Foreword

The intersection between intellectual property protection and international investment law is clear; many investment treaties explicitly include intellectual property among their enumerated examples of items that can constitute ‘investments’ under the treaty and thereby attract its protection, while others implicitly include it in their definitions of investment. Until recently, however, these matters were largely hypothetical, because 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: how much does investment law limit the ability of states to regulate in the public interest; how does one appropriately conceptualize the relationship between the World Trade Organization (‘WTO’) family of agreements, including the Agreement on Trade-Related Intellectual Property Measures (‘TRIPs’), and international investment agreements; does intellectual property represent the type of investment that has significant benefits for developing countries?

Other questions are more specific to intellectual property itself: what are the implications for the doctrine of expropriation if intangible property can be expropriated; when are investment agreements appropriately viewed as ‘TRIPS +’ agreements, and what are the implications of that designation; when if ever can prohibitions against technology transfer be overridden; and what obligations do states have under international law to prevent the piracy of intellectual property by private individuals? The list could continue, but rather than attempt an exhaustive list I commend to you Mr Vanhonnaeker’s treatment of these and other issues in his timely and important book.

Most investment disputes are now based on investment treaties, and the protections in those agreements are the bases for most claims submitted to arbitration. It is appropriate, therefore, that Mr Vanhonnaeker, in his study, focuses primarily on the issues likely to confront arbitral tribunals convened under investment treaties when the underlying dispute involves intellectual property in some shape or form, though it is not impossible for intellectual property questions to arise in cases
brought in arbitrations convened by virtue of a concession contract or an investment law.

Mr Vanhonnaeker’s systematic treatment of those disputes establishes that intellectual property rights do in fact qualify as investments under international investment agreements, and further that they can satisfy the requirements of Article 25 of the Convention on the Settlement of Disputes Between States and Nationals of Other States to the extent that it contains a definition of investment different from that found in any relevant investment treaty. He also tackles with precision and imagination the question of territoriality – the requirement that the investment be made in the territory of the host state in order for its obligations under an investment treaty to be triggered.

The second part elaborates on the most historically important standards of protection found in investment treaties – expropriation, National Treatment, Most-Favoured-Nation treatment, and the fair and equitable treatment standard – as they intersect with intellectual property protections. The question of compulsory licensing in particular could give rise to claims of indirect expropriation, and Mr Vanhonnaeker explores the ramifications of that possibility with specific attention to the importance of the TRIPs Agreement in any such analysis.

Performance requirements are rules and regulations whereby states that are host to foreign investments confer advantages on companies that agree to engage in certain policies, such as the use of locally-made products in their production facilities or the transfer of technology to local companies. Some, though by no means all, treaties forbid performance requirements, and a limited set of them is precluded by the Trade-Related Investment Measures Agreement (‘TRIMs’) of the WTO. Mr Vanhonnaeker explores the desirability of compulsory technology transfer and whether the TRIMs Agreement can be imported via an umbrella clause into those investment agreements that do not explicitly forbid performance requirements. His analysis is wide-ranging and considers the political aspects of extending those protections in addition to the more practical lawyerly question of how such an extension would work in practice.

Investment agreements constrain and sometimes obligate state action. Whether those obligations require a state to cause private entities to take certain actions, or to prevent them from doing so, has tended to arise in the context of the ‘full protection and security’ standard of treatment. Mr Vanhonnaeker brilliantly dissects the interplay between intellectual property, full protection and security, and the TRIPs agreement.

The final Part of the book is devoted to Mr Vanhonnaeker’s thoughtful and thorough analysis of investment treaties as ‘TRIPS +’ agreements and to case studies that enable him to bring the previous Parts of the
book together. As states continue to negotiate treaties with partially or thoroughly overlapping subject matter but with different types of enforcement mechanisms, questions about the relationship between those agreements will remain of the utmost importance. Bringing those agreements together can counter the ‘fragmentation’ of international law lamented by Professor Koskenniemi,¹ yet finding ways to make disparate regimes cohere is challenging at best and difficult and/or undesirable at worst.

‘What’s in a name? That which we call a rose. By any other name would smell as sweet.’² The fact that intellectual property is denominated ‘property’ makes it seem to fall naturally within the ambit of protections granted to property rights by international investment agreements. Yet as Shakespeare observed, the name that we accord an entity does not change its substance. Intellectual property does not necessarily fit easily within the standards of protection accorded to tangible property, and its inclusion in international investment agreements raises fascinating questions that have only begun to be addressed in practice. Mr Vanhonnaeker gives us a masterful overview of the relationship between intellectual property and international investment law in a monograph that is certain to be an indispensable reference for years to come.

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² William Shakespeare, Romeo and Juliet, Act II, Scene ii, 1–2.