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# **TTLF Working Papers**

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**International Investment Law and Data,  
Copyrights and Performance  
Requirements: A Closer Look at *Einarsson  
v Canada***

**Gabriel M. Lentner**

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# TTLF Working Papers

**Editors: Siegfried Fina, Mark Lemley, and Roland Vogl**

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## **General Note about the Content**

The opinions expressed in this paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum or any of its partner institutions, or the sponsors of this research project.

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## **Abstract**

International investment law and arbitration is ever expanding crossing into other legal regimes and raising novel legal questions. Among this expansion, cases involving intellectual property (IP) have been brought before investor-state dispute settlement (ISDS). So far, decisions have been rendered regarding trademarks and patents – data is next. In *Einarsson v Canada*, the claimants argue that Canada – through legislation and government action – confiscated their IP rights (IPRs) in seismic data in violation of investment protection standards provided for in NAFTA. This is the first known case, in which a copyright and data dispute is brought before investment arbitration, so the tribunal's decision will have broad implications for the development of this area of law.

On the basis of existing case law, this paper aims to analyze the many questions relating to data under investment law still unresolved. The legal issues range from the question whether and under what circumstances do copyrights and data constitute a covered investment under international investment law, to the extent and contours of the level of protection offered to those investments under international law (specifically under the fair and equitable treatment, FET, standard and the prohibition against uncompensated expropriations) and its relationship with domestic law and international and multilateral IP treaties. The case is also illustrative of the continuing propertization and expansion of IP protection through investment arbitration from patents and trademarks to copyrights and data. The paper thus also offers a case study for the general critique offered by some commentators in this vein.

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## 1. Introduction

The interface between international investment law and intellectual property (IP) law is continuing to develop.<sup>1</sup> After high profile investor-state dispute settlement (ISDS) cases, in which investment tribunals decided disputes involving trademarks and patents,<sup>2</sup> copyrights and data are next. In *Einarsson v Canada*, the claimants argue that Canada – through legislation and government action – confiscated their IP rights (IPRs) in seismic data in violation of investment protection standards provided for in NAFTA.<sup>3</sup> This is the first known case, in which copyright

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<sup>1</sup> Simon Klopschinski, Christopher S Gibson and Henning Grosse Ruse-Khan, *The protection of intellectual property rights under international investment law* (Oxford international arbitration series, Oxford University Press 2021) 3–5.

<sup>2</sup> *Eli Lilly v Canada*, Case No. UNCT/14/2, [2017] (UNCITRAL); Pratyush N Upreti, ‘Intellectual Property Rights in Investment Treaty Arbitration: A Critical Examination of the Philip Morris & Eli Lilly Awards’ [2020] TTLF Working Paper No 67 1; *Philip Morris v Uruguay* (2016) ICSID Case No ARB/10/7 (ICSID); *Bridgestone v Panama* (2017) ICSID Case No. ARB/16/34 (ICSID); Gabriel M Lentner, ‘Bridgestone v Panama: When Are Trademarks Covered Investments?’ (2019) 34(3) ICSID Review 569; Gabriel M Lentner and Dayana Zasheva, ‘Bridgestone v Panama: Denial of Justice in a Trade Mark Dispute and the Locus Standi of a Licensee in International Investment Arbitration’ (2022) forthcoming ICSID Review - Foreign Investment Law Journal; Brook K Baker and Katrina Geddes, ‘The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS’ (2017) 49 Loyola University Chicago Law Journal 479; Gabriel M Lentner, ‘Litigating patents in investment arbitration: Eli Lilly v Canada’ (2017) 12(10) Journal of Intellectual Property Law & Practice 815; Ruth L Okediji, ‘Is Intellectual Property "Investment"?' Eli Lilly v. Canada and the International Intellectual Property System’ (2014) 35 University of Pennsylvania Journal of International Law 1121; Tania Voon, ‘Philip Morris v. Uruguay: Implications for Public Health’ (2017) 18(2) The Journal of World Investment & Trade 320.

<sup>3</sup> *Einarsson v Canada*, ICSID Case No UNCT/20/6, Notice of Arbitration (18 April 2019). At the time of writing the case is still pending.

and data<sup>4</sup> issues arise in investment arbitration, so the tribunal's decision will have broad implications for the development of this area of law. With more than 2.5 billion US\$ claimed, the financial stakes are extremely high as well.

Against this backdrop and on the basis of existing case law, this paper aims to analyze the many questions relating to IP protection under investment law still unresolved. The legal issues range from the question, whether and under what circumstances do copyrights and data constitute a covered investment under international investment law, to the extent and contours of the level of protection offered to those investments under international law (specifically under the fair and equitable treatment, FET, standard and the prohibition against uncompensated expropriations) and its relationship with domestic law and international and multilateral IP treaties. In a first, the prohibition against performance requirements are also at issue. The case also showcases the continuing propertization and expansion of IP protection through investment arbitration from patents and trademarks to copyrights and data. The paper thus also offers a case study for the general critique offered by some commentators in this regard.

The subsequent analysis proceeds as follows. First, the facts of the case are laid out after which the preliminary question of copyrights as protected investments is addressed. This will be done by looking at the business activities at issues through the lens of existing case law. Next, the relevant protection standards are discussed in light of the facts of the case, ie FET, indirect expropriation and performance requirements. The conclusion then offers some closing remarks and contextualizes the results.

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<sup>4</sup> For investment law and the digital economy see eg. Andrew D Mitchell and Jarrod Hepburn, 'Don't Fence Me In: Reforming trade and Investment Law to Better Facilitate Cross-Border Data Transfer' (2017) 19 *Yale Journal of Law & Technology* 182; Marion Creach, 'Assessing the legality of data-localization requirements: Before the tribunals or at the negotiating table?' 254 *Columbia FDI Perspectives* (17 June 2019) <https://academiccommons.columbia.edu/doi/10.7916/d8-p3q6-tn21> accessed 23 August 2022; Enikő Horváth and Severin Klinkmüller, 'The Concept of 'Investment' in the Digital Economy: The Case of Social Media Companies' (2019) 20(4) *J World Invest Trade* 577.

## 2. Facts of the Case

According to the claimants, GSI (and its prior companies) ‘created, licensed, stored, processed and reprocessed’ marine seismic data in the Canadian offshore for principal use in oil and gas exploration.<sup>5</sup> This process is a ‘capital-intensive and time-consuming process.’<sup>6</sup> Over the course of its operations, GSI employed over 250 people.<sup>7</sup> Simply put, seismic exploration works by sending seismic waves through the earth's surface and observing how those waves interact with different geological formations.<sup>8</sup> The resulting data is then refined by advanced methods and technology after collection to generate useful information on locations of seismic events, as well as navigation and map data and interpretive remarks about seismic results.<sup>9</sup> GSI’s business model is thus based on licensing that data to third parties for oil and gas exploration.

Against this background, the investors of GSI, Theodore Einarsson, Harold Einarsson and Russell Einarsson, claim that portions of the seismic data ‘have been transferred and disclosed to third parties in Canada from time to time without the consent of, or notice to, GSI or the Claimants, and will likely continue to be transferred and disclosed in the future.’<sup>10</sup> Unknown to the investors is how much of the data has actually been disclosed to third parties.<sup>11</sup> GSI argues that ‘Canada's preservation of records of its disclosure of seismic data has been inconsistent, and Canada has lately stopped compiling or maintaining any records concerning disclosure, coinciding with GSI's requests to Canada for such information. It appears that Canada purposefully withheld the revelation from GSI and the Claimants.’<sup>12</sup> What is clear to the investors is that this disclosure has the effect of destroying their business.

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<sup>5</sup> *Einarsson v Canada* (n 3) para 10.

<sup>6</sup> *ibid* para 11.

<sup>7</sup> *Einarsson v Canada* (n 3) para 10.

<sup>8</sup> Martin Kratz, ‘Copyright in Seismic Data’ (Slaw, 27 December 2017)

<<https://www.slw.ca/2017/12/27/copyright-in-seismic-data/>>, accessed 30 August 2022.

<sup>9</sup> *ibid*.

<sup>10</sup> *Einarsson v Canada* (n 3) para 10.

<sup>11</sup> *ibid* para 17.

<sup>12</sup> *ibid* para 18.

GSI alleged infringement of its copyright and trade secret protection on this basis and pursued numerous legal actions in Canada – without success.<sup>13</sup> While the Alberta Court of Appeal held that the seismic data is indeed protected by copyright, it did not find a breach of GSI’s copyright rights.<sup>14</sup> This finding was based on the interpretation of the applicable regulatory regime provided for in the Canada Petroleum Resources Act (CPRA). Section 101 of CPRA limits the privilege of non-disclosure without consent to 5-15 years based on the legislative intention to incentivize oil and gas exploration.<sup>15</sup> <sup>16</sup> The Supreme Court of Canada denied leave to appeal this case.<sup>17</sup>

The investors subsequently turned to investment arbitration arguing that the disclosure to third parties violated their copyrighted works and trade secret rights under Canadian and international law.<sup>18</sup> Specifically, they alleged infringements of the Canadian Copyright Act, Articles 9, 8, and 12 of the Berne Convention for the Protection of Literary and Artistic Works, and Articles 1701 and 1711 of NAFTA.<sup>19</sup> Taken together, the investors argue that ‘[b]y its unlawful conduct, Canada confiscated the intellectual property rights in the Seismic Data and effectively destroyed GSI’s business.’<sup>20</sup>

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<sup>13</sup> *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 49 (CanLII).

<sup>14</sup> *Geophysical Service Incorporated v EnCana Corporation*, 2017 ABCA 125 (CanLII).

<sup>15</sup> Teresa Scassa, ‘Expropriating Copyrights in the Public Interest? Recent Court Decision Addresses Interesting Issue’ (Teresa Scassa, 16 May 2016)

<[https://www.teresascassa.ca/index.php?option=com\\_k2&view=item&id=215%3Aexpropriating-copyrights-in-the-public-interest%3F-recent-court-decision-addresses-interesting-issue&Itemid=53](https://www.teresascassa.ca/index.php?option=com_k2&view=item&id=215%3Aexpropriating-copyrights-in-the-public-interest%3F-recent-court-decision-addresses-interesting-issue&Itemid=53)> accessed 30 August 2022.

<sup>16</sup> Megan Mills and Izaak de Rijcke, ‘Geomatics and the law: Geospatial Data: Balancing Private Ownership and Public Interest’ (2016) 70(2) *Geomatica* 145, 148.

<sup>17</sup> Bryan Walker and Lucy L’Hirondelle, ‘Recent Judicial Decisions of Interest to Energy Lawyers’ (2019) 57 *Alberta Law Review* 503.

<sup>18</sup> *Einarsson v Canada* (n 3) para 19.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid* para 8.

In their Notice of Arbitration they contend the following violations of NAFTA's investment Chapter 11:

- a. Article 1105 -International Law Standards of Treatment Canada and the Governments of Newfoundland and Labrador and Nova Scotia, have concealed from the Claimants and GSI, and misrepresented, the extent of their disclosures of the Seismic Data, contrary to Canada's obligation in Article 1105 of the NAFTA to accord fair and equitable treatment to investors and their investments.
- b. Article 1106 -Performance Requirements The Alberta Decisions establish and enforce a system by which Canada imposes upon the Claimants and GSI a requirement to transfer proprietary knowledge to third parties in Canada to develop Canada's offshore oil and gas industry, contrary to Article 1106(l)(f) of the NAFTA.
- c. Article 1110 -Expropriation The Alberta Decisions have deprived GSI of the copyright and trade secret protections to which GSI was entitled with respect to the Seismic Data, and which the Claimants legitimately expected Canada to provide and, as a result, have deprived GSI of substantially all of its value and the Claimants of substantially all of the value of their investment, without compensation, contrary to Article 1110 of the NAFTA.<sup>21</sup>

In an effort to halt the NAFTA arbitration, Canada has asked for a court review of the Trade Law Bureau of Global Affairs Canada's judgment from October 9, 2019. On October 20, 2020, the Federal Court of Canada rejected the application.

### 3. Copyrights and Trade Secrets as Protected Investments

#### 3.1.The investment of GSI:

The first interesting (and preliminary) question is the qualification of the claimants' operations as covered investments to establish jurisdiction of a NAFTA Chapter 11 investment arbitration tribunal.

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<sup>21</sup> *Einarsson v Canada* (n 3) para 28.

According to the claimants, GSI (and its prior companies) ‘created, licensed, stored, processed and reprocessed’ marine seismic data in the Canadian offshore for principal use in oil and gas exploration.<sup>22</sup> The creation of which is a ‘capital-intensive and time-consuming process.’<sup>23</sup> Over the course of its operations, GSI employed over 250 people.<sup>24</sup>

### 3.2.Existing Case Law

Whether, and if so under what circumstances, copyrights and trade secrets are covered investment has not been directly addressed by tribunals so far. For example, the tribunal in *Eli Lilly v Canada* considered patents a covered investment, but did not discuss the specific grounds on which it reached this conclusion (left open whether the patents on their own were considered covered investments).<sup>25</sup> In *Philip Morris v Uruguay*, the tribunal held that ‘the Claimants’ investments in Uruguay’, including trademarks, ‘fall within the definition of the term [investments] under Article 1 of the BIT’, which explicitly included ‘trade or service marks, trade names, indications of source or appellation of origin’.<sup>26</sup> However, it was not the trademarks on their own that were considered but the ‘long-term, substantial activities in Uruguay’ as qualifying ‘investments’ and not the trademarks themselves.<sup>27</sup>

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<sup>22</sup> *ibid* para 10.

<sup>23</sup> *ibid* para 11.

<sup>24</sup> *ibid* para 10.

<sup>25</sup> *Eli Lilly v Canada* (n 2). See also Lentner, ‘Litigating patents in investment arbitration’ (n 2); Upreti, ‘Intellectual Property Rights in Investment Treaty Arbitration: A Critical Examination of the Philip Morris & Eli Lilly Awards’ (n 2); Henning Grosse Ruse-Khan, Kathleen Liddell and Michael Waibel, ‘Amicus Curiae Brief’ [2016] University of Cambridge Faculty of Law Research Paper 1; Boris Kasolowsky and Eric Leikin, ‘Eli Lilly v. Canada: A Patently Clear-Cut Dismissal on the Facts, but Opening the Door for Future Claimants on the Law’ (2017) 34(5) *Journal of International Arbitration* 889; Okediji, ‘Is Intellectual Property “Investment”? Eli Lilly v. Canada and the International Intellectual Property System’ (n 2); Brook K Baker and Katrina Geddes, ‘Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines - Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement’ (2015) 32(1) *Journal of Intellectual Property Law* 1; Baker and Geddes, ‘The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS’ (n 2).

<sup>26</sup> *Philip Morris v Uruguay*, Decision on Jurisdiction (2 July 2013), paras 24, 183, and 194.

<sup>27</sup> *ibid* 209. See also Upreti, ‘Intellectual Property Rights in Investment Treaty Arbitration: A Critical Examination of the Philip Morris & Eli Lilly Awards’ (n 2); Lentner, ‘Bridgestone v Panama: When Are Trademarks Covered Investments?’ (n 2).

The only detailed analysis of IPRs as such as protected investments was offered in *Bridgestone v Panama*.<sup>28</sup> Here the question was whether trademarks and licenses constituted an investment in the host state.<sup>29</sup> The applicable investment agreement contained a broad definition of ‘investment’ that listed – as many BITs do – intellectual property rights also as forms that an investment may take.<sup>30</sup> As to the additional requirement that an investment must have the ‘characteristics’ of an investment, the tribunal noted in reference to the Salini test,<sup>31</sup> that ‘there is no inflexible requirement for the presence of *all* these characteristics, but that an investment will normally evidence most of them’.<sup>32</sup>

Applying this test on the commercial activities of the investor it put emphasis on the ‘exploitation’ of the trademark. The investor had promoted the trademark in the host state’s market and the tribunal thus found that ‘the promotion involves the commitment of resources over a significant period, the expectation of profit and the assumption of the risk that the particular features of the product may not prove sufficiently attractive to enable it to win or maintain market share in the face of competition.’<sup>33</sup> What the tribunal also noted was that this would not be satisfied when there is a mere registration of a trademark without exploitation.<sup>34</sup>

In the words of the tribunal, exploitation

accords to the trademark, by the activities to which the trademark is central, the characteristics of an investment. It will involve devotion of resources, both to the

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<sup>28</sup> *Bridgestone v Panama* (n 2).

<sup>29</sup> Comprehensively on this, see Metka Potocnik, *Arbitrating Brands: International Investment Treaties and Trade Marks* (Edward Elgar 2019).

<sup>30</sup> *Bridgestone v Panama* (n 2) paras 164, 166. For a 2009 comprehensive empirical study see Rachel A 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’ (2009) 6(2) *Transnational Dispute Management* 1; See also Klopschinski, Gibson and Grosse Ruse-Khan (n 1); Ursula Kriebaum, *Eigentumsschutz im Völkerrecht: Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (Duncker & Humblot 2008) 74; Siegfried Fina and Gabriel M Lentner, ‘The European Union’s New Generation of International Investment Agreements and Its Implications for the Protection of Intellectual Property Rights’ (2017) 18(2) *The Journal of World Investment & Trade* 271 with further references.

<sup>31</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).

<sup>32</sup> *Bridgestone v Panama* (n 2) para 165 (emphasis in the original).

<sup>33</sup> *ibid* para 169.

<sup>34</sup> *Bridgestone v Panama* (n 2) para 171.

production of the articles sold bearing the trademark, and to the promotion and support of those sales. It is likely also to involve after-sales servicing and guarantees. This exploitation will also be beneficial to the development of the home State. The activities involved in promoting and supporting sales will benefit the host economy, as will taxation levied on sales. Furthermore, it will normally be beneficial for products that incorporate the features that consumers find desirable to be available to consumers in the host country.<sup>35</sup>

Another way of exploiting a trademark is licensing it, ie granting the licensee the right to exploit the trademark for its own benefit.<sup>36</sup> This would then also satisfy the requirements for being considered an ‘investment’.

Such finding appears to be in line with decisions on whether copyrights (and other IPRs) fall within the scope of Article 1 of Protocol No 1 of the European Court of Human Rights (ECtHR) providing fundamental rights protection for property in a broad sense.<sup>37</sup>

From these conclusions it is possible to deduce certain principles for the issue raised in *Einarsson v Canada*.

### 3.3. Seismic Data as Protected Investments in Light of Existing Case Law

In this case, the seismic data was recognized as protected by copyright under Canadian law.<sup>38</sup>

As such it would fulfill *prima facie* the requirement of NAFTA’s definition of investment.

According to Article 1139, investment covers *inter alia* ‘intangible’ property, which, as an early commentator pointed out, naturally includes IPRs.<sup>39</sup> As stated in *Bridgestone v Panama*,

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<sup>35</sup> *Einarsson v Canada* (n 3) para 172.

<sup>36</sup> *ibid*.

<sup>37</sup> *Balan v. Moldavia* App no. 19247/03 (ECHR 29 January 2008); *Dima v. Romania* App no. 58472/00 (ECHR 26 May 2005); *Melnitchouk v. Ukraine* App no. 28743/03 (ECHR 5 July 2005), ECHR 2005-IX. See also Christophe Geiger, ‘Intellectual Property and Investment Protection: A Misleading Equation’ in V. Fischer and others (eds), *Gestaltung der Informationsrechtsordnung - Festschrift für Thomas Dreier zum 65. Geburtstag* (Beck 2022) 15.

<sup>38</sup> For a discussion on how to classify the data itself or the business as covered investment, see Ivan Stepanov, ‘Investor-State Dispute Settlement and Data: Implications for Data Policy and Regulation’ (2020) 69(12) GRUR International 1242, 1243–1244

<sup>39</sup> Allen Z Hertz, ‘Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and at the World Trade Organization’ (1997) 23 Canada-United States Law Journal 261, 295.

however, merely owning an IPR would not as such satisfy the investment definition.<sup>40</sup> Rather it is the economic activities in connection with the IPR which – taken together – amount to an investment.<sup>41</sup>

This appears to be satisfied based on the claimant’s statements in the present case. The claimants note that ‘[c]reating marine seismic data is a capital-intensive and time-consuming process. It requires significant investment in order to produce final works, which are, in turn, extremely valuable. Seismic surveys cost millions of dollars to create and are closely guarded trade secrets governed by strict licensing agreements relating to the confidentiality and reproduction of the data. In this instance, the estimated costs expended to create the Seismic Data are approximately USD\$781,000,000, [...]’.<sup>42</sup> As held by the tribunal in *Bridgestone v Panama*, licensing IPRs is one way to exploit them.<sup>43</sup>

Looking at the fact pattern from the perspective of the claimants representation, it therefore does not appear to be too difficult for them to show that their long-term activities in Canada constitute a protected investment under NAFTA.<sup>44</sup> As Stepanov notes, there are various avenues to have data covered by investment protection (even if not directly).<sup>45</sup> In an asset-based definition, it would seem sufficient to show the economic value and the de facto control over data to be falling within the notion of intangible asset.<sup>46</sup> Otherwise, the licensing agreements relating to the data themselves more typically falls within most investment definitions.<sup>47</sup> Lastly,

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<sup>40</sup> *Bridgestone v Panama* (n 2) para 171 (‘[...] the mere registration of a trademark in a country manifestly does not amount to, or have the characteristics of, an investment in that country.’ For commentary see Lentner, ‘*Bridgestone v Panama*: When Are Trademarks Covered Investments?’ (n 2). See generally e.g. Fina and Lentner (n 30).

<sup>41</sup> *Bridgestone v Panama* (n 2) para 172.

<sup>42</sup> *Einarsson v Canada* (n 3) para 11.

<sup>43</sup> *Bridgestone v Panama* (n 2) para 173 See also Lentner, ‘*Bridgestone v Panama*: When Are Trademarks Covered Investments?’ (n 2).

<sup>44</sup> *Stepanov* (n 38) 1243–1244 On the two fundamentally different conceptions of ‘investment’ used by tribunals and commentators, see Michael Waibel, ‘Subject matter jurisdiction: the notion of investment’ (2021) 19 ICSID Rep 25.

<sup>45</sup> *Stepanov* (n 38) 1242–1243 See also Mitchell and Hepburn (n 4) 217–218.

<sup>46</sup> *Stepanov* (n 38) 1243.

<sup>47</sup> *ibid.*

the covered investment could be viewed to lie in the company involved in the data business as such.<sup>48</sup> It should also be noted that the concept of the unity of an investment<sup>49</sup> requires a holistic view of the integrated economic operations of the investors rather than individual transactions.<sup>50</sup> The requirement that ‘investments’ are made ‘in the territory of the host state’ does not pose particular problems here.<sup>51</sup>

#### 4. Relevant Protection Standards

##### 4.1. Fair and Equitable Treatment

According to the claimants:

‘Canada and the Governments of Newfoundland and Labrador and Nova Scotia, have concealed from the Claimants and GSI, and misrepresented, the extent of their disclosures of the Seismic Data, contrary to Canada’s obligation in Article 1105 of the NAFTA to accord fair and equitable treatment to investors and their investments.’<sup>52</sup>

Under NAFTA, the concept of legitimate expectations has been specified to refer to expectations that are reasonable and justifiable.<sup>53</sup> The words ‘concealed’ and ‘misrepresented’ point to an alleged violation of previous government representations that the investor relied

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<sup>48</sup> *ibid.*

<sup>49</sup> Christoph Schreuer, ‘The Unity of an Investment’ (2021) 19 ICSID Rep 3. See also the often-quoted passage from the tribunal in *CSOB v Slovak Republic* where it adopted the doctrine of the unity of the investment operation: ‘An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.’ *Československá Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) 5 ICSID Rep 335, para 72. See further Schreuer (n 49), 9, 24.

<sup>51</sup> On this further, see Mitchell and Hepburn (n 4) 218 et seq. For the issue of clinical data see Daria Kim, ‘Protecting Trade Secrets Under International Investment Law: What Secrets Investors Should Not Tell States’ (2016) 15 John Marshall Review of Intellectual Property Law 999, 1004 et seq; Stepanov (n 38) 1244 Generally on investments ‘in the territory of the host state’, see Christina Knahr, ‘Investments ‘In the Territory’ of the Host State’ in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer* (Oxford University Press 2009).

<sup>52</sup> *Einarsson v Canada* (n 3) para 28.

<sup>53</sup> *International Thunderbird Gaming Corporation v. The United Mexican States*, Award, UNCITRAL (26 January 2006) para 147, Separate Opinion Thomas Wälde (1 December 2005) paras 27-30 with more references. On the concept of legitimate expectations generally with further case law references see Rudolf Dolzer, Ursula Kriebbaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 208–212.

upon when making the investment.<sup>54</sup> This would have to be decided based on the facts if the tribunal decided to adopt such a standard.

On the other hand, the legitimate expectations (absent other grounds) have to be grounded in the existing legal framework at the time of the investment.<sup>55</sup> In this case, as pointed out by a Canadian IP expert, data disclosure is governed by Section 101 of the Canada Petroleum Resources Act (CPRA)<sup>56</sup> according to which data related to geophysical work is privileged and shall not be disclosed (with exceptions) without consent for at least 5 years.<sup>57</sup> In pursuing the matter in Canadian courts, the claimants argued that this does not, however, mean that the copyright in the data also expires after that period.<sup>58</sup> The courts rejected this interpretation and after reviewing the legislative history, the court concluded that the 5 year time period was intended to precisely balance copyrights with public interest in oil and gas exploration.<sup>59</sup>

As a result, it appears difficult to base an FET claim on the existence of an exception to copyrights protection that has been part of the existing legal system of the host state. To be sure, this will depend on the particular facts of the case and the existing legal framework and bases for legitimate expectations at the time when the investments were made. What the claimants allege in that regard is that the seismic data had to be submitted to Canada since 1969 according to existing legislation but that this was done ‘but for the [legislation] and various representations

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<sup>54</sup> On the standard for legitimate expectations, see Dolzer, Kriebaum and Schreuer (n 53) 211.

<sup>55</sup> See e.g. Ioan Micula, Viorel Micula and others v. Romania (I) ICSID Case No ARB/05/20, Award (11 December 2013) para 722; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No ARB/14/34 Decision on Jurisdiction, Liability and Certain Issues of Quantum (30 December 2019) paras 482-490.

<sup>56</sup> Canada Petroleum Resources Act, RSC 1985, c 36 (2nd Supp), s 101, <<https://canlii.ca/t/7vc4#sec101>>, accessed 3 August 2022.

<sup>57</sup> Teresa Scassa, ‘Expropriating Copyrights in the Public Interest? Recent Court Decision Addresses Interesting Issue’ (Teresa Scassa, 16 May 2016) <[https://www.teresascassa.ca/index.php?option=com\\_k2&view=item&id=215%3Aexpropriating-copyrights-in-the-public-interest%3F-recent-court-decision-addresses-interesting-issue&Itemid=53](https://www.teresascassa.ca/index.php?option=com_k2&view=item&id=215%3Aexpropriating-copyrights-in-the-public-interest%3F-recent-court-decision-addresses-interesting-issue&Itemid=53)> accessed 30 August 2022.

<sup>58</sup> *ibid.*

<sup>59</sup> Geophysical Service Incorporated v Encana Corporation, 2016 ABQB 230, paras 211-212.

made to [the investors] by Canada [...].<sup>60</sup> What these ‘various representations’ made to the investors specifically were will likely be decisive.

Besides that, the tribunal would need to turn to the question whether there were legitimate expectations at the time that the investment was made that no legislation would be introduced to encourage the exploration of oil and gas through a limited privileging and non-disclosure of data that needed to be submitted.

The notice of arbitration states that ‘for approximately 50 years, GSI and its predecessor companies’ were active in the business of seismic data.<sup>61</sup> In that respect the Canadian court of appeal noted in the related domestic proceedings that ‘[t]he correct statutory interpretation was reached by the Trial Court in determining the legislation’s “confiscatory nature” as to the data collected under the Regulatory Regime; again, in keeping with its intended purpose of dissemination following the privilege period. The Regime’s confiscatory nature, as determined by the Trial Court, was not only Parliament’s intent, but was well-known to GSI [...].’<sup>62</sup>

Still, even considering the introduction of Section 101 CPRA as a change in legislation after the investment was made, copyright law inherently has exceptions. As pointed out by a Canadian IP expert: ‘Copyright law already contains many provisions that aim to balance the public interest against the rights of the copyright holder.’<sup>63</sup> She gives the example of fair dealing and points to the fact that the CPRA is not the only federal law other than the Copyright Act itself that provides for limitations of copyrights.<sup>64</sup>

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<sup>60</sup> *Einarsson v Canada*, Notice of Intent (10 October 2018) paras 60-62.

<sup>61</sup> *Einarsson v Canada* (n 3) para 10.

<sup>62</sup> *Geophysical Service Incorporated v EnCana Corporation*, [2017] ABCA 125 para 106 (references omitted).

<sup>63</sup> Teresa Scassa, ‘Expropriating Copyrights in the Public Interest? Recent Court Decision Addresses Interesting Issue’ (Teresa Scassa, 16 May 2016)

<[https://www.teresascassa.ca/index.php?option=com\\_k2&view=item&id=215%3Aexpropriating-copyrights-in-the-public-interest%3F-recent-court-decision-addresses-interesting-issue&Itemid=53](https://www.teresascassa.ca/index.php?option=com_k2&view=item&id=215%3Aexpropriating-copyrights-in-the-public-interest%3F-recent-court-decision-addresses-interesting-issue&Itemid=53)> accessed 30 August 2022.

<sup>64</sup> *ibid*; see similarly Tara Peramatukorn, ‘Potential Expropriation Claims Against Data Sharing Requirements’ (2021) 51 *New York University journal of international law and politics* 249, 260.

This is true for IPRs in general. In contrast to property rights occasionally pronounced ‘absolute’, IPRs have inherent limitations and exceptions already built into the system.<sup>65</sup> As a result the basis for legitimate expectations that copyright law does not (and never will) provide for exceptions to protections in the public interest seems doubtful. In fact, the structure of international agreements, such as the Paris Convention and subsequently TRIPS and Chapter 17 of NAFTA provides for flexibilities precisely to allow states to pursue their own technological and development policy.<sup>66</sup>

In addition, the mere determination that the Canadian IP law on this point would violate Chapter 17 of NAFTA or other international agreements, would not suffice to establish a violation of the FET standard. As clarified by the binding interpretation by the Commission, ‘[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)’.

As a result, an FET claim does not seem to be too promising.

#### 4.2. Indirect Expropriation

In addition to an FET violation, the claimants allege that through the copy and disclosure of their data they have been ‘[...] deprived [...] of the copyright and trade secret protections to which GSI was entitled with respect to the Seismic Data, and which the Claimants legitimately expected Canada to provide and, as a result, have deprived GSI of substantially all of its value

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<sup>65</sup> Daniel Gervais, ‘Investor-State Dispute Settlement and intellectual property\_ lessons from Lilly v. Canada’ in Christophe Geiger (ed), *Research handbook on intellectual property and investment law* (Edward Elgar Publishing 2020) 260. Haimo Schack, ‘Schutzgegenstand, „Ausnahmen oder Beschränkungen“ des Urheberrechts’ [2021] GRUR 904, 904.

<sup>66</sup> Grosse Ruse-Khan, Liddell and Waibel (n 25) 9. For the general argument for a higher degree of deference to the domestic regulator in complex matters relating to public interest regulation see e.g. Tania Voon, ‘Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law’ (2015) 18 J Int Economic Law 795, 814–816.

and the Claimants of substantially all of the value of their investment, without compensation, contrary to Article 1110 of the NAFTA.’<sup>67</sup>

This will most probably be framed as an indirect expropriation of their copyrights. As opposed to direct expropriations, ‘[a]n indirect expropriation leaves the title untouched but deprives the investor of the possibility to utilize the investment in a meaningful way.’<sup>68</sup> Here the preliminary issue will then be whether the investor even acquired rights that were later (indirectly) expropriated considering the existence of the special regulatory regime as explained above. In other words, rights that do not exist cannot be expropriated. This non-existence of relevant rights appears to be the case here in so far as the existing regulatory regime provided for seismic data only 5 years of copyright protection.<sup>69</sup>

Without this as a basis for their expropriation claim, the investor will have to rely on legitimate expectations recognized to be an important element of indirect expropriations and not only of the FET standard. But here, too, ‘[w]hat matters are the rights acquired by the investor at the time of the investment.’<sup>70</sup> It will therefore depend on the specific facts of the case and whether there are (other) objective bases for legitimate expectations with regard to the investor.<sup>71</sup>

The question regarding the compatibility of the state measure with international IP treaties and Chapter 17 of NAFTA is separate. Here an exception exists for compulsory licenses or the revocation, limitation or creation of IPRs under the condition that those measures are consistent with Chapter 17 of NAFTA (Art 1110(7))<sup>72</sup> (which incorporates the minimum standards as

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<sup>67</sup> *Einarsson v Canada* (n 3) para 28.

<sup>68</sup> Dolzer, Kriebaum and Schreuer (n 53) 153.

<sup>69</sup> In this sense in a different context regarding copyright with respect to the EU Charta of Fundamental Rights and the ECHR see also Philipp Homar, *System und Prinzipien der gesetzlichen Vergütungsansprüche des Urheberrechts* (Verlag Österreich 2021) 320–321.

<sup>70</sup> Dolzer, Kriebaum and Schreuer (n 53) 172.

<sup>71</sup> For some further analysis based on some hypotheticals see Peramatukorn (n 64). For the protection of non-IP data assets see Stepanov (n 38) 1244–1245.

<sup>72</sup> On the broader context of this provision see Hertz (n 39) 306–307.

provided for in the Berne Convention). So, in case of an (indirect) expropriation, Art 1110(7) could be invoked by Canada to avoid responsibility.

However, it is not entirely clear that the limitation of a copyright to 5 years, instead of the minimum 50 years, would be in conformity with the Berne Convention and thus also Chapter 17 of NAFTA. Reasoning *e contrario*, Art 1110 applies in this case.<sup>73</sup> Of course that does not mean that a violation of Chapter 17 automatically results in a compensable expropriation. This was correctly pointed out by the state in *Eli Lilly v Canada* arguing that any other interpretation would rest on a logical fallacy of denying the antecedent.<sup>74</sup> In fact, new treaties such as the EU-Canada Comprehensive Trade Agreement included a clarification to that effect precisely for that reason.<sup>75</sup>

In any case, the lack of acquired rights means that there is no right to be expropriated in the first place, so the mere violation of the Berne Convention by Canada will arguably not be sufficient to establish an expropriation.<sup>76</sup> Violations of the Convention and/or NAFTA Chapter 17 are to be brought before State-to-State dispute settlement and are not subject to investment arbitration. And it must be noted that the so-called police powers doctrine<sup>77</sup> provides for regulatory measures in the public interest without the obligation to compensate, even when it negatively affects the investment.<sup>78</sup>

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<sup>73</sup> Graham Cook and Hannu Wager, 'Adjudicating intellectual property disputes at the GATT/WTO: are there general lessons for the Investor-State Dispute Settlement system?' in Christophe Geiger (ed), *Research handbook on intellectual property and investment law* (Edward Elgar Publishing 2020) 287 FN 3.

<sup>74</sup> *Eli Lilly v Canada*, Respondent's Rejoinder on the Merits (8 December 2015) paras 219-221. See also Gervais (n 65) 255-256.

<sup>75</sup> Art 8.12(6) states that '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.' On this see Fina and Lentner (n 30) 296-298.

<sup>76</sup> This is different from the situation where measures such as compulsory licenses are issued for IPRs that have already been granted. On this see Christopher Gibson, 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation' (2010) 25(3) *American University International Law Review* 357.

<sup>77</sup> *Philip Morris v Uruguay* (n 2) paras 191-192, 267-271.

<sup>78</sup> See on this further Stepanov (n 38) 1244-1245.

The claimants put forward the argument that Canada itself, through its courts, has admitted to confiscating their property.<sup>79</sup> The court stated: ‘The correct statutory interpretation was reached by the Trial Court in determining the legislation’s “confiscatory nature” as to the data collected under the Regulatory Regime; again, in keeping with its intended purpose of dissemination following the privilege period. The Regime’s confiscatory nature, as determined by the Trial Court, was not only Parliament’s intent, but was well-known to GSI [...].’<sup>80</sup> This reference to the supposed ‘admission’ of expropriation by the courts seems misleading, as it was just meant to describe the clear exception to copyright protection provided for in the regulatory regime. On a more fundamental level commentators have challenged the notion that IPRs as such can be expropriated. IPRs are considered to be private rights<sup>81</sup> (mostly owned by corporations<sup>82</sup>) but not just like any other asset. For example, Christopher Geiger rejects the investment approach towards IP<sup>83</sup> and Mark Lemley criticized the property approach often adopted by courts and commentators towards IP.<sup>84</sup> <sup>85</sup> Along these lines, Susan Sell makes a powerful argument that IPRs are best understood as privileges, not rights. She argues that

‘The so-called "rights talk" of the TRIPS deliberations [in context of patents for pharmaceuticals] obscured the fact that IP "rights" are actually grants of privileges. "Grants talk" highlights the fact that what may be granted may be taken away when such grants conflict with other important goals. Public health is one such goal.’<sup>86</sup> ‘Intellectual property is a temporary monopoly privilege that the state grants to encourage both

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<sup>79</sup> *Einarsson v Canada* (n 3) para 23.

<sup>80</sup> *Geophysical Service Incorporated v EnCana Corporation*, 2017 ABCA 125 para 106 (references omitted).

<sup>81</sup> See the preamble of the TRIPS Agreement. Hertz (n 39), 304.

<sup>82</sup> See Katharina Pistor, *The Code of Capital* (Princeton University Press 2019) 115.

<sup>83</sup> Geiger (n 37).

<sup>84</sup> Mark A Lemley, ‘Property, Intellectual Property, and Free Riding’ (2005) 83 *Texas Law Review* 1031 For the specific argument applying to investment law see Okediji, ‘Is Intellectual Property "Investment"? Eli Lilly v. Canada and the International Intellectual Property System’ (n 2); Ruth L Okediji, ‘When is intellectual property an "investment"?’ in Christophe Geiger (ed), *Research handbook on intellectual property and investment law* (Edward Elgar Publishing 2020).

<sup>85</sup> See Ruth L. Okediji, ‘Is Intellectual Property "Investment"? Eli Lilly v. Canada and the International Intellectual Property System’ (2014) 35(4) *University of Pennsylvania Journal of International Law* <<https://scholarship.law.upenn.edu/jil/vol35/iss4/>>, accessed 30 August 2022.

<sup>86</sup> Susan K Sell, *Private power, public law: The globalization of intellectual property rights* (Cambridge University Press 2003) 146 (references omitted).

creation and dissemination of new knowledge. It is not a ‘‘right’’; it is a privilege that the state may grant at its own discretion within the binding commitments that the state has made through the World Trade Organization and other agreements.’<sup>87</sup>

Viewed through this lens, limitations to and even removal of the granted privilege afforded by IPRs should not be considered expropriations in the first place.

#### 4.3. Performance Requirements

In a first in the recent IP-related investment disputes, the claimants also allege a violation of Article 1106 of NAFTA (Performance Requirements) on the basis that the court decisions ‘establish and enforce a system by which Canada imposes upon the Claimants and GSI a requirement to transfer proprietary knowledge to third parties in Canada to develop Canada’s offshore oil and gas industry, contrary to Article 1106(l)(f) of the NAFTA.’<sup>88</sup>

The prohibition of performance requirements is not found in many international investment agreements but those concluded by the US and Canada regularly contain clauses to this effect.<sup>89</sup>

The intent of such provisions is to ensure that states do not impose obligations on foreign investors to conduct their business in specific ways to protect the domestic market.<sup>90</sup> Examples range from local content requirements to forced technology transfer etc.<sup>91</sup>

Directly relevant to the case at hand is Article 1106 of the NAFTA. It provides

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

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<sup>87</sup> Susan K Sell, ‘Remarks’ (2014) 108 Proc annu meet- Am Soc Int Law 317, 318.

<sup>88</sup> *Einarsson v Canada* (n 3) para 28.

<sup>89</sup> Dolzer, Kriebaum and Schreuer (n 53) 140.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

(f) *to transfer* technology, a production process or *other proprietary knowledge* to a person in its territory, except when the requirement is imposed or the commitment or undertaking *is enforced by a court*, administrative tribunal or competition authority to remedy an alleged violation of competition laws or *to act in a manner not inconsistent with other provisions of this Agreement*;<sup>92</sup>

The claimants in this case raise the issue that the requirement that they are obligated to share their seismic data with the government is at odds with the prohibition to necessitate the transfer of ‘other proprietary knowledge’. Even when excluding the issue of disclosure to third parties, this provision appears to be *prima facie* engaged.<sup>93</sup> The outcome will of course depend on the question whether the data access regime falls within the exception when the measure is ‘is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement.’<sup>94</sup> This will be for the tribunal to decide. Suffice it to note here that to date, successful claims based on the prohibition on performance requirements are rare.<sup>95</sup> It therefore is open to speculation how successful this basis for an ISDS claim will be regarding the specific legal regime challenged by the claimants.

On a broader level, prohibitions on performance requirements can have implications for data-localization requirements or requirements of R&D conducted in the host state can only be mentioned here.<sup>96</sup> As mentioned, these issues are mostly uncharted territory for tribunals, so there is limited ground to speculate further. It is clear, however, that more cases will be brought

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<sup>92</sup> Emphasis added.

<sup>93</sup> Stepanov (n 38) 1246.

<sup>94</sup> See further *ibid.*

<sup>95</sup> Alexandre Genest, *Performance requirement prohibitions in international investment law* (Nijhoff international investment law series volume 13, BRILL 2019) 7 The exception seems to be *Mobil and Murphy v. Canada (I)* (ICSID Case No. ARB(AF)/07/4) where only a violation of the prohibition of performance requirements was found. See also Genest (n 95) 7–8 (arguing that this case has resulted in heightened interest in the issue of performance requirements in ISDS.)

<sup>96</sup> Stepanov (n 38) 1246.

on this basis and it will be interesting to follow these developments and how tribunals will respond.

## 5. Conclusion

The case brought by the investors in *Einarsson v Canada* raises many interesting issues with respect to ISDS and IP law, specifically as the IP/investment interface relates to data. Much will depend on the conceptualization of copyrights in domestic law and the nature of these rights and the extent to which specific copyright regimes are subject to review by an investment tribunal. A number of questions in this case will be resolved by an appreciation of the facts, particularly as regards any grounds for legitimate expectations of the investor. In any case, however, the treatment of these IP/investment issues will have an impact far beyond those specific facts.

And while the trend of equating IP and investment is rightly criticized for impeding a balanced approach toward IP policy, it is another brick in the wall of IP-related ISDS that is here to stay.<sup>97</sup> This should not come as a surprise. Rather, it is in line with the intentions of treaty drafters as an early commentator put it with respect to US interests pursued in NAFTA:

‘According to the United States, the Investment Chapter's purpose would be *inter alia* to protect the commercial benefits flowing from IP ownership. The United States was also seeking additional international disciplines for "trade-distorting practices" in the form of domestic restrictions on the commercial exploitation of IPRs, *e.g.*, performance requirements. According to the United States, the IP Chapter would also need the Investment Chapter for the principle of the free transferability of royalty payments. By way of further example, the United States added that the IP Chapter would establish the disciplines for the availability of compulsory licensing, but the Investment Chapter

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<sup>97</sup> Geiger (n 37) 14; Okediji, ‘Is Intellectual Property "Investment"? *Eli Lilly v. Canada* and the International Intellectual Property System’ (n 2); Rochelle Dreyfuss and Susy Frankel, ‘From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property’ (2015) 36 *Michigan Journal Of International Law* 557-602; Susy Frankel, ‘Interpreting the Overlap of International Investment and Intellectual Property Law’ (2016) 19(1) *Journal of International Economic Law* 121.

would allow the patent holder arbitration with respect to the level of compensation arising from any "taking" under the IP Chapter.<sup>98</sup>

The interests at stake are clear in so far as ‘countries which are net exporters of technology and copyright product welcome the chance to use [IIAs] to expand international protection for their foreign IPRs.’<sup>99</sup> Hence, importers of technology and copyright products must be cautious, otherwise over-protection of IP<sup>100</sup> occurs via investment protection.<sup>101</sup> Where to strike an appropriate balance between an investor’s business interests and a host state’s policy needs will be difficult to universally determine from the outset. As a result, tribunals called to decide on these questions should be sensitive and knowledgeable about IP policies and public interest.<sup>102</sup>

The case discussed will therefore be an opportunity for an investment tribunal to strike such appropriate balance. As I have explained elsewhere treating data just as any other property contains risks of distorting such balance.<sup>103</sup> Many issues remain unresolved like the question of whether social media corporations would satisfy the jurisdictional requirement of an ‘investment’.<sup>104</sup> Also, data-localization requirements might be challenged through ISDS based on an alleged violation of national treatment.<sup>105</sup> Other cases could involve the digital sector (online streaming).<sup>106</sup>

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<sup>98</sup> Hertz (n 39) 295–296. See also Cook and Wager (n 73) 287–288.

<sup>99</sup> Hertz (n 39) 304.

<sup>100</sup> See also the critique of the modern IP system specifically regarding equitable access to medicines, Eva Hilberg, ‘The Terra Nullius of Intellectual Property’ (2022) 36(2) *Ethics int aff* 125 On the debate of the moral justification for economic rights in IP see e.g. Jukka Varelius, ‘Is the Non-rivalrousness of Intellectual Objects a Problem for the Moral Justification of Economic Rights to Intellectual Property?’ (2015) 21(4) *Science and engineering ethics* 895 For a general third world approaches to international law (TWAIL) critique of the IP/investment law interface, see Pratyush N Upreti, ‘A TWAIL critique of intellectual property and related disputes in investor-state dispute settlement’ (2022) 25(1) *World Intellectual Property* 220.

<sup>101</sup> Hertz (n 39) 304–305.

<sup>102</sup> Advocating an ‘intertextual approach’ to achieve a proper balance between the two legal regimes see Emmanuel K Oke, *The Interface between intellectual Property and Investment Law* (Edward Elgar 2021).

<sup>103</sup> Gabriel M Lentner, ‘Treating Data as Property? A View from International Investment Arbitration’ [2018] *Medien & Recht International* 71. See also Okediji, ‘When is intellectual property an ‘investment’?’ (n 84) 96.

<sup>104</sup> Horváth and Klinkmüller (n 4). See also generally on cross-border data transfer under international trade and investment law Mitchell and Hepburn (n 4).

<sup>105</sup> Marion A Creach, ‘Assessing the legality of data-localization requirements: Before the tribunals or at the negotiating table?’ (2019).

<sup>106</sup> *beIN Corporation v Kingdom of Saudi Arabia*, UNCITRAL, Notice of Arbitration (1 October 2018). There is no publicly available information as to the status of the case at the time of writing.

With such high stakes at issue, the tribunal is expected to offer well-reasoned decisions that will lead the way in this interesting and ever developing area of law.