II. International Legal Framework

A. International Intellectual Property Law

1. International Intellectual Property Treaties

The first multilateral treaties that addressed the issues of IP and obliged the states to create basic IPRs in their legal systems were the Paris Convention[6] and the Berne Convention.[7] The two treaties are deemed to be the cornerstone treaties of what can generally be called international IP law.[8] Established at the end of the 19th century the treaties were created as a response to unwarranted business practices in the modern world, whose economy was increasingly reliant on knowledge. The idea behind the treaties was to grant protection to innovators and artist, in particular writers, with a view of incentivizing creation and innovation.[9] From a purely legislative perspective the treaties created a set of legal standards to be implemented by the states. The cornerstone of both treaties is the national treatment standard. In addition, the Paris convention expressly contained the most favored nation principle.[10] These provisions provided for a fair amount of legal harmonization internationally, without creating too much obligations in the treaties themselves. Interestingly, the Paris convention did not create wide substantive rights. The treaty mainly addressed procedural and formal aspects of industrial property law.[11] Quite notably there was no obligation to introduce patent protection in domestic law. Like-

6 Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [herein after: Paris Convention].

7 Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 331 U.N.T.S. 217, [herein after: Bern Convention].

8 Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis, 3rd ed., § 1.10 (2008).

9 Rochelle Dreyfuss & Susy Frankel, From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property, 36 Mich. J. Int'l L. 557, 561 (2014-2015).

10 Paris Convention, Supra note 6, art. 3 and 4, and Bern Convention, Supra note 7, art. 5(3)

11 For example, it provides the right of the inventor to be mentioned (Paris Convention art. 4ter), priority period rules for patent registration in multiple countries

wise, there were no provisions stipulating the establishment or setting of patentability requirements. These matters were left to the states to implement on their own accord. The legislative gaps assured that state sovereignty was recognized with considerable room left for the introduction of measures benefiting their own domestic goals. Moreover, neither treaty had a strong compliance mechanism, which resulted in no complaints ever being filled on an international level.[12] Over the years both treaties were amended in order to adapt to modern times and practices.[13]

After the Second World War social changes accelerated worldwide. The developments in politics, trade and technology created new paradigms in international economic relations and IP along with it.[14] Politically the facilitation of free trade was seen as a way to ensure peace after the War. Out of that idea the GATT[15] was born. GATT created a legal framework for the free flow of goods.[16] Following in the next few decades, the development of the IT sector and the emergence of the internet created unprecedented business opportunities. Things were changing rapidly and IP was becoming increasingly relevant in the world economy.[17] This meant that its prominence had risen in the political debate as well. IP right holders started requesting that a precise definition of IPRs be provided so as to accommodate the needs of their international business models. The attention turned to WIPO, the caretaker of the major IP treaties. WIPO was asked to adapt the rules on IP to the newly developed circumstances. However, this attempt failed. From there the focus shifted to WTO and as a result the TRIPS was created.[18] The shift brought in considerable changes in all IP fields. Conceptually IP started being perceived primarily as a constituent

---

(Paris Convention art. 4) and the conditions for the issuance of compulsory licenses (Paris Convention art. 5).

12 Dreyfuss & Frankel, Supra note 9, at 562.

13 The Paris Convention was amended 7 times from 1900 to 1979 and the Bern Convention was amended 8 times from 1886 to 1979.

14 Peter Van Den Bossche, The Law and Policy of the World Trade Organization, 2nd ed., 5 (2010).

15 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187.

16 Ralph H. Folsom, Principles of International Trade Law, 7 (2014).

17 Dreyfuss & Frankel, Supra note 9, at 562.

18 Peter Drahos with John Braithwaite, Information Feudalism, Who Owns the Knowledge Economy, 61-62 (2002).

part of international trade and IPRs started being viewed as rights proper. IP assumed the shape of commodities,[19] a far cry from IP known in the 19th century.

The TRIPS is one of the main agreements that forms a part of what is known as WTO law. It is a comprehensive agreement that in great detail deals with a multitude of IPR aspects. First of all, it obliges the states to introduce protection for IPRs and determines the minimum standards which IPRs need to be subject to. The state is notably allowed to implement higher standards but that is left to the state's discretion.[20] The TRIPS provides for the incorporation of the Paris and Berne treaties as integral parts of the TRIPS.[21] The principles of most favored nation and national treatment likewise found their ways into the treaty.[22] Furthermore the TRIPS creates a set of substantive rights that the states are required to implement. This is a significant development in comparison to the two other major IP treaties mentioned previously, where no such obligations existed. Express language that creates these standards and sets the scopes of protection can be found in the TRIPS. For example, article 27(1)[23] states: "[s]ubject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application." The TRIPS also provides a minimum set of rights that should be conferred to the right holders. For copyright protection minimum rights were already established in the Bern Convention.[24] However the Paris Convention provided much less in terms of the minimum of rights afforded to the right holders. The TRIPS article 27 creates two essential rights for patent holders – the right to exclude other

19 Laurinda L. Hicks & James R. Holbein, Convergence of National Intellectual Property Norms in International Trading Agreements, 2 Am. U.J. Int'l L. & Pol'y, 769, 770 (1997).

20 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [herein after: TRIPS].

21 *Id*, art. 2.

22 *Id*, art. 3 & 4.

23 *Id*, art. 27.

24 Bern Convention, Supra note 5, art. 6-19.

from using the patents (the so called negative right),[25] and the right to transfer or license the patent to others.[26] The TRIPS expressly recognizes possible variations in the scope and nature of protection. Article 27(3) for example envisages the possibility of exclusion of certain types of inventions from patenting. Article 6 excludes the application of the most favored nation and national treatment to the law dealing with international IP exhaustion.[27] Furthermore concepts found in article 9 like 'expression' and 'idea' or 'new',[28] 'inventive step' and 'industrial application' found in article 27 are left undefined at the treaty level.[29] Another significant development found in TRIPS is the enforcement part.[30] This part of the treaty sets precise obligations for the state in regards to the enforcement of IP rights. Not only does it secure a general enforcement framework[31] but it likewise provides more detailed obligations on damages, injunctions, criminal penalties and evidence.[32] The TRIPS, even though providing a substantial amount of obligations for WTO member states, leaves some regulatory leeway for the implementation of the rules. This is achieved by omitting strict definitions of treaty terms[33] and giving the chance to exclude certain types of protection.[34] The TRIPS likewise recognizes the non-absolute nature of IPRs by providing rules for certain limitations of rights. The compulsory license's rules or the three-step test exception are prime examples thereof.[35] These international rules are constructed to leave policy space for their implementation at the domestic level. In that regard the TRIPS is not only a purely legal document but it holds significance in a political and diplomatic sense as well. However, the TRIPS was

25 TRIPS, Supra note 20, art. 28(1).
26 *Id*, art. 28(2).
27 *Id,* art. 6.
28 *Id,* art. 9.
29 *Id,* art. 27.
30 *Id,* part III.
31 *Id,* art. 41.
32 *Id,* art. 43-46.
33 For example, TRIPS art. 27(1) contains the terms invention, new, inventive step, industrial application without ascribing any definitive meaning to them.
34 TRIPS, Supra note 20, art. 27(3).
35 *Id,* art. 30 & 31.

already a policy concession for some countries[36]. It was adopted as a tradeoff for access to other economic areas and it is considered a compromise even in some developed countries.[37] Nevertheless states often followed their own approach to the implementation of the TRIPS rules. The difference in how the TRIPS was perceived from a national perspective resulted in different implementations of the TRIPS norms in domestic legal systems.

With the TRIPS being part of the WTO *acquis*, the enforcement of IPRs is not only secured in national legal orders but from an international law perspective as well. This means that the states' compliance with their international law obligations is secured through the WTO dispute settlement mechanism. So far there have been 37 registered cases before the WTO dispute settlement system arising out of the TRIPS agreement.[38] Cases such as *Canada — Patent Term*[39] and *United States — Section 110(5) of US Copyright Act*[40] are prominent examples how the TRIPS flexibilities function.

The *Canada — Patent Term* case dealt with two measures implemented by the Canadian government on the stockpiling and the regulatory review of soon-to-expire pharmaceutical patents. With these measures the Canadian government wanted to speed up the appearance of generic drugs on the market. The Canadian government legislated certain exemptions in the patent legislation which affected some patents preceding the date of their expiry. The WTO panel concluded that the regulatory review was an ex-

36 States were obliged to provide patent protection even if they did not have it before. South Center, The TRIPs Agreement, A Guide for the South, The Uruguay Round Agreement on Trade-Related Intellectual Property Rights, 19 (2000).

37 Anthony Taubman, Australia's Interests under TRIPS Dispute Settlement: Trade Negotiations by Other Means, Multilateral Defense of Domestic Policy Choice, or Safeguarding Market Access?, 9 Melb. J. Int'l L. 217, 222 (2008).

38 For a list of cases see, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26# (Visited last on Mar. 6, 2018).

39 *Panel Report, Canada – Term of Patent Protection,* WT/DS170/AB/R, (Oct. 12, 2000) [herein after: *Canada – Patent Term*].

40 *Panel Report, United States-Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (Jun. 15, 2000) [herein after: *US – Copyright Act Section 110(5)*].

emption that was allowed, while the stockpiling exemption was not.[41] In the *United States — Section 110(5) of US Copyright Act* case the exemptions for the payment of royalties coming from a certain type of small hospitality establishment. Namely restaurants of a certain size were exempt from paying copyright and related rights' royalties. This exemption was found to be inconsistent with WTO law.[42] However interestingly the US never actually implemented the recommendation evidenced by the provision still standing today.[43] The two cases shed light on several aspects of the TRIPS. They show how the WTO dispute settlement mechanism uses the TRIPS in determining limits and exception of IPRs. They likewise show the TRIPS used in such a way that it is not a pure adversarial, litigation like tool for settling disputes. As part of international law, it is subject to politics and diplomacy. Even when the norm might not be TRIPS compliant it is up to the state to decide how to act on it.[44]

Another function that can be attributed to the TRIPS is its perceived function and use as a benchmark for IP law, a policy guide and "ghostwriter" for domestic legislators.[45] However the TRIPS leaves much to be desired for the private person. All aspects of WTO law remain in the sphere of public international law. As such the recourse to the dispute settlement mechanism is left strictly to the states. Therefore, in case private parties wish to raise a TRIPS violation complaint, they must persuade a WTO Member State government to do it for them. Due to the political and diplomatic dimension of the TRIPS the states might therefore be reluctant to pursue conflict resolution through this method. Another reason for this is that the states might rely on domestic legal provisions which are borderline compliant with WTO law and are unwilling do endanger themselves through possible retributive proceedings.[46]

---

41 See, *Canada – Patent Term,* Summary available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds114sum_e.pdf (Visited last on Mar. 6, 2018).

42 See, *US – Copyright Act Section 110(5)*, Summary available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds160sum_e.pdf (Visited last on Mar. 6, 2018).

43 Copyright Act of 1976 § 110 (5)(B)(i), 17 U.S.C., § 107 (2012)

44 See Taubman, Supra note 37, 230-31.

45 *Id,* at 222, 227.

46 Valentina Vadi, Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investment, 5(1) NYU J. Intell. Prop. & Ent. L., 113, 141 (2015).

B. International Investment Law

1. International Investment Agreements

IIAs are international treaties signed between states, usually in bilateral or on rarer occasions multilateral form, whose purpose is to secure a stable investment framework for foreign investors.[47] The root of IIAs lies in the reciprocal arrangements of European nations which offered protection to foreign owned property.[48] The early international investment agreements signed in the post Second World War period were based on the Friendship, Navigation and Commerce treaties from the nineteenth century.[49] The first modern IIA is considered to be the Germany – Pakistan Bilateral Investment Treaty of 1959.[50] Nowadays there are more than 3000 IIAs worldwide.[51] The idea behind these agreements was to stimulate the flow of foreign direct investment to countries that desired foreign capital on the one side. On the other side, their aim was to provide security to the investors against the disturbance and confiscation of their assets. The presumption was that the countries needing foreign capital do not always possess the required legal stability. The protection was therefore secured by incorporating many different types of property and assets under the definition of investment.[52] The standards of protection such as the FET standard and the rules on expropriation were defined broadly, with the intent of covering as many potential situations as possible. The idea was to provide the in-

47 *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series on International Investment Policies for Development, 14-15 (2009).

48 Kate Miles, The Origins of International Investment Law, Empire, Environment and the Safeguarding of Capital, 21 (2013).

49 Margie-Lys Jaime, Relying Upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements, 46 Geo. J. Int'l L., 261, 266 (2014-2015).

50 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investment, Ger. - Pak., Nov. 25, 1959, 457 U.N.T.S. 24 [herein after: Germany – Pakistan BIT].

51 Valentina Sara Vadi, Through the Looking-Glass: International Investment Law through the Lens of Property Theory, 8 Manchester J. Int'l Econ. L., 22, 33 (2011).

52 Stephanie Bijlmakers, Effects of Foreign Direct Investment Arbitration on a State's Regulatory Autonomy Involving the Public Interest, 23 Am. Rev. Int'l Arb., 245, 253 (2012).

vestors with wide recourse options for the protection of their investments.[53]

Even though IIAs can be drafted differently as regard the form and scope of protection, several recurring parts can still be distinguished. The US Model BIT[54] will be used as a showpiece treaty for the purpose of this thesis. The first general section is the "definitions" section. These provisions clarify and give interpretative meaning to the substance of the treaty. Perhaps the most important part of this section is the definition of *the investment*.[55] The definition is crucial as terms not covered by the definition do not fall under the treaty's scope of protection, hence there is no jurisdiction *ratione materiae*. The second section provides a number of substantive rights to the investors. Protection through the FET standard, rules on justifiable expropriation or the rules on the free flow of capital are all commonly found in IIAs.[56] The third section prescribes the acceptable state behavior by stipulating obligations requiring abstinence from certain actions. The section likewise stipulates the creation of the exceptions in favor of the state.[57] Finally the last major section creates a possibility for the investor, a private person, to seek direct recourse against the host state if it deems that the host state had violated rights provided by the treaty which likewise resulted in the investor suffering economic damage. The recourse sought is found in the form of investor-state dispute settlement, or colloquially called (international) investment arbitration.[58]

2. International Investment Arbitration

International investment arbitration is a dispute settlement mechanism which grants access to the investor, a private person, to challenge mea-

53 Jaime, Supra note 49, at 269.
54 2012 U.S. Model Bilateral Investment Treaty, Treaty Between The Government of the United States of America and the Government Of [Country] Concerning The Encouragement and Reciprocal Protection of Investment, available at: http://www.state.gov/documents/organization/188371.pdf (Visited last on Mar. 6, 2018) [herein after: US Model BIT].
55 *Id,* art. 1.
56 *Id,* art. 5-7.
57 *Id.* art. 10-13.
58 *Id.* art. 24.

sures of the state if it deems that its treaty rights had been violated.[59] This mechanism intends to secure a balance between the rights of the investor with the state's right to regulate.[60] Unlike the older IP treaties which had no embedded dispute settlement mechanisms[61] or the WTO's which grants access only to the states,[62] IIAs give access to a private person to challenge the state directly in an international dispute settlement forum.[63] As in other types of arbitration there is a possibility to choose the applicable arbitration rules that will govern the investment arbitration proceedings. Some are investment arbitration specific,[64] while others that are designed for commercial arbitration, in general, are likewise applicable.[65] Investment arbitration awards are accordingly recognized and enforced through the New York Convention.[66]

However, investment arbitration is nowadays under criticism. The considerable power conferred to investment Tribunals is not seen in a positive light.[67] They are deemed holding absolutist views of property with little regard for other values.[68] Likewise the chance for the investor to challenge a state's regulatory measure, particularly ones pertaining to human rights, the environment and public health has raised considerable concerns.[69] The sheer possibility of challenging national legislation, which need not materialize in practice, can often lead to the "regulatory chill." In practice this

59 Not all IIAs have this option. For example, the Germany – Pakistan BIT art. 11 provides only for state to state arbitration in case of a dispute in the interpretation of the treaty.
60 Jaime, Supra note 49, at 269.
61 Dreyfuss & Frankel, Supra note 9, at 562.
62 Referring to "Members" which are states. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, art. 1. [herein after: DSU].
63 US Model BIT, Supra note 54, art. 24.
64 For example, International Centre for Settlement of Investment Disputes (ICSID), Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, Mar. 18, 1965, ICSID/15/Rev. 1 (2003) [herein after: ICSID Rules].
65 For example, UNCITRAL Arbitration Rules, Dec. 15, 1976, 15 I. L. M. 701 (1976); [herein after: UNCITRAL Rules].
66 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun 10, 1958, 330 UNTS 38.
67 Bijlmakers, Supra note 52, at 253.
68 Vadi, Supra note 51, at 30.
69 Bijlmakers, Supra note 52, at 254.

means that states threatened by possible investment arbitration might often be reluctant to change their own laws.[70] It seems the criticism has nevertheless to some degree been fruitful. Nowadays investment Tribunals show more deference to the state's right to regulate.[71] This has not however deterred investors trying to challenge the state's regulatory mechanisms.

3. Intellectual Property Rights as Protected Investments

It is generally accepted that IPRs can be protected as investments. This coverage finds its basis in the "definitions" part of an IIA. IPRs can therefore be covered by being directly named or by using the terms such as "intangible property".[72] However the broad and loose definition does not necessarily encapsulate all of the aspects of IPRs. IPRs have some distinct features in comparison with the classical notion of property or rights usually covered in international investments law. IPRs are territorial in nature. What constitutes a patent and consequently a protected investment in one country, might be denied patent protection in another, thus affording no investment law protection to the same invention. As some IPRs are acquired through registration an unsuccessful registration will not confer investment protection.[73] Beyond the matter of providing protection to IPRs as investments, the relationship between the special characteristics of IPRs[74] and the standards of protection[75] commonly found in IIAs remains very much in the air. Ultimately the ability to determine what are IPRs and to what extent they are protected is left to the state.[76] The protection of

---

70 Johnathan Griffiths, On the Back of a Cigarette Packet: Standardized Packaging Legislation and the Tobacco Industry's Fundamental Right to Intellectual Property, 4 I. P. Q. 243, 245 (2015).

71 Bijlmakers, Supra note 52, at 254 & Vadi, Supra note 51, at 31.

72 Bryan Mercurio, Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements, 15 (3) J. Int't Econ. L., 871, 874-76 (2012).

73 *Id.,* at 876-78.

74 For example, compulsory licenses in patents or the existence of the right to exclude in contrast with the right to use in patents and trademarks.

75 The FET standard protection and rules on expropriation.

76 Tania Voon, Andrew Mitchell & James Munro, Intellectual Property Rights in International Investment Agreements: Striving for Coherence in National and International Law, (Melbourne Legal Studies Research Paper,

IPRs should therefore be observed in line with the legislation of the state. The role of IIAs should hence be to confirm the existing rights which are created in domestic law.[77] An approach which can have some merit in investment arbitration is the one taken by the ECtHR. In a case relating to an IPR the Court recognized the right of domestic courts to clarify and interpret the scope of IPRs.[78] The protection of IPRs, which are not absolute in their nature,[79] under IIAs should be acknowledge in full, with all the rights and limitations included.[80] This is particularly important as IPRs are used as policy tools in many ways. The scope of protection alongside with the limitations of rights are crafted to serve exactly that purpose.

C. NAFTA

The NAFTA is an agreement signed by the USA, Canada and Mexico in an effort to liberalize and facilitate trade, while also eliminating barriers for investment in North America.[81] Being a comprehensive agreement the NAFTA not only provides rules regarding the trade in goods, but likewise the rules on trade in services[82] and the rules on technical barriers to trade[83]. The treaty also creates bodies in charge of administering the treaty, like the FTC[84] and the rules for inter-partes dispute settlement[85]. However

---

Paper No. 675, 2013), 1, 8 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318955 (Visited last on Mar. 6, 2018).

77 Okediji, Supra note 5, at 1219.

78 Griffiths, Supra note 70, at 355.

79 Vadi, Supra note 46, at 195.

80 In one of the drafts of the TPP the following phrase was used when defining intellectual property rights as investments: "intellectual property rights [which are conferred pursuant to domestic law" see, Brook K. Baker & Katrina Geddes, Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines – Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement, (Northeastern Pub. Law and Legal Theory Faculty Research Paper Ser., Paper No. 242, 2015), 1, 22 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2667062 (Visited last on Mar. 6, 2018).

81 Robert A. Pastor, The North American Idea, The Vision of a Continental Future, 7-9 (2011).

82 NAFTA, Supra note 2, Chap. 12-14.

83 *Id.* Chap. 9.

84 *Id.* Chap. 18

85 *Id. C*hap. 19

particularly important for this thesis are two chapters – the IP Chapter[86] and the Investment Chapter.[87]

The NAFTA IP Chapter, is structured in a similar fashion to the TRIPS, although in certain instances it is more extensive. The Chapter when enacted mostly impacted Mexican IP law but the US and Canada needed to amend their legislation as well.[88]

The NAFTA Investment Chapter was enacted to liberalizes foreign direct investment particularly in Mexico, which had a closed and controlled system for foreign investment. Nowadays the NAFTA is one of the most commonly used investment arbitration mechanisms.[89] The Investment Chapter creates substantive rules intended for foreign investors in the similar to other IIAs. Provision establishing the FET standard[90] or the rules on the expropriation of investments[91] are clear examples thereof. Furthermore, the Chapter creates the option for investor-state dispute settlement.[92] The dispute resolution mechanism is set out in considerable detail and provides extensive guidance for all procedural aspects of investment arbitration. One of the most important provisions of the dispute resolution section is article 1139. In this article the definition of what should be or should not be considered an investment is given. The language of subparagraph 1139 (g) provides that "[i]nvestment means real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." Even though not expressly mentioned, IPRs, being intangible rights, can be covered as investments.[93] The provision lays the cornerstone of any claim by the investor based on the perceived mistreatment of IPRs by the state. The perceived mistreatment of those rights will be assessed from the law applicable to investment arbitration. This means that the actions of the state will be subject to the evaluation under the FET standard (article 1105) and the

86 *Id.* Chap. 17
87 *Id.* Chap. 11
88 Ralph. H. Folsom, NAFTA, Free Trade and Foreign Investment in the Americas in a Nutshell, 199 (2014)
89 Vanessa Humm, American Trade News Highlights for Summer 2013, The Rise of the Investor – State Suit and the Call for Reform, 5 Law & Bus. Rev. Am. 425, 427 (2013)
90 NAFTA, Supra note 2, art. 1105
91 NAFTA, Supra note 2, art. 1110
92 NAFTA, Supra note 2, art. 1115-1139
93 Mercurio, Supra note 72, at 874-76.

rules on expropriation (article 1110). However little guidance is given how inherent limitations of IPRs correspond with the Investment Chapter. The only reference to IPRs is found in article 1110(7). The article states that compulsory licenses and the creation, limitation or creation of IPRs, if done in accordance with the NAFTA IP Chapter cannot constitute expropriation. However, further elaboration on the relationship between article 1105 and the IP chapter is left undefined. Another notable provision, that sheds light on the relationship of the NAFTA Investment Chapter with the rest of the treaty, is article 1112 which essentially subordinates the whole NAFTA Investment Chapter to the rest of the NAFTA treaty.[94]

94 Ralph. H. Folsom, Supra note 86, at 171.