Chorzów Factory – intellectual property and the continuity of international law in investor-state dispute settlement

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One of the most important cases in the jurisprudence of international law – Chorzów Factory – has a hidden secret, so much so that, even when in plain sight, legal post-mortems of the case fail to mention this well-kept secret. Chorzów Factory was about intellectual property rights, specifically patents and trade secrets, and this narrative has never been fully addressed. When the developments in international investment law and arbitration are fully considered it is worth looking back at Chorzów Factory to associate it with new streams of contemporary investor-state disputes that include issues such as intellectual property rights. Because Chorzów Factory has established the full reparation standard for unlawful expropriation, the standard has enabled a continuity of international law and underscores its importance for contemporary investment arbitration. However, the intellectual property narrative of Chorzów Factory has been neglected, and, in this article, I want to develop the intellectual property narrative of Chorzów Factory and to demonstrate the nexus between fair compensation, intellectual property rights and the continuity of international law.

Keywords: Chorzów Factory, investor-state dispute settlement (ISDS), patent expropriation, reparation standard, international law

1 INTRODUCTION

By way of introduction, it is vital to look at a few contemporary factors of intellectual property in relation to investor-state dispute settlement (ISDS) before evoking its history. These contemporary factors traverse intellectual property rights, trade and investment, investment arbitration, and the valuation of intellectual property rights. The significance of these factors is that they tend to pull international law in a private direction, whereas the adjudication process and protection of private intellectual property rights at the global level is akin to what some have labelled the ‘weakening of sovereignty’¹ and therefore

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1. Peter Drahos, ‘Thinking Strategically about Intellectual Property Rights’ (1997) 21 Telecommunication Policy 201.