup>95</sup> The advent of TRIPS-plus standards and the developed economies’ preference for bilateral agreements as a way of heightening those standards, are to be understood as part of that rewriting.<sup>96</sup> However, the authors sound a warning that if the competing objectives of developed and developing economies are not checked, the overall international regime for IPR protection will be undermined.<sup>97</sup>

Ms. Liberti focuses primarily on free trade agreements and the extent to which these IIA have explicitly expanded TRIPS obligations.<sup>98</sup> She details specific extensions of new rights contained in regional trade agreements entered into by each of the EU, U.S. and Japan.<sup>99</sup> She also notes the development of more extensive exclusions of IIA obligations with respect to “most favored nation” treatment and “non-discrimination” where the standards to be applied are based on TRIPS (or other multilateral IP agreements).<sup>100</sup> Moreover, she highlights the uncertainties created by these overlapping regimes and the potential problems this could cause, for example, where there is a claim of expropriation based on compulsory licensing, revocation of a patent or parallel importation,<sup>101</sup> not to mention ambiguities in the compensation that might be due for any proven breach.<sup>102</sup> She points to similar inconsistencies between TRIPS and other IIA protections concerning the prohibition of performance requirements and of transfers of technology.<sup>103</sup>

This recurring theme of an awkward and unhappy co-existence of necessity between TRIPS and the TRIPS-plus standards embodied in IIAs is further developed in the remaining articles in this Special Issue.

### 3.3 *Practical application of IIA standards to IPR*

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<sup>94</sup> Anderson & Razavi, *supra* note 92, at 1.

<sup>95</sup> *Id.*, at 6.

<sup>96</sup> *Id.*, at 16-17.

<sup>97</sup> *Id.*, at 17.

<sup>98</sup> Liberti, *supra* note 2.

<sup>99</sup> *Id.*, at 3-5 and Annex I.

<sup>100</sup> *Id.*, at 11-12.

<sup>101</sup> *Id.*, at 13-21.

<sup>102</sup> *Id.*, at 21-22.

<sup>103</sup> *Id.*, at 22-25.

As has been discussed, there are only a handful of known cases of IPR-focused disputes under an IIA. However, several of the authors in this symposium have mapped out the likely contours of potential claims and the complex issues that decision-makers will have to confront.

James Mendenhall approaches this topic by looking at IIAs as “filling the gaps” left by the main international agreements on IPRs.<sup>104</sup> He does this by outlining the four main substantive rights and protections provided in typical IIAs and then applying them to a series of eight hypothetical case studies. He concludes that IIAs may be most effective in addressing weaknesses in a state’s enforcement of IPRs, an area in which TRIPS and other multilateral agreements have failed so far to gain traction. But he notes that investors may have greater difficulty trying to enforce rights in IIAs outside of those disputes in which there is easily-established direct state complicity in the offending conduct.<sup>105</sup>

Marie Louise Seelig focuses her article on patent revocation and invalidation, examining whether such acts could constitute a form of direct or indirect expropriation.<sup>106</sup> She formulates a four-part test for assessing whether such a revocation or invalidation is an actionable expropriation. Her starting point is that the investor must analyze whether the applicable IIA has express grounds under which patents may be revoked or invalidated. Assuming there is no such exclusion, one should analyze the host state’s national laws and if the act of revocation or invalidation was in violation of those laws then a BIT violation might exist. If the offending act was in conformity with local law, one looks to whether the empowering law was in place when the patent was granted. If it was, then, unless arbitrary or discriminatory, it should have formed part of the investor’s legitimate expectations and is unlikely to support an IIA claim. If, however, the law has changed since the patent was granted, one should give the case close scrutiny and refer to investment law case law, in determining whether it is actionable under the relevant IIA.<sup>107</sup> In so doing, she offers a road map for balancing domestic law legitimacy and freedom to regulate with investor protections grounded in international investment law.

Closely related to Ms. Seelig’s topic, several contributors focused on the highly contentious issue of possible IIA claims arising where a state exercises its power to create “compulsory licenses” and/or to interfere with a patentee’s monopoly by claiming “governmental use” rights.<sup>108</sup> This is a topic of great political import as it affects areas like access to medicines, agricultural development policies, plant species and remedying anticompetitive behavior.<sup>109</sup> It also bears an “inherently

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<sup>104</sup> Mendenhall, *supra* note 10.

<sup>105</sup> *Id.*, at 19.

<sup>106</sup> Seelig, *supra* note 29.

<sup>107</sup> *Id.*, at 9-10.

<sup>108</sup> Gibson, *supra* note 5; Liberti, *supra* note 2; Vadi, *id.*; Bernieri, *supra* note 5; Correa *supra* note 5.

<sup>109</sup> For a general introduction to the topic see, Jerome H. Reichman & Catherine Hazendahl, *Non-Voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS and an Overview of the Practice in Canada and the United States of America*, Issue Paper No. 5 June 2003, available at <http://www.iprsonline.org/resources/docs/Reichman%20-%20Non-voluntary%20Licensing%20-%20Blue%205.pdf>.

contentious character.”<sup>110</sup> The background to compulsory licenses and the regime envisaged by TRIPS is set out in several articles.<sup>111</sup> However, each of the authors approaches the topic from a unique vantage point.

Ms. Liberti provides a broad overview of issues likely to arise in the context of IIA claims premised on alleged breaches of IPR protections. She shows that there is little consistency amongst those attempts by treaty-drafters to define the relationship between the obligations in TRIPS and those of specific regional trade agreements or BITs. Further, she points out that several free trade agreements have separate intellectual property chapters that provide another overlay of rights and duties. She notes that it remains to be seen whether the standards provided in these intellectual property treaties can be effectively combined with the broad-brush standards and procedural provisions found in the investment chapters of these same trade treaties.<sup>112</sup>

Ms. Bernieri also considers the relationship between IIA protections and state’s rights to create compulsory licensing regimes to achieve public health objectives.<sup>113</sup> She too recognizes the ambiguities that arise in trying to reconcile these public health objectives with broad-brush guarantees of investment protection applied to IPRs. She offers reasons why these protections should not be interpreted so as to undermine international instruments (such as the Doha Declaration) and national laws that permit compulsory licensing. Perhaps more importantly, she asserts that the added uncertainty and concern for potential liability engendered by these TRIPS-plus obligations, “contribute[s] to the already uncertain landscape of compulsory licenses by inclining the balance against their use.”<sup>114</sup>

Ms. Bernieri is also concerned that attempts in recent IIAs to clarify the interplay between investment protection and TRIPS have been unavailing. She notes that the newest IIAs, such as the DR-CAFTA, provide a specific exception that its protections do not apply to compulsory licenses granted in relation to IPRs “in accordance with the TRIPS Agreement.” But her criticisms are, first, that as an exception this suggests that other IIAs are intended to encompass compulsory licenses and, second, it is extremely difficult to ascertain what must be done to ensure one acts “in accordance with TRIPS” (particularly given the lack of specificity in that agreement on this issue). Professor Correa makes a similar criticism, also pointing to other ambiguities in the exception that further muddy the waters.<sup>115</sup>

Professor Carlos Correa takes up many of these same themes in his contribution to the symposium.<sup>116</sup> One of his key concerns is that TRIPS is designed to leave WTO members

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<sup>110</sup> Gibson, *supra* note 5, at 52.

<sup>111</sup> Gibson, *id.*, at 7-15; Liberti *supra* note 2, at 13; Bernieri, *supra* note 5, at 9-15; Correa, *id.*, at 2-8.

<sup>112</sup> Liberti, *id.*, at 28 and see Annex I (table of IPR protections under IP chapters of regional trade agreements).

<sup>113</sup> Bernieri, *supra* note 5.

<sup>114</sup> *Id.*, at 30.

<sup>115</sup> Correa, *supra* note 5, at 12. See also Gibson, *supra* note 5, at 33-37.

<sup>116</sup> Correa, *id.*



considerable leeway in how to implement compulsory licensing laws. This is seen, for example, in the TRIPS obligation that the patent-holder must receive remuneration in accordance with the economic value of the authorization granted (typically a percentage royalty based on sales of the actual patented good). However, the percentage royalty and the rationale for it varies enormously between different jurisdictions. Professor Correa identifies this same discretion given to states as being a fertile area for potential claims that a patent-holder has been inadequately compensated when applying IIA standards. Indeed, the IIA formulation of compensation for such expropriation is likely to be based on the different standards applicable in the investment law sphere. Other authors also identify these differing approaches to compensation as being a potential gray area that could attract investor claims.<sup>117</sup>

Some of the contributors emphasize the sociological ramifications of expanding IPRs into the realm of investment protection. Valentina Vadi does not limit her article only to compulsory licenses but assesses instead the interplay between investor protection, IPRs and public health in general. She refers to the increased “‘propertization’ of knowledge governance” by the advent of TRIPS, which has been further heightened by the TRIPS-plus standards set by IIAs and the fact that these treaties provide investors with direct rights to prosecute those protections in international arbitration.<sup>118</sup> Her prescription for addressing this is to take a broader approach to interpretation of IIA rights that recognizes that IPRs “should not be considered as absolute rights, but should be interpreted in the light of their goals and limits.”<sup>119</sup> In doing so, she also supports permitting reference to a broader range of interpretative sources, including the jurisprudence of regional human rights courts, the European Court of Justice and the writings produced by relevant international institutions.<sup>120</sup>

### 3.4 *Some Practical Issues*

#### 3.4.1 Jurisdictional concerns

As with all investment disputes, there are important jurisdictional requirements that must be analyzed in light of the specific facts of the dispute and the wording of the applicable IIA (and any other relevant treaties). For example, even where IPRs are explicitly included in a particular IIA’s definition of an “investment”, the claimant may further have to prove that the investment and the investor is of the sort intended to be covered by the treaty. Is an investor whose sole connection with the jurisdiction is an application for a patent right covered by the IIA? Does the treaty or other applicable law require that the investment be registered or otherwise recognized by the host state? These kinds of threshold requirements are too fact-intensive to analyze in the abstract but, given the particularities of IPRs compared to tangible assets, close attention is demanded at the outset of a claim.<sup>121</sup>

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<sup>117</sup> Liberti, *supra* note 2, at 21-22; Bernieri, *supra* note 5, at 30 (suggesting that compensation is the “most contentious” issue with compulsory licenses and national court decisions might provide valuable guidance).

<sup>118</sup> Vadi, *supra* note 2, at 2.

<sup>119</sup> *Id.*, at 20.

<sup>120</sup> *Id.*, at 16-20.

<sup>121</sup> For further discussion of some of these jurisdictional matters, see McLachlan, Shore & Weiniger, *supra* note 72, at paras 6.01 ff. (“In recent years, the question of what constitutes an investment has become increasingly important as a threshold jurisdictional question in treaty arbitration.”) The authors refer to the

### 3.4.2 Choice of forum

Similarly, access to dispute resolution procedures provided under IIAs, typically requires that the investor make an election between seeking to vindicate its treaty rights (1) in an arbitration proceeding initiated through the relevant IIA and (2) litigating those claims in a local court or other forum (referred to as taking a “fork in the road.”) An investor faced with such an election may have to make difficult choices about where best to prosecute its case. In making that election, the investor will have to weigh the relative merits of each of the available forums. This also includes whether to try to convince the investor’s home state to invoke diplomatic protection and to bring a dispute to the WTO body charged with enforcing complaints over violations of TRIPS. Professor Gibson addresses some of these considerations in his article.<sup>122</sup>

### 3.4.3 Applicable law

A claim premised on breach of an IIA in relation to interference with IPRs inevitably raises complex issues of what law should be applied to analyze the claim and, further, what interpretative tools may shed light on the substance of the rights at issue. As an initial comment, Seelig identifies two theories: national IPR laws determine the scope and content of protection and, based on the “territoriality principle,” should be given priority; but once the IPR comes into existence, substantive international BIT norms might apply. This requires balancing, on the one hand, the applicable national laws and, on the other, the international investment standards found in the relevant IIA.<sup>123</sup>

The issues become all the more complex in considering what role other international intellectual property treaty norms should play in assessing IIA standards. As Professor Gibson notes, some IIAs such as the U.S.-Uruguay BIT or the DR-CAFTA (discussed above), provide specific reference to TRIPS. TRIPS compliance therefore is front and center of any analysis.<sup>124</sup> Similarly, a

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award in *Fedax v. Venezuela* (*Award on Jurisdiction*, 11 July 1997, available on the websites listed in note 80), where the tribunal agreed that a claim brought by the beneficiary of promissory notes issued by Venezuela, constituted an investment under the Netherlands-Venezuela investment treaty, in particular because of the ‘significant relationship’ between the transaction and the hosts state’s development. Conversely, in *Joy Mining Machinery v. Egypt* (*Award on Jurisdiction*, 6 August 2004, available on the websites listed in note 80), a panel found that performance guarantees issued in favor of an Egyptian state-controlled entity in connection with a contract for the supply of a mining equipment did not qualify as an investment under the UK-Egypt BIT because the contract amounted to a mere sales contract on ‘normal commercial terms’; Lucy Reed, Nigel Blackaby & Jan Paulsson, *Guide to ICSID Arbitration*, 2004, at 15 ff. (“Tribunals have found ‘disputes arising directly out of an investment’ to include disputes over capital contributions and other equity investments in companies and joint ventures, as well as non equity direct investments via service contracts, transfer of technology, natural resource concession agreements, and projects for the construction and operation of production and service facilities in the host states.”)

<sup>122</sup> Gibson, *supra* note 5, at 37-51.

<sup>123</sup> Seelig, *supra* note 29, at 5-6.

<sup>124</sup> Gibson, *supra* note 5, at 33-35.

preliminary local law analysis may need to be undertaken where an investment must have been made “in accordance with” the law of the host state.<sup>125</sup>

However, Professor Gibson goes on to ask whether, in the absence of an express reference to TRIPS, an investment tribunal should refer to TRIPS or other international intellectual property treaty standards. The answer may lie in the specific wording of the IIA at issue (especially where it refers to “applicable rules of international law”) or to forum-specific provisions such as Article 42 of the ICSID Convention.<sup>126</sup> However, Professor Gibson carries on to provide some tentative conclusions on the more difficult questions of (1) whether a compulsory license may be TRIPS compliant yet violate the expropriation protection in an IAA, (2) whether a state’s TRIPS violation may provide an independent basis for a claim of indirect expropriation under an IAA and (3) whether TRIPS norms may inform vague IIA substantive protections like fair and equitable treatment.<sup>127</sup>

#### 3.4.4 Remedies and enforcement

Professor Gibson also notes that there potentially are differences in the kind and scope of remedies that are available in each of the different dispute resolution forums on offer. He maps some of these differences in his article, in particular that the WTO forum would focus on removal of the compulsory license or amending it so that it comes into TRIPS compliance, whereas the IIA claim would instead most likely be for compensation based on the damage suffered in terms of the impaired value of the investment.<sup>128</sup>

This is a theme developed specifically by Brian A. White and Ryan J. Szczepanik in their contribution to the symposium.<sup>129</sup> The authors first note that preliminary injunctions are a mainstay of domestic intellectual property litigation but that, arguably, IIAs provide only very limited scope for preliminarily enjoining the activity of a host state.<sup>130</sup> They also note that remedies will not be able to be extended to private actors that may be involved in the IPR violations. The authors identify restitution and monetary compensation as the primary remedial tools of IIA dispute resolution but also refer to the limited instances of ICSID tribunals having held they have the power to order non-pecuniary damages such as specific performance.<sup>131</sup> Of course, the attraction of these remedies will depend on the nature of the claim and the claimant’s desired outcome. For example, if the allegations are that a state has failed to adequately protect copyrighted material within its territory, monetary compensation may be difficult to assess and of little meaning to the right-holder who would prefer an order that the sovereign be made to fulfill its enforcement obligations. This highlights the inherent limitations of the investment protection model.

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<sup>125</sup> Seelig, *supra* note 29, at 3.

<sup>126</sup> Gibson, *supra* note 5, at 45.

<sup>127</sup> *Id.*, at 44-49.

<sup>128</sup> *Id.*, at 50-51.

<sup>129</sup> White & Szczepanik, *supra* note 79.

<sup>130</sup> *Id.*, at 10.

<sup>131</sup> *Id.*, at 11.

#### **4. Conclusion**

This brief overview of the articles that follow should already make clear that protection of IPRs through IIAs comes with its own set of complexities and contentions. Many of those complexities and contentions are a by-product of the imperfect system of international IPR treaties that make up the legal framework for IPR regulation. Chief amongst these treaties is the TRIPS. Given the competing agendas and unresolved philosophical disputes that have been part and parcel of attempts at creating consistent international standards for regulation of intellectual property, it is little wonder that these battles have spilled over into the investment treaty arena.

The rationale for this TDM Special Issue was to provide a forum to bring together commentators from both the intellectual property and the investment law worlds. We are confident that this collection of articles is a helpful step towards starting a conversation about IPRs and investment treaties that will hopefully bring greater awareness about the opportunities and consequences this topic presents.