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SEMINAR

on

Defining Intellectual Property as an 'Investment' in International Investment Law – A Case for Economic Development



MR. IVAN STEPANOV

Max Planck Institute for Innovation and
Competition, Munich
Law Faculty, Friedrich-Alexander-University,
Erlangen-Nuremberg

Biography:

Mr. Ivan Stepanov is a doctoral candidate at the Law Faculty, Friedrich-Alexander-University, Erlangen-Nuremberg and at the Max Planck Institute for Innovation and Competition. Originally hailing from Novi Sad, Serbia, where he obtained his Bachelors in Law at the University of Privredna Akademija, Ivan holds two LLM degrees, one from the University of Amsterdam in international trade and investment law and one from the Munich Intellectual Property Law Center in intellectual property (IP) and competition law. In addition to his academic career, Ivan practiced law in Serbia and interned at EUIPO's International Cooperation and Legal Affairs Department in Alicante, Spain. Ivan's research focuses on the interaction of international investment law and intellectual property and its consequent effects on pharmaceutical innovation. His broader research interest center around IP in the context of public international law, especially international economic law, IP and alternative dispute resolution and international IP policy making.

Programme

Introductory Remarks

11:30 am – 11:35 am

Prof. (Dr.) Indranath Gupta, Professor,
Jindal Global Law School & Co-Director,
Jindal Initiative on Research in IP and
Competition (JIRICO)

Seminar Talk

11:35 am – 12:20 pm

Mr. Ivan Stepanov, Law Faculty, Friedrich-
Alexander-University, Erlangen-Nuremberg

Q&A

12:20 pm – 12:35 pm

Vote of Thanks

12:35 pm – 12:40 pm

Prof. (Dr.) Vishwas H. Devaiah, Professor,
Jindal Global Law School & Co-Director,
Jindal Initiative on Research in IP and
Competition (JIRICO)

Date: Thursday 19th September, 2019

Time: 11:30 am – 12:40 pm

Venue: Big Bang Conference Room, T-1, O.P. Jindal Global University,
Sonipat 131001, Haryana, India

RSVP: Ms. Isha Gaba, Project Manager, JIRICO, +91-8396907321, igaba@jgu.edu.in

Abstract:

Intellectual Property (IP) and foreign direct investment (FDI) are lauded as the cornerstones of economic development. Their presence is promoted as quintessential for economic growth and their respective international legal regimes, international investment law (IIL) and international IP law are structured to reflect this position. However, once the surface is scratched, economic literature posits a more complex and uneasy relationship. IP and FDI can facilitate economic development but their presence does not guarantee it. In fact, an improperly set up legal framework can negatively impact economic development. A multitude of factors, including the type of the intellectual property right (IPR) or the investment, the existence of technology transfer and the host state's economic development level, determine the effect on the host state's economy. Some questions arise out of these considerations. To what degree IIL and the international IP regime contribute to economic development and under which conditions does this occur?

This investigation focuses on one aspect of this complex relationship. International investment agreements (IIAs) offer foreign investors the chance to challenge acts of the host state which they deem affected their investment, before an investor-state dispute settlement (investment arbitration) tribunal. In order to qualify for investment arbitration, the investor must hold a covered 'investment'. IP is commonly defined as an 'investment' in IIAs. However, a textual definition of something as an 'investment' does not automatically guarantee that it will be accepted as such. In order to make this determination the tribunals will often endeavor into deeper legal analyses. In particular, ICSID¹ tribunals often apply the *Salini* test which factually assesses whether the 'investment' possesses what would be considered the usual characteristics of an 'investment' when determining its legal validity. Perhaps the most disputed prong of *Salini* is the requirement of the 'investment's' contribution to the host state's economic development. Once IP is juxtaposed to such an analysis several considerations emerge.

IPRs are primarily exclusionary rights and the way a right holder uses them can differ widely. They can be used to exclude the unauthorized use of the subject matter covered by the IPR, but also more proactively, to facilitate trade or to build complex business operations centered around the IP. Although these uses are all principally permissible under IP rules, the question arises whether all of them warrant IIL protection? Moreover, what is the relationship of an IPR and its use with the contribution to the economic development of the host state? As this presentation argues, pure exclusionary use should not suffice to grant investment protection over an IPR. IP must be used in a way where it displays the characteristics of an investment to be eligible for IIL protection. Moreover, in such a setting, IP's contribution to the economic development should be a legitimate consideration in the matter. The view is based not only on the interpretation of the applicable treaty language but it finds foothold in economic theory as well. The analysis will focus on the cases which have dealt with the stated issues in considerable detail: *Philip Morris v. Uruguay* and *Bridgestone v. Panama*.

¹ International Centre for the Settlement of Investment Disputes is the part of World Bank and it is the biggest forum and platform for investor-state dispute settlement, handling about 50% of the global case load.