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LEGITIMACY AND NEW CHALLENGES

Clara Ducimetière

RESEARCH PAPERS

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ABSTRACT

In 2009, C.S. Gibson was suggesting that: "With this early coverage of intellectual property in BITs, it is perhaps surprising that there has yet to be a publicly reported decision concerning an IPR-centered investment dispute. Given the trajectory of the modern economy, however, in which foreign investments reflect an increasing concentration of intellectual capital invested in knowledge goods protected by IPRs, this could soon change"[‡]. A couple of years later, the first investment cases dealing with IP issues were made public.

In this context, this paper first addresses the conditions that have to be fulfilled in order to bring intellectual property claims in investment arbitration, by touching upon the question of the definition of an investment in theory and in practice. It also tries to shed light on some of the implications of recent arbitral awards touching upon this interaction between intellectual property and investment protection, from a legal and regulatory perspective.

On the other hand, the specific situation of the European Union is scrutinized, and in particular the project put forward by the European Commission to adapt the dispute settlement system for the protection of investments.

En 2009, C.S. Gibson s'étonnait de ce que « Compte tenu de la prise en compte, de manière précoce, des questions de propriété intellectuelle dans les accords bilatéraux d'investissement, il est pour le moins surprenant qu'aucune décision arbitrale portant sur cette question n'ait été rendue publique. Toutefois, étant donné l'évolution de l'économie moderne, qui montre une concentration croissante des investissements étrangers dans les biens protégés par les droits de propriété intellectuelle, la situation pourrait bientôt changer ». Quelques années plus tard, les premières affaires relatives à des différends en matière d'investissements incluant des questions relatives aux droits de propriété intellectuelle étaient rendues publiques.

Dans cette optique, le présent document énonce les conditions qui doivent être remplies pour que la question des droits de propriété intellectuelle puisse être soulevée dans le cadre des procédures d'arbitrage liées à des investissements, en abordant les problèmes soulevés par la définition de la notion d'investissement à la fois en théorie et en pratique. Il tente également de faire la lumière sur certaines des implications qui découlent des récentes décisions arbitrales portant sur le lien entre propriété intellectuelle et protection des investissements d'un point de vue juridique et réglementaire.

Il examine également de manière approfondie le cas spécifique de l'Union européenne, en particulier le projet proposé par la Commission européenne visant à modifier le système de règlement des différends afin d'assurer la protection des investissements.

En 2009, C.S. Gibson sugirió que: "Con esta cobertura temprana de la propiedad intelectual en los Tratados Bilaterales de Inversión (TBI), tal vez sea sorprendente que todavía no se haya hecho pública ninguna decisión de arbitraje sobre esta cuestión. Sin embargo, dada la trayectoria de la economía moderna, en la que las inversiones extranjeras reflejan una concentración cada vez mayor del capital intelectual invertido en bienes de conocimiento protegidos por los derechos de propiedad intelectual, esta situación podría cambiar pronto". Unos años más tarde, se hicieron públicos los primeros casos de inversión relacionados con cuestiones de propiedad intelectual.

En este contexto, el presente documento aborda en primer lugar las condiciones que deben cumplirse para presentar demandas de propiedad intelectual en el arbitraje de inversiones,

[‡] Christopher S. Gibson, 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation' (2009) 6 Transnational Dispute Management 3.

abordando el tema de la definición de una inversión en la teoría y en la práctica. Asimismo, trata de arrojar luz sobre algunas de las conclusiones de los recientes laudos arbitrales acerca de esta interacción entre la propiedad intelectual y la protección de las inversiones, desde una perspectiva legal y reglamentaria.

Por otro lado, se analiza la situación específica de la Unión Europea y, en particular, el proyecto propuesto por la Comisión Europea para adaptar el sistema de solución de controversias para la protección de las inversiones.

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INTRODUCTION

> *"Until recently, […] few or no investment cases involved claims that states had violated their investment obligations with respect to intellectual property. There is still a relative paucity of cases, but those we have are high-profile disputes that implicate most of the controversial issues that beset investment law today."*
>
> *Andrea K. Bjorklund* [1]

While investor-state dispute settlement (ISDS) emerged in the 1950's as part of bilateral trade and investment agreements[2], it is still a quite recent alternative dispute settlement mechanism in the history of international law. As Professor Bjorklund rightly pointed out, the emergence of investment cases involving intellectual property (IP) matters is even more recent, and the scrutiny of IP claims by investor-state tribunals raises new questions and challenges with regard to the legitimacy of this practice.

Intellectual property rights (IPRs) are exclusive rights granted to inventors and creators for a limited time period. They are negative rights, since they are rights to exclude others from using the invention or creation without the owner's consent, rather than positive rights to use the protected work or invention. Intellectual property rights were first developed as national, territorial rights, and are becoming more and more global assets, protected in always more countries. The entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995 marked a turning point in the globalization of IPRs[3].

Intellectual property offices or domestic courts usually deal with disputes arising from IPRs, when it involves private parties. States also have the possibility to challenge other States' trade-related measures, including IP, in the World Trade Organization's (WTO) Dispute Settlement Body[4]. Since the 1950's, an alternative dispute settlement mechanism allowing investors from one country to sue the government of another country for breach of its international trade and investment agreements emerged on the international scene. While in the first decades of its existence, ISDS was not very popular, with only a couple of cases per year, its importance grew at the turn of the new millennium with a cumulative number of 767 known ISDS cases in 2016[5]. The United Nations Conference on Trade and Development (UNCTAD) notes: "In 2015, investors initiated 70 known ISDS cases pursuant to IIAs, which is the highest number of cases ever filed in a single year"[6].

ISDS is included in most international investment agreements (IIAs), i.e. bilateral investment treaties and trade agreements with investment provisions, as a possibility for investors to challenge State measures in breach of an IIA to which the host State and the home State of the investor are parties. Traditionally investment tribunals review claims based on the

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[1] Foreword from Andrea K. Bjorklund, in: Lukas Vanhonnaeker, *Intellectual Property Rights as Foreign Direct Investments: from Collision to Collaboration* (Edward Elgar Publishing 2015).

[2] The Germany-Pakistan BIT is often cited as the world's first BIT and dates back 1959. See: Marc Bungenberg, 'A History of Investment Arbitration and Investor-State Dispute Settlement in Germany' (2016) CIGI ISA Paper No 12 .

[3] Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (3rd edn, 2008).

[4] This is subject to the requirement that the States are members to the WTO, which is the case for 164 countries since July 2016.

[5] UNCTAD, *World Investment Report 2017 Investor Nationality: Policy Challenges*, 2017) xi.

[6] UNCTAD, *World Investment Report 2016 Investor Nationality: Policy Challenges*, 2016) 104.

breach of expropriation, national treatment, most-favored-nation or fair and equitable treatment provisions. Recent cases involving Philip Morris and Eli Lilly raised interesting issues in the field of intellectual property, as these companies brought claims against Uruguay[7] and Australia[8] on the one hand, and Canada[9] on the other hand, based *inter alia* on the alleged violation of their IP assets[10].

Intellectual property rights have usually been included in investment chapters of IIAs, either directly or indirectly[11], but this protection had always remained rather theoretical. Indeed, already in 1903, the US Friendship Commerce and Navigation Agreement with China included copyright protection[12]. Later, with the expansion of BITs and trade agreements with investment provisions, the reference to IPRs became more and more common. For instance, in the 2008 German Model BIT, intellectual property rights are listed as “investments”[13]. In parallel, investor-state dispute settlement chapters were included in these IIAs to allow investors to challenge State measures in breach of these agreements. ISDS became growingly popular, despite strong criticisms with regard to the functioning and legitimacy of these ad hoc tribunals.

It is important to highlight at this stage that IPRs can usually be found in two different chapters in IIAs: in the intellectual property chapter as such, or as a listed investment in the investment chapter. In this paper, we will only address the latter, that is, when IP is considered a protected investment, which raises specific issues in the field of IP and policy-making.

In the European Union, the opposition of the civil society[14] to agreements including ISDS became highly visible during the negotiations of the Comprehensive Economic and Trade Agreement between the EU and Canada[15], which was eventually signed in October 2016. One of the main criticisms put forward is the power given to private investors, especially big multinational corporations, to claim high amounts of money for compensation. Indirectly, this questions the impact of these claims on States’ power to regulate in the public interest, in order to safeguard public health for instance. Other flaws of the ISDS system include the lack of legitimacy, lack of consistency and predictability of arbitral decisions, the absence of appeal mechanisms or the lack of transparency[16].

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[7] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* ICSID Case No ARB/10/7, Request for Arbitration (19 February 2010).
[8] *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia,* Notice of Arbitration (21 November 2011).
[9] *Eli Lilly and Company v. The Government of Canada* UNCITRAL, ICSID Case No UNCT/14/2, Notice of Arbitration (12 September 2013).
[10] See section I.A.2. below.
[11] Lahra Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview' (2010) 01 OECD Working Papers on International Investment 39 6.
[12] Ibid.
[13] Article 1 of the 2008 German Model Treaty.
[14] See “Statement against Investor Protection in TTIP, CETA, and other trade deals”, February 2016, available at <http://www.globaljustice.org.uk/civil-society-statement-against-investor-protection-ttip-ceta-and-other-trade-deals> accessed 18 October 2018.
[15] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and The European Union and its Member States, 2016.
[16] European Commission, *COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Multilateral reform of investment dispute resolution*, 2017) 11.

The fact that private arbitral tribunals are increasingly interpreting intellectual property provisions raises complex issues. The main question we will try to answer in this paper is whether investor-state tribunals are an appropriate forum for litigating IP disputes. In other words, what is the anchor to review IP provisions in arbitral tribunals and what are the consequences of this review from a legal and regulatory point of view? Since there have been very few ISDS cases involving IP, can we identify a new trend of litigating IP disputes in ISDS and is it therefore necessary to adapt and revamp this dispute settlement mechanism?

The first part of this paper will touch upon some of the main issues arising from the review of intellectual property claims in investor-state arbitrations, by determining, on the one hand, whether investor-state tribunals have jurisdiction over IP disputes and, on the other hand, what the consequences of this review are from a legal and regulatory perspective. This analysis will lead us to a second observation: the need to undertake a profound reform of the system. Therefore, the second part will scrutinize the different ways that have been put forward to reform the ISDS system, especially by revising the relevant provisions in IIAs. We will have a closer look at the European Union landscape and the current reforms taking place in the field of investment protection, to finally assess whether there are relevant proposals for the IP system.

A. The controversial review of intellectual property claims by investor-state tribunals: an overview of legal and regulatory issues

Traditionally, domestic courts and IP offices deal with IP disputes opposing private parties, while the WTO Dispute Settlement Body is competent for cases involving two States. However, alternative dispute resolution mechanisms, such as arbitration, mediation, or conciliation inter alia, are becoming increasingly important in the field of intellectual property[17]. One particular type of arbitration, investor-state dispute settlement, allows investors to bring claims against States. The most popular institutions in terms of number of cases handled are the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA) and the Stockholm Chamber of Commerce (SCC)[18].

The fact that intellectual property claims can feature in investment arbitrations is far from being obvious, and indeed, very few cases have been publicly reported so far. It is therefore key to first understand the conditions that have to be fulfilled in order to bring IP claims in investment arbitration, and to have a closer look at the definition of an investment in theory and in practice. Second, we will shed light on the publicly available IP-related cases, which have had significant implications from a legal and regulatory perspective.

I. Bringing intellectual property claims into investment disputes: what is the necessary anchor?

Intellectual property is designed to protect right holders against unauthorized uses by third parties. It is understood as a negative right to exclude, rather than a positive right to "use" the protected invention or creation. Investment protection covers a different range of rights. Investors are protected against expropriation and other unlawful acts or omissions committed by States.

Therefore shifting from a traditional IP protection to an investment protection for intangible rights seems to be problematic already from the point of view of the scope of protection. Nevertheless, intellectual property is protected under most IIAs' investment chapters, sometimes implicitly but sometimes also explicitly. This assimilation between IP and investment appears not only in most treaties, but also in some of the important cases that have touched upon this issue.

1. The reference to intellectual property in investment chapters of IIAs

There are different ways of making reference to IPRs in international investment agreements. Carlos Correa and Jorge E. Viñuales listed four main possibilities of bringing IPRs within the definition of investment: no express mention of IPRs, with only a reference to "property" or "assets"; a general reference to "IPRs" or "intangible property" without further

[17] Sarah Theurich, 'Efficient Alternative Dispute Resolution in Intellectual Property' (2009) 3 WIPO Magazine.
[18] See <http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution> accessed 18 October 2018. From 1987 to 2017, the ICSID has been administering 520 cases, the PCA 110 cases and the SCC 41 cases (some are still pending).

details; a reference to IPRs with enumeration of the intangible assets covered; and finally, a definition of IPRs that may or may not refer to the law[19].

To take an example, in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, Article 8.1 clarifies that "forms that an investment may take include: […] (g) intellectual property rights"[20]. This formulation can be found in most agreements today[21]. Therefore, for many commentators there is no doubt that intellectual property is indeed protected as an investment under most modern agreements. In this sense, B. Mercurio confirms that "it is almost assumed that IPRs are one way or another included within the scope of IIAs"[22].

Despite the rather recent reactions from the IP world against the assimilation of IP to investment, it is worth mentioning that these rights have been covered investment since the very first investment agreements. Lahra Liberti shows that already in 1903, the United States included copyright protection in its Friendship Commerce and Navigation Agreement with China[23]. Following this trend, she confirms that most investment agreements make reference to IP, either in their preamble, or explicitly in the definition of investment[24].

This assimilation remained extremely unexplored for decades aside from contributions of few prominent scholars[25]. Nevertheless, in recent years, private investors have seen in this correlation between IP and investment a way to challenge States' measures in private fora such as investor-state tribunals instead of resorting to domestic courts or the World Trade Organization (WTO). But before looking at some of these cases and their potential impact, it is worth mentioning some of the most important standards of protection contained in IIAs and some interesting trends in treaty drafting.

<u>Expropriation, fair and equitable treatment, and other investment standards of protection</u>

Foreign investors are protected in a host State in accordance with minimum standards of treatment, provided they can demonstrate that they are investors that have made an investment in the host country according to a specific investment agreement. One fundamental standard is the protection against unlawful expropriation. A difference has to be made between direct and indirect expropriation. Direct expropriations have become less important with time since countries want to attract foreign investments. Direct expropriations refer to cases of taking by a government of an investor's property with a view to transferring ownership of that property to another person, usually the authority that exercised its power to do the taking[26].

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[19] Carlos Correa and Jorge E. Viñuales, 'Intellectual Property Rights as Protected Investments: How Open are the Gates?' (2016) 19 Journal of International Economic Law 91.
[20] COUNCIL DECISION (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part Article 8.1.
[21] See for instance the 2012 US Model Bilateral Investment Treaty (Article 1) or the 2009 India-Korea CEPA (Article 10.1).
[22] B. Mercurio, 'Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements' (2012) 15 Journal of International Economic Law, 876.
[23] See Article XI of the TREATY BETWEEN THE UNITED STATES AND CHINA FOR THE EXTENSION OF THE COMMERCIAL RELATIONS BETWEEN THEM, available at <http://www.chinaforeignrelations.net/node/209> accessed 18 October 2018.
[24] Liberti, 'Intellectual Property Rights in International Investment Agreements: An Overview' (n 12) 6.
[25] It is worth noting that some scholars had raised their voices in this regard, Carlos Correa in 2004 amongst others (see note 59).
[26] *S.D. Myers, Inc. v. Government of Canada* UNCITRAL, Partial Award (13 November 2000), para 280.

Indirect expropriations are more common, and usually defined as measures which effect is "equivalent" or "tantamount" to direct expropriations. It must be noted that expropriations are not prohibited as such, but they must meet certain conditions to be legal. There seems to be consistency between the treaties on the conditions that have to be met: the measure must be non-discriminatory, enacted for a public purpose, in accordance with due process of law, and against compensation[27].

In the case opposing Philip Morris and Uruguay, the Claimant argued that the single presentation requirement and the 80% health warnings requirement were expropriatory since it banned seven variants of the Claimants' trademarks and diminished the value of the remaining trademarks[28]. The tribunal rejected the Claimants' claims, founding that the measure must have "a major adverse impact on the Claimants' investments", amounting to a "substantial deprivation" of the investments' value[29]. It then found that the 80% requirement was not expropriatory since "a limitation to 20% of the space available […] could not have a substantial effect on the claimants' business since it consisted only in a limitation imposed by the law"[30] and did not prohibit the use of the trademark. It also found that the single presentation requirement did not deprive the Claimants' from the value of their business and investments, and that the measure was a valid exercise of Uruguay's police powers, and thus rejected the claim for expropriation[31].

In this case and other cases involving intellectual property aspects, the investors also relied on other standards of protection, in particular on the fair and equitable treatment standard (FET). Treaty practice with regards to the FET diverges, and the reference to the standard is usually terse. Newly adopted treaties such as the CETA have defined the standard[32], codifying arbitration practice. Based on the FET standard, tribunals have to determine whether the State's measure is fair and equitable. Other standards have been developed from the FET, such as the protection of the investor's legitimate expectations, due process and denial of justice or the protection against arbitrary and discriminatory measures. Without entering into the detailed facts of the case, it can be mentioned that a breach of FET is currently being argued by Bridgestone in the case opposing it to Panama, with regards to judicial decisions from the Panamanian courts. The Claimant argues that there has been a denial of justice because: "First, there were fundamental breaches of due process. Second, the decision was arbitrary. Third, there was corruption in the process. Fourth, the decision was incompetent."[33] The case is still pending.

Other standards of protection are available to foreign investors under IIAs, such as national treatment, most-favored-nation, umbrella clauses, full protection and security, but the most important standards especially in intellectual property cases seem to be those of indirect

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[27] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (1st edn, Oxford University Press 2008), 91.
[28] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* ICSID Case No ARB/10/7, Award (8 July 2016), para 180.
[29] Ibid, para 192.
[30] Ibid, para 276.
[31] Ibid, paras 284, 287.
[32] See CETA Article 8.10.(1): "Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6".
[33] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* ICSID Case No ARB/16/34, Claimants' Memorial (11 May 2018), para 165.

expropriation and fair and equitable treatment. Before mentioning some of these cases in more details, we will briefly look at recent treaty practices and open questions in the field of IP, in particular with regards to compulsory licenses, revocation and limitations of IPRs and applications.

New trends in treaty practice and open questions for intellectual property

Policy makers are progressively attempting to ensure that some IP measures cannot be challenged under the investment chapter of IIAs. This is the case, for instance, of compulsory licenses or the revocation or limitation of IPRs, which some IIAs (partially) exclude from the scope of the expropriation provision[34]. For instance, Article 14.8(6) of the United States-Mexico-Canada Agreement on expropriation and compensation reads: “This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that the issuance, revocation, limitation or creation is consistent with Chapter 20 (Intellectual Property) and the TRIPS Agreement”.

Some commentators have considered this only a partial exclusion, since the inconsistency of the measure with the TRIPS Agreement or the IP Chapter of the agreement could open the door to a challenge of the measure in relation to the expropriation standard[35]. It also raises the difficult question of the legitimacy and competency of investor-state tribunals to assess the compatibility of a measure with the IP Chapter or WTO Agreements, which are in addition subject to state-to-state dispute resolution.

On the other hand, the difficult assessment of applications has raised interesting doctrinal debate. The core question is whether patent, trademark or other IP applications can be qualified as “investments”? And if so, are applications *protected* investments?[36] This particular question is outside of the scope of this paper[37], but these interrogations should be kept in mind for further analysis of the ISDS system.

[34] This has not always been the case. On the contrary, compulsory licenses have long been considered as being a possible subject of investment claim in investor-state arbitration. Nevertheless, no arbitration case based on the issuance of a compulsory license has ever been reported to our knowledge. See in this regard Gibson, 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation' (n 1).

[35] With regard to NAFTA Article 1110(7), Sean Flynn contends that “by including the last clause evoking the extent of consistency with Chapter 17, it invites ISDS to be used by private companies to challenge the revocation, limitation or creation of intellectual property rights alleged to be inconsistent with the intellectual property chapter. This opens a backdoor for private companies to essentially enforce the terms of the IP chapter, even though the IP chapter itself makes no allowance for such litigation”. See: Sean Flynn, 'TTIP Stakeholder Statement: Protect IP from ISDS' (*infojustice.org,* 23 April 2015) <http://infojustice.org/archives/34319> accessed 18 April 2018.

[36] In this regard, see Mercurio, 'Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements' (n 23) 7-8.

[37] For further analysis of this issue, please see Valentina Vadi, 'Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investments' (2015) 5 NYU J Intell Prop & Ent L 113, 150-2; Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (First edn, Oxford University Press 2016), paras 7.10-12.

2. IP protection as an investment: a shy application in practice

Few publicly available arbitration cases have touched upon the question of the protection of intellectual property as a protected investment[38], but those which have have been qualified as high-profile cases: Philip Morris v. Uruguay[39], Philip Morris v. Australia[40], Eli Lilly v. Canada[41] and Bridgestone v. Panama[42], inter alia[43]. The doctrine has commented to different extents these cases and it is not the purpose of this paper to go into the very details of the facts and arguments of the parties[44]. It is nevertheless interesting to highlight some key issues for the protection of intellectual property and public policy arising from these arbitral awards.

Before doing so, it is important to mention that several other publicly available cases involved intellectual property issues[45]. For instance, in CME v. Czech Republic[46], the investor CME brought a claim against the Czech Republic for, inter alia, expropriation of both its tangible and intangible assets (including intellectual property rights). In this case, the broadcasting licenses that CME was holding exclusively in Czech Republic are considered as "intellectual property", and therefore the analysis of the tribunal does not mention explicitly IP, but rather focuses on the licenses.

In another case opposing F-W Oil Interests, Inc and the Republic of Trinidad and Tobago[47], the tribunal very briefly addressed the intellectual property claim. The investor was claiming that its confidential plans and economic models submitted in the framework of a tender process had been used in a second tender process without the investor's authorization, therefore resulting in an unlawful appropriation of its IP assets. However, the tribunal rejected the claim, because of the lack of evidence that these assets represented an "investment" and

[38] In 2009, C. Gibson even noted "With this early coverage of intellectual property in BITs, it is perhaps surprising that there has yet to be a publicly reported decision concerning an IPR-centered investment dispute" (Gibson (n 1) 2).
[39] *Philip Morris v. Uruguay, Award (n 29).*
[40] *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia,* PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).
[41] *Eli Lilly and Company v. Canada* ICSID Case No UNCT/14/2, Final Award (16 March 2017).
[42] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* ICSID Case No ARB/16/34, Request for Arbitration (7 October 2016).
[43] Some commentators also mention the AHS v Niger and Erbli Serter v France cases where IP was the main object of the dispute. See: Gabriele Gagliani, 'International Economic Disputes, Investment Arbitration and Intellectual Property: Common Descent and Technical Problems' (2017) 51 Journal of World Trade 335, 344.
[44] For an intellectual property perspective on the cases see: Daniel Gervais, 'Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada' 8 UC Irvine Law Review 459; Lisa Diependaele, Julian Cockbain and Sigrid Sterckx, 'Eli Lilly v Canada: the uncomfortable liaison between intellectual property and international investment law' (2017) 7 Queen Mary Journal of Intellectual Property 283; Mercurio, 'Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements' (n 23).
[45] For instance, *CME v Czech Republic* UNCITRAL Arbitration Proceedings, Final Award (14 March 2003); *Generation Ukraine, Inc. v. Ukraine* ICSID Case No ARB/00/9, Award (16 September 2003); *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* ICSID Case No ARB/05/10, Award on Jurisdiction (17 May 2007); *Joseph Charles Lemire v. Ukraine* ICSID Case No ARB/06/18, Award (28 March 2011); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* UNCITRAL, Award (12 January 2011); *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago* ICSID Case No ARB/01/14, Award (3 March 2016); *Apotex Inc. v. The Government of the United States of America* ICSID Case No UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013).
[46] *CME v Czech Republic (n 46).*
[47] *F-W Oil v. Trinidad & Tobago (n 46).*

that the investor had suffered a specific loss. Other cases such as Shell v. Nicaragua involved intellectual property but were not made public[48].

Let us briefly come back to the Philip Morris and Eli Lilly cases. Philip Morris brought claims against the States of Uruguay and Australia to challenge part of their tobacco regulations. In short, these countries undertook reforms to regulate the use of trademarks on cigarette packaging, imposing in particular that the trademark be displayed in a plain and harmonized style, and that health warnings appear on the packaging, therefore reducing the liberty and room for maneuver of trademark owners. Philip Morris challenged these regulations at different levels, from domestic courts to WTO Dispute Settlement Body[49], but also in arbitral tribunals. The WTO Panel circulated the Panel Report on 28 June 2018 where it ruled in favor of Australia, finding no violation of WTO law, and after over 6 years of complex proceedings[50]. At the time of writing, Honduras and the Dominican Republic notified the Dispute Settlement Body of their decision to appeal certain aspects of the Panel Report.

In the case opposing Philip Morris to Uruguay, the Claimant challenged the single presentation requirement, the 80% health warning requirement and the mandatory pictograms to be displayed on cigarette packaging. It argued that these measures were unreasonable and that they constituted an expropriation and a violation of fair and equitable treatment. In particular, it argued that the measures were unreasonable because there was no relationship between them and the public health objectives pursued by Uruguay[51]. The Claimant also contended that it had suffered a denial of justice in relation to the contradictory decisions issues by two of the highest courts of Uruguay: the Tribunal de lo Contencioso Administrativo, and the Supreme Court of Justice. The Tribunal dismissed the claim on expropriation, finding that there is no right to use a trademark but only a right to exclude, and that the measures did not prevent the Claimant to exclude others from using its trademark[52]. It also found that the measures were reasonably related to a legitimate public policy objective. It also dismissed the FET claim and the denial of justice, finding that the measures were neither arbitrary nor discriminatory, and that the measures did not modify the legal framework above an acceptable margin of change[53].

In the Eli Lilly case, pharmaceutical patents were at issue, and notably the fact that two of Eli Lilly's patents were cancelled after a stricter interpretation of the utility requirement by Canadian courts. Both Eli Lilly's Zyprexa and Strattera patents were declared invalid by the Federal Court for lack of utility. The Federal Court of Appeal dismissed the appeals and the Supreme Court refused to leave to appeal the decisions of the Court of Appeal. Eli Lilly

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[48] *Shell Brands International AG and Shell Nicaragua S.A. v. Republic of Nicaragua* ICSID Case No ARB/06/14 , Settled (2006).

[49] It is important to note that Philip Morris could not directly challenge domestic regulations at the WTO, since only States can challenge other State's policies. Therefore, the cases brought against Australia were filed by Ukraine, Honduras, the Dominican Republic, Cuba and Indonesia. For more information on the cases see: <https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm> accessed 18 October 2018.

[50] ICTSD, 'WTO Panel Upholds Australia Plain Packaging Policy for Tobacco Products' (2018) 22 Bridges Weekly.

[51] *Philip Morris v. Uruguay, Request for Arbitration (n 8), para 79.*

[52] *Philip Morris v. Uruguay, Award (n 29), paras 180-307.*

[53] Ibid, paras 309-432. It is worth noting that Gary Born, one of the arbitrators, dissented on two aspects of the award: it considered the two contradictory decisions of the highest courts of Uruguay to constitute a denial of justice, and the single presentation requirement to violate Uruguay's obligation to provide fair and equitable treatment.

subsequently requested the establishment of an arbitration panel under ICSID rules alleging a violation of the minimum standard of treatment and expropriation provisions of NAFTA. This very complex case led to the arbitral award released on 16 March 2017[54], whereby the tribunal ruled in favor of the State of Canada[55]. In particular, the tribunal found that there had been no dramatic change in the utility requirement under Canadian law, which the investor needed to show to establish a violation of legitimate expectations and thus FET[56]. The tribunal also rejected the arbitrariness or discriminatory nature of the utility requirement, and thus dismissed the claims of expropriation or violation of minimum standards of treatment[57].

Even though the above-mentioned cases all dismissed the investors' claims on different grounds, the recourse to investor-state arbitration for intellectual property disputes has been widely criticized by the doctrine. While some have argued that a ruling in favor of a State is still a loss for the State eventually, especially from a financial point of view, others have shown that the threat of an investment dispute can deter States from enacting new laws or taking measures for a public purpose.

II. Settling investment disputes with intellectual property claims: what are the legal and regulatory implications?

Scholars and policy makers have highlighted the potential impacts of these IP-investment cases from a legal and regulatory perspective[58]. First, these cases constitute a real threat to TRIPS flexibilities and further impact the fragmentation of international IP law. They have also been widely criticized for having a "chilling effect" in relation to public policy reforms and a detrimental impact on the regulatory freedom of States.

1. From threats to TRIPS flexibilities to the fragmentation of international IP law: a review of potential legal implications

One of the main concerns that was raised after the Philip Morris cases and was confirmed by the Eli Lilly case is the possibility to challenge international IP standards in an investment arbitration tribunal. Cynthia M. Ho shows that the cases brought by Philip Morris and Eli Lilly are likely to have a negative impact on TRIPS flexibilities[59]. She points out the fact that investors bring up compliance with international treaties such as the TRIPS Agreement in their claims and therefore, arbitrators are requested to interpret these international IP provisions. Whereas some scholars have recalled that the legitimate forum for settling disputes over the interpretation of WTO Agreements such as TRIPS is the WTO, investors are challenging the compliance of State measures with these agreements and thus threatening the

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54 *Eli Lilly v. Canada, Final Award (n 42).*

55 For a deeper analysis of the case, please see Gervais, 'Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada' (n 45).

56 *Eli Lilly v. Canada, Final Award (n 42) paras 307-382.*

57 Ibid, paras 418-441.

58 Amongst early papers published on the topic, see Carlos Correa, 'Bilateral Investment Agreements: Agents of New Global Standards for the Protection of Intellectual Property Rights?' (2004) 1 Transnational Dispute Management 32 and Ermias Tekeste Biadgleng, 'IP Rights under Investment Agreements: the TRIPS-Plus Implications for Enforcement and Protection of Public Interest' (2006) SOUTH CENTRE RESEARCH PAPERS .

59 Cynthia M. Ho, 'A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings' (2016) 6 UC Irvine Law Review 74.

flexibilities they entail in ISDS[60]. This "threat" to TRIPS flexibilities can have very practical consequences on the regulatory flexibility of States and public health, since State measures using these flexibilities could be challenged by investors if they consider that their investments have been affected by these measures, but also legal consequences with regard to the consistency of decisions emanating from different dispute resolution bodies[61].

Generally, the decisions taken by investment tribunals are binding on the parties including on States[62]. What would happen if an arbitral award was in direct contradiction with the decision taken by a domestic court or if the investment tribunal decided not to follow the case-law and interpretation of the TRIPS Agreement established by the WTO? The problem of consistency of international IP law is becoming increasingly important as the number of courts and tribunals dealing with IP issues increases. It seems necessary, in this regard, to incorporate safeguards to ensure the consistency of decisions touching upon IP, either in the treaties that serve as a basis for the claims, or in the statutes of the arbitral tribunal, to diminish the risk of legal inconsistencies and therefore the adverse impact on TRIPS flexibilities.

In order to balance this statement, the findings of the tribunal in the Eli Lilly case are worth reproducing here: "It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts. It will accordingly only be in very exceptional circumstance, in which there is clear evidence of egregious and shocking conducts, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct against the obligations of the respondent State under NAFTA Article 1105(1)"[63]. Thus, the tribunal in this case confirmed the approach already taken by the tribunal in the Philip Morris v Uruguay case, which consists in acknowledging the "margin of appreciation" of States and domestic courts in implementing public policy.

The threat of contradicting decisions or awards between different bodies leads to what is known as the fragmentation of the law, which is not new in the field of international law[64]. This means that international law is no longer a harmonized and unique body of rules, but rather that different approaches and interpretations can be adopted for the same legal rule. The question of the impact of contradictory decisions in the field of intellectual property in the

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[60] The case of compulsory licenses seems to be one of the major concerns in the field. Compulsory licenses are one of the TRIPS flexibilities contained in Article 31. Many authors have asked whether the issuance of a compulsory license for a patent could be regarded as an indirect expropriation and therefore be challenged on the basis of the relevant IIA provisions. The arbitral tribunal would then review the claim based on the IIA provisions rather than the TRIPS provisions. Some agreements are thus explicitly excluding compulsory licenses from the definition of expropriation, such as NAFTA Article 1110.7. On this issue see: Carlos Correa, 'Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses' (2004) 26 Michigan Journal of International Law 331, Gibson, 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation' (n 1).

[61] While it is true that the same could be asked about the interpretation of international conventions by national and supra-national courts, it is outside of the scope of this article. On this issue see: Helmut Philipp Aust and Georg Nolte, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016).

[62] This is the case of ICSID awards following Article 53 and 54 of the ICSID Convention on The Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

[63] *Eli Lilly v. Canada, Final Award (n 42) para 224.*

[64] For a thorough analysis on the fragmentation of international law see: UN International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (A/CN4/L682, 2006).

light of the recent developments can be asked. What would be the legal consequences of arbitral awards involving investors and States that would contradict national court decisions?

It could be argued that, since arbitration tribunals mostly award monetary compensation, the impact on national laws is quite reduced[65]. The legal impact would therefore be rather indirect, in the sense that these decisions could threaten the parties, which would refrain from taking actions that could lead to the arbitration and payment of the monetary compensation. It has been stressed in this regard that "Limiting remedies to "only" monetary compensation is of little solace to countries when remedies can be tens or hundreds of millions of dollars and the average defense of even a successful suit costs almost $5 million, but has been up to $40 million to simply assess jurisdiction."[66] This is the issue of the chilling effect of arbitral decisions.

2. Refraining from regulating or the so-called "chilling effect"

A second class of consequences that these arbitral decisions have on States is the so-called "chilling effect", which has been pointed out by scholars in many different fields, including in the field of IP[67]. Indeed, cases such as the Eli Lilly or the Philip Morris cases are considered to have a "chilling effect" on the governments that want to implement changes in their health policies. In other words, governments could be reluctant to enact new laws to pursue public policy goals such as the "plain packaging" regulation to reduce the consumption of tobacco, because of the threat of being sued by private investors in ISDS.

Some commentators have suggested that this regulatory chill could be observed in New Zealand, with regards to the Tobacco Plain Packaging regulation. While in Australia, the Tobacco Plain Packaging Act was adopted in two and a half years, it took over six years to New Zealand to enforce a very similar legislation. Some have seen in this delay an example of regulatory chill that could have been caused by different elements, such as the fear of litigation, but also the strong influence of lobbies[68].

This issue is even more pressing for developing and least-developed countries, which could probably not afford to pay the costs of arbitration proceedings. To give just one example, in the recent Eli Lilly case, the tribunal decided that the claimant not only had to bear the costs of the arbitration, amounting around USD 750,000, but it also had to cover 75% of respondent's costs of legal representation and assistance, that equated around CAD 4,500,000[69]. In total, the claimant, Eli Lilly in this case, had to pay over USD 4,300,000, only for legal fees. The situation is quite different in case the Claimant wins the case, and is

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[65] Cynthia M. Ho notes that "The United States has also attempted to defend investment claims as consistent with regulatory autonomy because its agreements do not permit tribunals to overturn U.S. law and instead can only award monetary compensation. Although this is technically true, it does not actually address how nations are constrained: some international agreements permit investment tribunals to order injunctive relief that could in fact overturn domestic laws." (Ho, 'A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings' (n 60) 423).

[66] Ibid.

[67] See inter alia: A. Mitchell and E. Sheargold, 'Protecting the autonomy of states to enact tobacco control measures under trade and investment agreements' Tob Control <https://www.ncbi.nlm.nih.gov/pubmed/25361743> accessed 28 March 2018; Jane Kelsey, 'Regulatory Chill: Learnings From New Zealand's Plain Packaging Tobacco Law' (2017) QUT Law Review ; Peter Yu, 'The Investment-Related Aspects of Intellectual Property Rights' (2016) Research Paper No. 16–35 Texas A&M University School of Law .

[68] See Kelsey, 'Regulatory Chill: Learnings From New Zealand's Plain Packaging Tobacco Law' (n 68).

[69] *Eli Lilly v. Canada, Final Award (n 42) para 460.*

awarded damages in addition to legal fees: the amounts are then much higher. A report of UNCTAD shows that, on average, a successful claimant is awarded $522 million[70]. One can therefore understand that some countries would refrain from enacting legislations that could be challenged by foreign investors.

A strict correlation between the absence or delay of new public policy regulations and the possibility for investors to bring claims against States is difficult to establish. The States might have different interests involved or other factors might come into play. On the other hand, corporations will not systematically initiate arbitration proceedings if State measures appear to affect their investments; there are many alternative routes for dispute resolution. One could even suggest the existence of a form of chilling effect on investors, once they have lost a case or other investors have lost cases on similar grounds. Therefore cautiousness is required when it comes to draw conclusions in this regard.

Nonetheless, the reaction of scholars and the civil society after the recent cases suggests that reforms of the ISDS system are needed, including from an IP point of view. Rather than abolishing the system or excluding any reference to intellectual property in the investment and ISDS chapters of investment agreements, some proposals are put forward to reform investor-state dispute settlement and tackle the issues that it raises. In the second part of our analysis we will therefore look at the ISDS system and some of the proposals to revamp it, while focusing in particular on the reforms at a European Union level.

[70] UNCTAD, 'Special Update on Investor-state Dispute Settlement: Facts and Figures' (2017) 3 IIA Issues Note 1.

B. THE NECESSARY METAMORPHOSIS OF INVESTOR-STATE DISPUTE RESOLUTION: IDENTIFYING GAPS AND POTENTIAL WAYS FORWARD FOR INTELLECTUAL PROPERTY DISPUTES

Investor-state dispute settlement has been widely criticized for different reasons that are not specific to intellectual property. Some criticisms are intrinsic to the nature of arbitration, and touch upon, for instance, the transparency, legitimacy, competency, or absence of appeal mechanisms in arbitration[71]. There is a trend towards reforming ISDS promoted by many actors of international arbitration, starting with the United Nations Commission on International Trade Law (UNCITRAL), which established a Working Group for "Investor-State Dispute Settlement Reform"[72] in 2017. The task of this Working Group is to identify concerns regarding ISDS and to put forward some proposals.

The European Commission is also looking at reforms for ISDS included in its trade agreements and has recently published an impact assessment for a multilateral reform of investment dispute resolution[73]. These changes could have an impact on IP disputes, and the recent cases involving IP matters might have contributed to raising awareness about the implications of ISDS.

Before addressing the specific situation of the European Union and the project put forward by the European Commission to adapt the dispute settlement system for the protection of investments, we will expose some possible reforms at the stage of drafting the investment agreements, such as the revision of the relevant chapters or provisions or the introduction of exceptions and limitations.

I. Revising the relevant provisions in international investment agreements

Whether or not one considers the adjudication of IP issues in investment tribunals to be legitimate and desirable, reforms seem to be necessary in order to ensure a balance between the interests involved as well as to tackle some of the issues already highlighted above. Some opponents to the assimilation between IP and investment protection proposed to exclude intellectual property from the definition of investment, and therefore from investment tribunals' scrutiny[74]. As an alternative, the integration of exceptions and limitations in IIAs as possible safeguards has been put forward.

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[71] These issues were addressed in particular during the second panel of the CDR Autumn Arbitration Symposium 2017 on "The future of investor-state investment disputes". See Andrew Mizner, 'Debating the future of investor-state arbitration' <https://www.cdr-news.com/categories/disputes/7780-debating-the-future-of-investor-state-arbitration> accessed 8 August 2018.

[72] More details on the Working Group's agenda and relevant documents are available at: <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html> accessed 18 October 2018.

[73] Commission, *COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Multilateral reform of investment dispute resolution (n 17)*.

[74] The exclusion of intellectual property from the definition of "investment" in IIAs was already suggested in 1997 by several countries during negotiations for the Multilateral Agreement on Investment (MAI). In this regard see: OECD, *Report to the Negotiating Group on Intellectual Property* (Negotiating Group on the Multilateral Agreement on Investment (MAI) DAFFE/MAI(97)32, 1997).

1. The attempt to exclude IP from ISDS scrutiny: an efficient approach?

The opponents to the review of intellectual property provisions by investor-state tribunals have proposed to exclude intellectual property from the definition of "investment". As we have seen, intellectual property is covered under most IIAs' definition of investment. Therefore, removing any reference to intellectual property or intangible asset would end the debate. But this is unlikely to happen in light of treaty practice and the importance of intellectual property in the world's trade and investment flows. Nevertheless, it is possible to limit investor-state tribunals' jurisdiction over IP matters by appropriately drafting the provisions of investment treaties.

We have seen before that some IP-related measures such as compulsory licenses are already excluded from the definition of expropriation in some agreements[75]. This safeguard is intended to prevent investors from challenging these measures in ISDS. But several observations should be made: first, not all investment treaties foresee such safeguards; second, compulsory licenses or other IP-related measures could be challenged on different grounds (not necessarily expropriation); and third, these provisions excluding IP measures from the scope of expropriation usually require that this measure be taken "in accordance with" the TRIPS Agreement or the IP Chapter of the IIA, thus adding a way out to circumvent this safeguard. Let us briefly come back to the last two points.

On the one hand, excluding specific IP-related measures from specific investment provisions appears to be a quite limited solution. The measures could be challenged on difference grounds such as fair and equitable treatment or non-discrimination, and many other measures still fall under the jurisdiction of investor-State tribunals.

To illustrate these observations, the trade agreement between Canada and the EU is a good example, since it attempts to exclude some IP-related measures from ISDS scrutiny. Article 8.12 (6) of the CETA clarifies what is covered under the concept of expropriation. This article reads: "For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the TRIPS Agreement and Chapter Twenty (Intellectual Property), do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS Agreement or Chapter Twenty (Intellectual Property) does not establish an expropriation."

The second sentence is an additional safeguard, as it seems that the first part of the article alone would not be sufficient to protect States against claims based on IP protection. Indeed, the NAFTA Article 1110 (7) also excluded "the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property)". However, as illustrated by the Eli Lilly case, this wording was not enough to avoid an ISDS dispute based on patent revocation. Therefore, the negotiators of the CETA seemed to be more cautious, by adding

[75] See for instance 2012 US Model BIT Article 6 (5) or US-Chile FTA Article 10.9 (5) that read "This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement". With regards to the wording used some scholars have asked whether this would really prevent investors from bringing a claim in this case. Indeed, if the claimant was able to prove that the compulsory license has not been granted in accordance with the TRIPS Agreement, i.e. the State did not respect the conditions of Article 31 TRIPS, would the tribunal then be able to review the claim for expropriation? The question is still open.

this additional sentence as well as the clarification in Annex 8-D. Whether the provision alone will be sufficient to avoid any dispute in the field remains to be seen.

It is worth noting that the 2018 United States-Mexico-Canada Agreement[76], modernizing the NAFTA, does not foresee any possibility for ISDS for future disputes between the United States and Canada. On the other hand, for disputes arising between the United States and Mexico, ISDS is still an option but it has become a rather limited and controlled one. Indeed, the scope of potential claims that can be brought is contained in the Annexes 4-C to E. According to Annex 4-D, Article 3, an investor will only be able to bring a claim for breach of Article 14.4 (National Treatment) and Article 14.5 (Most-Favored-Nation Treatment), except with respect to the establishment or acquisition of an investment, and for breach of Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation.

For intellectual property disputes, that would surely limit the possible claims that can be brought since most claims seem to rely on indirect expropriation, breach of fair and equitable treatment or denial of justice, which seem to be outside of the scope of this new agreement. While intellectual property is still included under the definition of investment, and the agreement entails exceptions and limitations for IP-related measures such as the issuance of compulsory licenses, or the creation, revocation or limitation of IPRs, any disputes arising thereof would have to be settled in a state-to-state dispute settlement procedure.

Nevertheless, most agreements still provide for the possibility of settling IP disputes in investor-state tribunals, and despite some attempts to clarify the scope of investment provisions, many uncertainties remain and partial exclusions might not be a fully reliable shield against ISDS claims. Therefore, we will address an interesting feature of the Philip Morris and Eli Lilly decisions that can be seen as a tool to achieve balanced decisions: the recognition of States' sovereign power to regulate and their "margin of appreciation".

2. *The recognition of States' sovereign right to regulate in the public interest in recent IP disputes*

An alternative way to tackle the issues that were identified before, or in other words, to ensure a certain balance between the rights of investors and public policy considerations, is to reaffirm States' regulatory power by including provisions similar to Article XX GATT in investment agreements. This would protect countries' right to adopt measures "necessary to protect human, animal or plan life or health, or relating to the conservation of natural resources"[77] without violating investors' rights, or by stating explicitly these sovereign powers in the preamble of the agreement.

Such a provision would not prevent investors from bringing claims against States for breach of IIA provisions, but it gives an additional safeguard to States against frivolous claims and to regulate in the public interest. Indeed, in cases based on IIAs incorporating such clauses, the tribunal would have to consider them when deciding upon the legitimacy and legality of a measure. It is worth noting that some tribunals have already considered these non-investment concerns, based on the preamble or provisions of a particular treaty, or based

[76] See the Agreement Text available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico> accessed 18 October 2018.
[77] GATT Article XX.

on an interpretation relying on international law and the *Salini test* requiring a contribution of the investment to the host State's development[78].

On the other hand, some commentators see this approach as rather problematic, at least when explicit reference is made to a WTO treaty. With regard to specific references to the TRIPS Agreement, B. Mercurio notes that: "Asking a tribunal established under a BIT to interpret the TRIPS Agreement is dangerous as it would mean a tribunal established under one regime would be forced to interpret an agreement established under another regime. The arbitral tribunal may or may not have expertise in WTO law or even be familiar with WTO jurisprudence."[79] Nevertheless, a tribunal could take into account general principles common to different bodies of law such as investment or trade law without interpreting a specific provision under a WTO treaty. It could therefore asses a State measure in light of these general principles, such as the legitimate safeguard of public interests, which features in recent IIAs as well as in WTO Agreements such as TRIPS.

In relation to the deference investment tribunals owe to judicial decisions and the need to interpret provisions in accordance with the Vienna Convention, Cynthia Ho observes that: "It remains unclear whether a tribunal of commercial lawyers will accept these arguments given not only a narrow view of intellectual property rights that do not consider public policy, but also a general trend "towards viewing intellectual property as solely an asset divorced from its policy foundations."[80] Nevertheless, the tribunals in the Philip Morris and Eli Lilly cases have referred to the deference due to national authorities and taken into account external provisions by application of the Vienna Convention on the Law of Treaties (VCLT).

In Philip Morris v. Uruguay, the tribunal engaged in a balancing exercise between the investor's rights and Uruguay's sovereign right to regulate. In assessing whether the measures at issue were expropriatory, the tribunal found that "the adoption of the Challenged Measures by Uruguay was a valid exercise of the State's police powers, with the consequence of defeating the claim for expropriation under Article 5(1) of the BIT"[81]. The Tribunal recalled that the protection of public health had "long been recognized as an essential manifestation of the State's police power"[82], relying on the 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens, and the Third Restatament of the Foreign Relations Law of 1987 as well as statements from the OECD[83]. It stated that, in order for a measure not to constitute an indirect expropriation, it has to be taken in bona fide, for the purpose of protecting public welfare, be non-discriminatory and proportionate[84]. It found that in the case at issue, the measures were "not 'arbitrary and unnecessary' but rather were potentially 'effective means to protecting public health'"[85].

It is worth noting that the Claimant recognized several times in its submissions the State's right to regulate. In its notice of Arbitration, the Claimant contended that: "The Claimants do not challenge the Uruguayan Government's sovereign right to promote and protect public

[78] Pia Acconci, 'Is it Time to Integrate Non-investment Concerns into International Investment Law?' (2013) 10 Transnational Dispsute Management.
[79] Mercurio, 'Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements' (n 23) 899-900.
[80] Ho, 'A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings' (n 60) 421.
[81] *Philip Morris v. Uruguay, Award (n 29) para 287.*
[82] Ibid, para 291.
[83] Ibid, paras 292-4.
[84] Ibid, para 305.
[85] Ibid, para 306.

health. However, the Government cannot abuse that right and invoke it as a pretext for disregarding the Claimants' legal rights." [86] The Claimant's argument was that "the measures were expropriatory, even if enacted in pursuit of public health, because they were unreasonable"[87], in that they were not connected to the legitimate public health objective pursued. It was therefore the tribunal's difficult task to balance the intended public health effects of the measure against the investor's rights and legitimate expectations, and to decide whether the measure fell within the scope of the accepted right of States to regulate and their 'margin of appreciation'.

Despite the growing acceptance of non-investment concerns in investment disputes, the system is still undergoing a major crisis of legitimacy. Proposals for reforming the system have already been put forward at different levels.

II. Proposals for reforming investor-state arbitration: an overview of the EU landscape

Following the growing concerns with respect to investor-state arbitration amongst all EU stakeholders, the European Commission put forward proposals for a reform of the ISDS system in the EU[88]. This step forward is particularly visible in the latest draft of the CETA[89], but also in internal projects such as the impact assessment for the establishment of multilateral investment court[90]. In parallel, the Court of Justice of the European Union (CJEU) will soon give guidance on the compatibility of the ISDS chapter in the CETA with the Treaties including fundamental rights, which is likely to have a broader impact, including on the protection of intellectual property[91]. Before giving an overview of the project of a multilateral investment court, the role of the CJEU in this area and the compatibility of investment arbitration with EU primary law will be addressed.

1. The disputed compatibility of ISDS with EU law and the role of the CJEU

The compatibility of ISDS with EU law is becoming increasingly controversial. Not only are EU institutions having a closer look at the issue, also the scholars and the civil society have raised their voice in this regard.

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[86] *Philip Morris v. Uruguay, Request for Arbitration (n 8) para 7.*
[87] *Philip Morris v. Uruguay, Award (n 29) para 198.*
[88] In 2014, the EU launched a public consultation on the EU's approach to investment protection and ISDS in the TTIP. The public consultation was completed in March 2017. More information available at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 (last accessed 18 January 2018).
[89] Benedetta Cappiello notes that "With regard to procedural rules, article 8.18 states that 'Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this section a claim.' This means that, eventually, the CETA negotiators accepted the proposal made by the Commission to establish a permanent arbitral court, which, à l'occurrence, will be constituted according to article 8.27" (Benedetta Cappiello, 'ISDS in European International Agreements: Alternative Justice or Alternative to Justice?' (2016) 13 Transnational Dispute Management 15).
[90] Commission, *COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Multilateral reform of investment dispute resolution* (n 17).
[91] The application to initiate proceedings was lodged on 7 September 2017 by the Kingdom of Belgium and the hearing took place on 26 June 2018. The opinion of the Advocate General is expected to be released in January 2019. See Opinion Avis 1/17 - Accord ECG UE-Canada, available at <http://curia.europa.eu/juris/fiche> accessed 18 October 2018.

The proposal of the European Commission which was implemented in the CETA was to integrate an Investment Court System (ICS), as an alternative to the ISDS system[92]. Therefore, the ISDS system has been replaced in readiness by this ICS, which did not mitigate the controversy around the compatibility of this system with EU law. Therefore, the Belgian federal government, following the resistance put up by the Walloon against the CETA, sought an Opinion from the CJEU on the compatibility of the ICS with EU Treaties[93]. The request was formally submitted in September 2017, and the Opinion of the Court is likely to have an important impact, not only on the ICS provisions of the CETA, but on the investment court and investor-state systems featuring in many EU IIAs in general.

In particular, the Belgian government requested an Opinion of the Court on the following aspects: (1) the exclusive competence of the CJEU on the interpretation of EU law; (2) the general principle of equality and effectiveness requirement of EU law; (3) the right to access tribunals; (4) the right to an independent and impartial justice[94]. This Opinion was not to be expected before at least one or two years, but since the ICS is outside the scope of provisional application of the CETA, it did not jeopardize the rest of the agreement that already partially entered into force on 21 September 2017.

The impact that this decision is likely to have on intellectual property will also be interesting to further scrutinize. Indeed, if the Court were to decide that it has exclusive competence on the interpretation of EU law, what would be the consequence on decisions of investment arbitral tribunals required to interpret EU IP provisions contained in directives or regulations as part of the applicable law? The answer is probably not straightforward. One could argue that, since arbitral awards are only binding on the parties, the effect of the arbitral awards would remain *inter partes*. However, the debate is slightly different when it comes to investor-state disputes, as the decision impacts the governments and therefore, the public.

The question of the compatibility of ISDS with EU law and the question of the competency of the EU is also extremely complex since the EU has not an exclusive competency in all areas, as illustrated by the opinion 2/15 of the Court[95].

In its opinion dated 15 May 2017, the Court addressed different issues raised by the European Commission with regard to the FTA between the EU and Singapore. The Court touched upon investment and IP questions, which are particularly relevant for our analysis. It is worth noting that the position of the court is not straightforward, and the decision could be seen as a quite complex one. Indeed, the Court stated that the provisions on foreign direct investment fall within the common commercial policy, but that non-direct foreign investment fall within a competence shared between the EU and the Member states. Therefore the EU cannot approve by itself the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of the FTA, “in so far as they relate to non-direct investment between the European Union and the Republic of Singapore”[96]. With regards to intellectual property

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[92] For more information on the context and the differences between the two systems, see: European Parliament, *From Arbitration to the Investment Court System (ICS) - The Evolution of CETA Rules*, 2017).
[93] EURATIV with Reuters, 'Belgium seeks EU court opinion on EU-Canada free trade deal (6 September 2017)' <https://www.euractiv.com/section/ceta/news/belgium-seeks-eu-court-opinion-on-eu-canada-free-trade-deal/> accessed 18 October 2018.
[94] Royaume de Belgique Affaires étrangères Commerce extérieur et Coopération au développement, *AECG DEMANDE D'AVIS BELGE À LA COUR DE JUSTICE DE L'UNION EUROPÉENNE NOTE EXPLICATIVE* (6 September 2017).
[95] *Opinion 2/15 of the Court (Full Court)* (Court of Justice of the European Union).
[96]Ibid, para 305.

provisions, the Court acknowledged that Chapter 11 (Intellectual Property) falls within the exclusive competence of the EU, even if some provisions are related to moral rights. Finally, the provisions of Section B of Chapter 9 on Investor-State Dispute Settlement also fall within the shared competence.

In this opinion, the CJEU only answered the question of the competence of the EU to sign and conclude such an agreement. On the contrary, the Court did not touch upon the question of the compatibility of the agreement with EU law[97], and this is precisely what the Belgian Government is seeking to clarify with regards to ISDS in its request for Opinion.

In parallel or perhaps as a reaction to the general discontent towards ISDS, the European Commission is looking at new proposals for the reform of the investor-state arbitration system.

2. *Project for the establishment of a multilateral investment court: an appropriate forum for intellectual property?*

The European Commission is currently looking at possibilities for reforming the investment dispute settlement system, in particular in case of investor-state disputes. In the framework of the CETA between the EU and Canada, the governments have agreed on a “new approach on investment protection and investment dispute settlement”[98].

The Commission adopted a “two-step approach” to reform the ISDS system, with the aim of institutionalizing an investment court system for future EU trade and investment agreements, and establish an international investment court with an appellate mechanism. In August 2016 it launched an impact assessment “to examine the possible options and impacts of a reform of the ISDS system at multilateral level, including through the establishment of a permanent multilateral investment Court”[99]. It is interesting to note that this impact assessment was limited to “examining options for reforming at multilateral level the dispute settlement system and does not examine the substantive investment protection standards, which are not intended to be addressed by this reform”[100].

While we have seen that the review of intellectual property claims in ISDS raises issues that are common concerns in the field of ISDS, such as the transparency, the absence of appeal, or the cost of procedures, it also raises some substantive issues that would therefore not be covered under this reform. At the same time, it seems that a profound reform of the system would have to start from a revision of the agreements themselves, which are then enforced and interpreted by the investment courts[101].

To tackle some of the shortcomings raised by the ISDS system, as highlighted by public consultations and expert reports, the Commission’s proposal for a multilateral investment court would entail a Tribunal of First Instance and an Appeal Tribunal with permanent tribunal members, and apply the UNCITRAL Rules on Transparency, whereby hearings,

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[97] Ibid, para 30.
[98] European Commission, *CETA: EU and Canada agree on new approach on investment in trade agreement* (2016).
[99] Commission, *COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Multilateral reform of investment dispute resolution (n 17)* 6ibid.
[100] Ibid.
[101] See above point II.A.2.

documents and findings are made public. This would allow responding to some of the main criticism that the ISDS system had to face, such as the absence of appeal mechanisms and the lack of transparency. However, these proposals have already been criticized by the doctrine as being insufficient and overlooking the essential issues[102].

In 2017, the EU joined the broader project for the establishment of a multilateral investment court under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). On 20 March 2018, the Council adopted the negotiating directives for a multilateral investment court, authorizing the Commission to negotiate on behalf of the EU in this field[103].

Whether such a multilateral investment court would be a more legitimate forum for IP disputes is an open debate. While it would respond to some of the concerns that were raised after the Philip Morris or Eli Lilly cases in terms of procedure and transparency, some difficulties remain and will have to be addressed. In particular, the competency of the arbitrators in the field of IP or the coexistence with other IP courts such as the future European Patent Court[104] will not necessarily be tackled by the reform.

On the other hand, it is clear that the reform will only touch upon procedural aspects surrounding investor-state dispute settlement, and would not enter into the consideration of substantial standards of protection, which are a major aspect of the criticism formulated against the current system, in particular for intellectual property. In addition, the questions of the safeguard of the TRIPS flexibilities, or the State’s power to regulate in the IP field will not be specifically addressed by the reform, and it would therefore be desirable that the future system foresee broader safeguards and carve-outs under which specific IP issues could be addressed. Considering the early stage of the reform, it is nevertheless difficult to assess the real impact that it will have on future IP disputes.

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[102] Gus Van Harten, 'Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA' (2014) Osgoode Legal Studies Research Paper No 59/2014 .

[103] Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 20 March 2018, available at <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 18 October 2018.

[104] Simon Klopschinski, 'International Investment Arbitration, the European Patent Office, and the Future Unified Patent Court' (*Kluwer Patent Blog, August 1, 2018,* 2018) <http://patentblog.kluweriplaw.com/2018/08/01/international-investment-arbitration-extraordinary-remedy-concerning-decisions-european-patent-office-future-unified-patent-court/> accessed 7 August 2018.

CONCLUSION

In 2009, C.S. Gibson was suggesting that: “With this early coverage of intellectual property in BITs, it is perhaps surprising that there has yet to be a publicly reported decision concerning an IPR-centered investment dispute. Given the trajectory of the modern economy, however, in which foreign investments reflect an increasing concentration of intellectual capital invested in knowledge goods protected by IPRs, this could soon change”[105]. A couple of years later, the first investment cases dealing with IP issues were made public.

Nevertheless, there have been very few known cases in practice discussing IP issues in the framework of investment protection. This raises therefore the question of whether we are observing a new “trend” in the field, i.e. whether the number of cases is likely to increase in the coming years, or whether these were isolated cases which will remain rather theoretical. In parallel, scholars are discussing the legitimacy of submitting IP disputes to investor-state arbitrations. While there are still important issues to be tackled, such as the safeguard of the regulatory power of States and the recognition of public policy objectives, the coming reforms in the field might open new legitimate paths for the adjudication of IP disputes.

Whether opportunity or threat, this relatively new alternative to challenge States’ IP policies will not soon be out of the spotlight.

[105] Gibson, 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation' (n 1) 3.

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