Rights to do, rights to prevent, and an intersected approach?
Lessons from intellectual property, information control and oil and gas

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"Ensuring a greater degree of control over the timing, rate, and level of natural resource exploration and development was one of the key governmental objectives. The release of proprietary information (following a period of time) to the public to promote further exploration was also a primary legislative goal"[1]

<a>INTRODUCTION

"Data is the new oil":[2] this is an oft made statement. Further, there is the view within the oil and gas industry that the industry's future relies on Geophysical Data.[3] Reflecting this, some legislative and regulatory steps have required those who hold a licence to explore and produce oil and gas in a particular area, to disclose to the regulator some sets of information which the licence holder obtained in the course of their activities. Some oil and gas regimes then require that this information - regarding, say, location of seismic reserves from a borehole - be shared with others in the sector. This is ostensibly meant to enable greater and more efficient oil and gas extraction. This information disclosure obligation and framework can be argued, however, to conflict with the rights of intellectual property (IP) owners to control, in some cases, the use which others can make of information without the consent of the IP owner. This conflict led to IP litigation in Canada, and the opening quotation in this contribution is taken from the first instance judgment.

This contribution will explore this conflict. It will discuss IP and oil and gas frameworks particularly in the UK and in Canada; some regulatory drivers in the UK; some possible means of resolving the conflict in the UK; the Canadian litigation; and the relevance of trade and investment agreements. Note that this contribution will not engaged in depth with confidentiality obligations concerning geophysical data. As will be noted, the oil and gas regulators discussed here have addressed the intersection of their goals with confidentiality; they have not, however, engaged with IP.

This contribution will note that the existence of clear goals of a regulatory system, an assertive regulator with robust enforcement powers, and industry support for new regulatory approaches may seem to have created oil and gas regimes which can prevail over IP rights when the two fields clash in respect of information of sharing and re-use. This is of interest in itself as the interests of IP have tended to prevail when IP has been argued to conflict with addressing public goals, such as responses to climate change and health needs. These controversial relationships have been the subject of detailed analysis and will not be explored

[1] *Geophysical Service Incorporated v Encana* 2016 ABQB 230 ("*GSI v Encana First Instance*") [158]
[2] Although see more detailed analysis in Lauren H Scholz, 'Big Data is Not Big Oil: The Role of Analogy in the Law of New Technologies (September 2018, Tennessee Law Review, forthcoming) via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252543 accessed 26 April 2020
[3] Velda Addison, 'It all relies on Geophysical Data' Hart Energy (11 January 2017) https://www.hartenergy.com/exclusives/it-all-relies-geophysical-data-176724 accessed 26 April 2020

here.[4] Yet in this contribution it will be suggested that decision makers in respect of oil and gas regulation and legislation and in respect of IP law are in fact taking a blinkered, or at least incomplete, approach to addressing this apparent battle of equals. Further, it will be seen that another challenge to delivery of the regulatory goals being pursued in respect of oil and gas - and an opportunity for IP owners seeking to resist the implications of this - lies in the prospect of an Investor State Dispute Settlement (ISDS) Action.

From this novel combination of perspectives, this contribution will build arguments which can have an impact on all regulatory and legislative actions to address a public goal when the response (properly viewed) involves more than one policy area and field of law, and also involves private rights. The intertwining of the three strands (IP, oil and gas and ISDS) set out here, makes clear that apparently diverse forms of regulation and law can exist within an intersected landscape; and that when one seeks to deliver change, it is wise to look outside the actors and regimes which seem immediately relevant – no matter how powerful one's field might seem to be.

<a>IP: RIGHTS TO PREVENT DISCLOSURE OF INFORMATION

<b>The International Umbrella Obligations

IP rights confer the power control the activities of others, if initial requirements are met for the right to exist in respect of the underlying innovation and creativity. The prospect of conflict with oil and gas obligations regarding information. which may be introduced in some countries, arises from the fact that since 1995 most of the members of the WTO - through the TRIPS agreement - have obligations to provide protection in their laws for IP rights in a baseline form.[5] This includes protection for copyright, and there is also the potential for states to provide additional protection, which will be discussed below in the context of database rights.

TRIPS[6] incorporates most of the substantive provisions of the Paris Act (1971) of the Berne Convention, pursuant to which state parties agreed to protect copyright. States may also (although they are not obliged to) impose limits on the scope of copyright rights. In most cases, exceptions and limitations must be consistent with the "three step test": limited to special cases, do not conflict with a normal exploitation of the work and impose no unreasonable prejudice on the legitimate interests of the author.[7] Further, TRIPS provides that rights can (but again need not) be limited as necessary to, inter alia, promote the public interest in areas of vital importance to socio-economic and technological development,

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[4]See eg Abbe E. L. Brown, *Intellectual Property, Climate Change and Technology: Managing National Legal Intersections, Relationships and Conflicts* (Edward Elgar, 2019) ("Brown"); Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford University Press, 2008)

[5] Annex 1C to World Trade Organization Agreement, Agreement on Trade-Related Aspects of Intellectual Property Rights https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs accessed 26 April 2020 (TRIPS), art 1(1). For transitional provisions, see TRIPS, art 65 (which refers also to developing countries) and art 66 (regarding least developed countries)

[6] TRIPS, art 9 referring to arts 1-21 Berne Convention and Appendix thereto https://www.wipo.int/treaties/en/ip/berne/ accessed 26 April 2020

[7] Berne Convention, art 9(2) and TRIPS art 13; see valuable consideration of case law, literature proposals as to scope, see Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (November 18, 2013). American University International Law Review, Vol. 29, No. 3 (2014), pp. 581-626. Available at SSRN: https://ssrn.com/abstract=2356619 accessed 16 May 2020

although states' positions must still be consistent with the rest of the agreement. [8] It may seem surprising for this public interest possibility to be raised in the context of oil and gas, given arguments for reduction in use of fossil fuels to assist in responses to climate change which may be more readily identified as a public interest issue.[9] Yet arguments could be advanced for relevance of the provision to oil and gas based on the more communal contribution to economic growth which is sought to be addressed in the oil and gas developments. This will be discussed in more detail below.

<b> National Rights

<c> Copyright

Against this backdrop, some interesting questions arise in the UK jurisdictions as to the rights which could be relevant to oil and gas information. UK copyright has deep national roots in legislation[10] and case law[11] since well before TRIPS. For copyright to exist there needs to be an original work, with copyright protecting the particular expression of an idea, rather than the idea itself.[12] The traditional UK originality threshold could be said to be rather low: the work must not have been copied from another piece of work, and there needed to be the use of skill, labour and judgement to generate the work.[13] In the 21st century, EU case law set out a need for there to have been an intellectual creation in creating the work.[14] This approach was then taken in some UK national court decisions;~~,~~ judges have also, however, considered that the established UK test remains.[15] Writing this in 2020, it must be noted that future UK courts will not be bound to, and may not choose to, follow EU approaches given that the UK has left the EU. If courts consider that there remains a need for an intellectual creation, it would be difficult to argue that copyright arises from the gathering of information relating to, say, the location of oil and gas reserves from a seismic survey. This process does, however, involve significant skill, labour and judgement; so if this more traditional approach is applied, copyright could be relevant to this debate.

Some developments in Canada, where the approach to originality and copyright is more akin to the traditional position in the UK jurisdictions,[16] are of particular interest. Landmark litigation, to which reference was made at the start of this contribution, was seen in *GSI v Encana.* This involved the grant by oil and gas regulators of licences to GSI regarding completing surveys and licensing the results to oil and gas companies for use in exploration. GSI was also required to deposit the results of the surveys with the regulators, and after a period of confidentiality the information was then made public. The information was used by Encana and others. GSI argued in a claim against Encana (and others) and also the Crown,

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[8] TRIPS, art 8

[9] See eg UK Committee on Climate Change, 'Switching to low-carbon fuels' https://www.theccc.org.uk/tackling-climate-change/reducing-carbon-emissions/what-can-be-done/low-carbon-fuels/ and ClientEarth, 'Fossil fuels and climate change: the facts' (19 December 2019) https://www.clientearth.org/fossil-fuels-and-climate-change-the-facts/ both accessed 26 April 2020

[10] Notably Statute of Anne 1709

[11] *Hinton v Donaldson* 1773 Mor 8307, *Donaldson v Beckett* (1774) 2 Bro PC 129

[12] See consideration in *Designers Guild Ltd v Russell Williams (Textiles)* Ltd [2001] FSR 11 [24] [25]

[13] *Ladbroke v William Hill* [1964] 1 WLR 273, *Interlego AG v Tyco Industries* [1989] AC 217

[14] *Infopaq International A/S v Danske Dagblades Forening* C-5/08 [2009] ECDR 16

[15] See *SAS Institute Inc v World Programming* [2013] EWHC 69 (Ch) and [2013] EWCA Civ 1482, compare *Newspaper Licensing Agency Ltd v Meltwater Holdings BV* [2011] EWCA Civ 890 [20]; ~~*SAS Institute Inc v World Programming* [2013] EWHC 69(Ch)~~

[16] See consideration in *GSI v Encana First Instance* [39-40] referring to landmark decision in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13

that GSI owned copyright in surveys and that publication and the use by others of the surveys when they were made public (and the enabling of this) was in breach of copyright. This case's exploration of the intersection between two areas of law is considered later in this contribution. For now, it is important to note the finding that there was human skill and judgement in the process carried out by GSI,[17] and that the seismic data compilation was an expression of GSI's views of what the image of subsurface looked like, rather than being a compilation of facts which are a feature of the landscape.[18]

Finally on copyright, during the lengthy term of the right[19] the copyright owner can prevent, in particular, the direct or indirect reproduction or communication to the public of the whole or a substantial part of the work, without their consent.[20] The proposed sharing and use of the new data across the industry would, therefore, appear to infringe. Some exceptions to copyright do exist in the UK, reflecting the flexibilities seen in TRIPS discussed above,[21] yet none would cover all of the situations which could arise here.[22]

<c> Database rights

Taking advantage of the fact that TRIPS only creates minimum standards of protection, the UK also has a national database right, often termed a *sui generis* right, which protects some databases.[23] This right was introduced pursuant to EU legislation[24] and again it will be interesting to see how this right is treated in the future in the UK given its departure from the EU. There are views that the database right creates unwarranted power for information control; the contrary view is that the lack of such rights, particularly if the more limited approach is taken to the existence of copyright as seen above, would mean that investment in structuring databases would not be rewarded.[25] A 2018 EU review of the effectiveness of the database right concluded that there was no evidence that it was having a positive impact on the database industry. The EU did decide, however, to maintain the right.[26] There is no *sui generis* database right in Canada.

For now, at least, in the UK, a database is defined for these purposes as a collection of independent works, data or other materials which are arranged in a systematic or methodical way and which are individually accessible by electronic or other means.[27] For the database

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[17] *GSI v Encana First Instance* [70] [79] [82-5]
[18] *GSI v Encana First Instance* [97-9]
[19] TRIPS, art 12 depending on the nature of the work, a minimum of 50 years; UK Copyright, Designs and Patents Act 1988 (CDPA), ss12-15, with the relevant period for present purposes being the life of the author plus 70 years.
[20] CDPA, ss16(1), (3)(a) and (b), 17, 20
[21] CDPA, ss28-50
[22] See eg CDPA, s29(1) and 29A fair dealing and data analysis for research for non commercial purposes, see *HMSO and Ordinance Survey v Green Amps* [2007] EWHC 2755 (Ch); CDPA, s30(1) fair dealing for criticism and review requires consideration of that or another work
[23] Copyright and Rights in Database Regulations 1997 SI 1997/3032 ('Database Regulations')
[24] EC Directive 96/9/EC on the legal protection of databases O.J. L 77 11 March 1996 20-28
[25] See consideration in Jerome H Reichman and Pamela Samuelson, 'Intellectual Property Rights in Data' [1997] 50 Vanderbilt Law Review 52-166; Charlotte Waelde, 'Database and Lawful Users: the chink in the armour' [2006] Intellectual Property Quarterly 256; Estelle Derclaye, 'Intellectual property rights on information and market power – comparing European and American protection of databases' [2007] 38(3) International Review of Intellectual Property and Competition Law 275-298; Teresa Scassa and D.R. Fraser Taylor, 'Intellectual property law and geospatial information: some challenges' [2014] 6(1) World Intellectual Property Law Journal 79-88
[26] EU review SWD(2018) 146 final Evaluation of Directive 96/9/EC on the legal protection of databases
[27] Database Regulations, art 6, amending CDPA by s3A

right to exist, there must be substantial investment in obtaining, verifying or presenting information for the database – and this is distinct from investment in creating the information in the first place.[28] The courts have noted the difference, however, between the recording of an existing fact (such as a scientific measurement) and the creation of new information.[29] This suggests that a database right may exist regarding the obtaining of a set of seismic information about, say, a borehole. Depending on the processes carried out, there may have been additional work for verification and presentation, and this would further support the existence of the right.[30] Taking another example, a database right would also exist over a geological end of well report which drew together data gathered throughout the period of drilling or production.[31]

Database right owners control (for a much shorter period than the copyright)[32] the extraction or re-utilisation of the whole or substantial part of contents of database and also the repeated and systematic extraction of insubstantial parts.[33] The meaning of extraction has been considered to entail something beyond looking at – "consulting" - the database; there needs to be a moving of information into another medium and for use to be made of it there.[34] Re-utilisation means making the contents of the database available to the public, and is interpreted widely and irrespective of the purpose of the activity.[35]

Applying this here, the oil and gas information regimes could seem to involve extraction and reutilisation, both directly on the part of the OGA and indirectly by subsequent industry users. Finally, for database rights, just as was so for copyright, there is no direct exception to the database right which engages with oil and gas. There is one more general provision which may be of some relevance. This will be explored after the following discussion of the wider context and content of oil and gas regulation.

<a>PERMISSIONS TO ACT AND ASSOCIATED OBLIGATIONS: OIL AND GAS

<b>Regime Structures

There is no single international umbrella regime for oil and gas regulation, in contrast to that seen for IP through TRIPS. Strong regulatory themes transnationally, however, are either a state licensing the carrying out of activities such as exploration and production, or states

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[28] Database Regulations, art 13(1); *British Horseracing Board v William Hill Organization Ltd* Case C-203/02 [2004] ECR I-10415 (*William Hill*) [29]-[34].
[29] *Football Dataco Ltd v Sportradar* [2013] EWCA Civ 27 [39] [43] [49]
[30] For details of this information set, see Oil and Gas Authority, 'Guidance on Reporting and Disclosure of Information and Samples' (February 2019) https://www.ogauthority.co.uk/media/5353/oga-guidance-on-reporting-disclosure-18-february-2019.pdf accessed 27 April 2020 ('OGA Guidance'), 18; see consideration in Waelde, 266-7
[31] OGA Guidance,15; even if this did include an element of subjective judgment *Football Dataco*, [65]-[68]
[32] Database Regulations, art 17 – 15 years but note that a substantial change in the database will create a new database with a new term
[33] Database Regulations, art 16.
[34] *William Hill* [54-[5]; *Directmedia Publishing GmbH v Albert Ludwigs-Universitat Freiburg* C-304/07 [2008] ECR I-7565 [36]-[40]; *Innoweb BV v Wegener ICT Media* C-202/12 [2014] Bus LR 308, [47]; *77M Ltd v Ordnance Survey Ltd* [2019] EWHC 3007 (Ch) (*77M*) [267]-[9], [277]-[8]
[35] Database Regulations, art 12(1); *William Hill* [45], [47-8]

entering into production sharing agreements with operators.[36] The UK system involves, in essence, the grant by a regulator of licences to carry out activities, over a block of territory for a period, after a formal competitive application process.[37] Indeed one reason for the new information sharing regimes will be seen to be to ensure that more information is available to assist future bidders, to avoid duplication of activity and to bring about the best matches of need and interest. The licensing regime for oil and gas in Canada differs in that it sits at federal, provincial, and territorial levels; it is similar, however, in that there is a system of licences conferring the entitlement to engage in activity for a period in respect of packages of territory.[38]

<b>The UK Move to Sharing

<c>The goal

A new regulatory and legislative regime came about in the UK in the light of the Wood Review, "Maximising Economic Recovery" of 2014[39]. A new regulator, the Oil and Gas Authority (OGA),[40] was created and the aim was to deliver the "principal objective" of "maximising economy recovery".[41] In particular, this is to come about through collaboration between holders of petroleum licences (and also operators under these licences),[42] and the development of strategies to enable the principal objective to be met.[43] New robust enforcement sanctions were to apply if petroleum-related obligations (including to act in accordance with strategies or enable the principal objective to be met) were not met.[44] Ultimately, this could lead to the removal of the licence.

Information sharing is a key part of the new regime. The Energy Act 2016 provided for secondary legislation (regulations) regarding the retention, and then disclosure to the OGA on request, of information relevant to the carrying out of the principal objective.[45] The new requirements are stated to be sanctionable under the processes discussed above.[46] Additional legislation was to be passed, after a consultation, regarding the circumstances in which this information could be further shared.[47] In determining the time periods after which this

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[36] Greg Gordon et al, 'The Wood Review and Maximising Economic Recovery upon the UKCS' in Greg Gordon et al *UK Oil and Gas Law: Current Practice and Emerging Trends: Resource Management and Regulatory Law* (3 ed, Edinburgh University Press, 2018) (Gordon) vol 1, chapter 4
[37] See for example, Oil and Gas Authority, 'Licensing Rounds' webpage https://www.ogauthority.co.uk/licensing-consents/licensing-rounds/ accessed 27 April 2020
[38]See Government of Canada, 'Northern petroleum resources' https://www.rcaanc-cirnac.gc.ca/eng/1100100036087/1538585604719; for Alberta, 'Oil sands regulation' webpage https://www.alberta.ca/oil-sands-acts-and-regulations.aspx; and for Nova Scotia, 'Oil and Gas Regulating Activities and forms' https://energy.novascotia.ca/oil-and-gas/onshore/regulating-activities-and-forms all accessed 27 April 2020
[39] Wood Review, 'UKCS Maximising Economic Recovery Review' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/471452/UKCS_Maximising_Recovery_Review_FINAL_72pp_locked.pdf accessed 27 April 2020
[40] Energy Act 2016 (EA), s1
[41] Petroleum Act 1998 (PA) (as amended), s9A(1)
[42] PA, s9A(1)(b)(i) and (ii)
[43] PA, s9A(2)
[44] EA, s42-7, and see Gordon, 133
[45] EA, ss27-8 and s34. This led to the Oil and Gas Authority (Offshore Petroleum) (Retention of Information and Samples) Regulations 2018 2018/514
[46] EA, s28(4) and s42(3)(c)
[47] EA, s66, and s66(3) regarding consultation

sharing is to come about, the Energy Act provides that regard is to be had to[48] the extent to which the period would allow “owners”[49] of the oil and gas information a reasonable period of time to satisfy the main purpose for which they got the information; the potential benefits to the petroleum industry of the information being published at a particular time; and the potential risk that the time period may discourage persons from acquiring or creating petroleum related information. In balancing these factors, regard is also to be had to the principal objective of maximising economic recovery.[50]

<c> The delivery

The resulting 2017 OGA consultation questions,[51] and the industry responses to them,[52] focussed on an appropriate time for value to have been gained, such that the confidential status of the relevant pieces of information could be brought to an end. The consultation stated that: “timely and transparent access to data has been repeatedly asked for by industry and the OGA consider that earlier transparent access to information and samples is likely to stimulate investment and lead to the discovery and development of an number of significant oil and gas fields and stimulate uplift in investment in the UKCS”.[53] The consultation also noted that more information- could enable “the development of new techniques, software tools and other intellectual property that will be highly exportable”.[54]

-Further, and also of interest given the points made above in the context of TRIPS and oil and gas, the consultation refers to the information involved as a “national asset”.[55] Yet the fact that elements of this national asset may themselves be the subject of IP rights is not considered. In the OGA response which followed, there was again a clear determination for the information to be made public in as short a time as possible. There was no engagement[56] with arguments which had been raised against this, however, including those which did refer to IP rights.[57]

The result was the Oil and Gas Authority (Offshore Petroleum) (Disclosure of Protected Material after Specified Period) Regulations 2018 (“Information Regulations”).[58] These provide that various pieces of information are to be shared - either immediately, after 2 years, after 5 years or after the expiration of the licence, with the period varying with the nature of

[48] EA, s66(5)
[49] The term used in EA, ss66(5)(a) and 66(2) – this contribution will not engage with the issue of whether or not this is the appropriate term.
[50] EA, s66(6)
[51]OGA, ‘Consultation on Proposed Regulations for the Retention and Disclosure of Information and Samples’ https://www.ogauthority.co.uk/media/3824/consultation-on-proposed-regulations-for-the-retention-and-disclosure-of-information-and-samples-ver2_29june.pdf accessed 28 April 2020 (OGA Consultation), see in particular paras 42-3, 127-33 and questions 28-30, 37-9
[52] OGA, ‘Responses to the Consultation on Proposed Regulations for the Retention and Disclosure of Information and Samples’ https://www.ogauthority.co.uk/media/4799/consultation-response-retention-and-disclosure-of-information-and-samples-ver6-24apr2018.pdf accessed 28 April 2020 (OGA Response to Consultation), see in particular responses to q 25, q 29
[53] OGA Consultation, 6, para 7
[54] OGA Consultation, 6, para 8
[55] OGA Consultation, 6, para 9
[56] OGA Response to Consultation “summary of ~~r~~esponses to questions” 25, 34, 37, 38, 50, 53, 54, 60, 61 and “OGA response” ~~responses~~ on 34, 40, 42-3, 50, 52-3, 58
[57] OGA Response (points made by others), 37, 38, 54 and referring to IP, 32, 39, 41, 49, 51, 52, 55, 56
[58] SI 2018/898 (Information Regulations)

the information.[59] These regulations make no relevant reference to the fact that information in itself, or in its structures, may be the subject of IP rights and that the publication of the information and the use of it by others could raise questions of infringement. There was also no discussion of these issues in the Parliamentary process of the Energy Act 2016[60] nor that regarding the Information Regulations.[61] The explanatory memorandum of the Information Regulations refers to industry engagement and support and the need for the disclosure to "enable timely and transparent access for industry to petroleum-related information and samples" – it does not refer to IP.[62]

<c> Some possible futures

This new regime raises the possibility of the entity which is the subject of the obligation to disclose oil and gas information, which is also the holder of a relevant IP right, refusing to share information with the OGA (through, since 2019, the National Data Repository ("NDR"). [63] This approach may appeal to the IP owner if they wished to prevent publication and use of the works which are the subject of the IP right. From the IP law perspective, the discussion so far suggests that the IP owner~~y~~ is entitled to do this. This course could, however, lead ultimately to the removal of oil and gas licence.[64] The availability of such a robust response to reliance on IP is unusual, save in respect of some exceptional cases under competition law.[65] Legislation from both oil and gas and from IP may provide, however, some other means of engaging with the other field and so avoiding this possible conflict and outcome. This will now be explored.

<a> OPPORTUNITIES AND PROSPECTS

<b> The discretion to share

The Energy Act provides that the OGA can choose to disclose the information to others; the OGA is not, however, obliged to do so.[66] This point was noted in the OGA consultation response[67] and is included in the OGA's Guidance, most recently from 2019, on "Reporting and Disclosure of Information Samples". One example provided in the Guidance is that this discretion might be exercised if the information is subject to a longer period of protection

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[59] Information Regulations, arts 5-15
[60] See Bill Stages – Energy Act https://services.parliament.uk/Bills/2015-16/energy/stages.html accessed 28 April 2020
[61] Hansard https://hansard.parliament.uk/lords/2018-07-19/debates/80D29B4C-D3E8-428C-9276-7EF2FFD250B4/OilAndGasAuthority(OffshorePetroleum)(DisclosureOfProtectedMaterialAfterSpecifiedPeriod)Regulations2018 accessed 28 April 2020
[62] See via http://www.legislation.gov.uk/uksi/2018/514/made paras 7, 8
[63] National Data Repository website https://ndr.ogauthority.co.uk/dp/controller/PLEASE_LOGIN_PAGE and see also OGA Data Centre Overview https://www.ogauthority.co.uk/data-centre/overview/, both accessed 28 April 2020
[64] EA, s28(4), ss42(1), (3)(a), (4)
[65] *IMS Health v NDC Health* C-418/01 [20040 ECR I-5039; *Microsoft v Commission of the European Communities* T-201/04 [2007] ECR II – 3601 – note also the potential for freedom of expression to prevail in rare cases noted in *Ashdown v Telegraph Newspapers* [2002] Ch 149 (*Ashdown*). See further consideration by the author in Abbe E. L. Brown, *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology* (Edward Elgar, 2012); see also note 5. ~~[cross ref Brown, Hestermayer note]~~
[66] EA, s66(1) provides a basis on which the sharing of information is not prohibited; see also Information Regulations, arts 5(2), 6(3), 7(3), 8(2), 9(3), 10(2), 11(2), 12(2), 13(2), 14(3), 15(3).
[67] OGA Response to Consultation, 30, 52

under an oil and gas arrangement.[68] This provides a base for IP owners to argue against disclosure based on their own period of protection.

<b> **Stretching the Safeguards**

Another possibility sits in the MER strategy[69] document.[70] The MER strategy sets out what it terms the “Central Obligation”, of persons taking steps necessary to ensure that the maximum value of economically recoverable petroleum is recovered from the strata beneath the relevant UK waters.[71] The MER strategy also has “safeguards”,[72] including that no obligation permits or requires conduct which is otherwise prohibited by or under any legislation.[73] It is argued here that this provision applies to information disclosure activity. The Energy Act provides that the retention and disclosure regimes created apply to activities relevant to the fulfilment of the principal objective[74], and the MER strategy’s Central Obligation refers to this. Further, general obligations are imposed on petroleum licence holders (and operators under the licences) to comply with the MER strategy when carrying out activities.[75]

The safeguarding provision has a list of legislation including competition, health and safety, and environmental protection, but it is stated to be non exhaustive and therefore can encompass IP legislation. The discretionary nature of the OGA disclosure noted above means that activity is not required, however the regulations do permit it. But would this activity be prohibited under IP law such that the safeguard provision would need to be relied on to avoid the conflict? The fact that there are no specific oil and gas related exceptions in respect of copyright and database rights suggests, as noted above, that the disclosure activity can infringe. The possibility remains, of course, of new exceptions being introduced, or for new statutory licensing regimes to be set up in respect of works which are the subject of copyright[76] or database rights.[77] Some more general possibilities mean that at present the oil and gas legislation would not always permit activities prohibited under IP law. These will now be discussed.

<b> **Some Possibilities for Database Rights**

The present database regime includes an exception for databases which are open to public inspection pursuant to a statutory requirement in respect of activities carried out by or with the authority of the appropriate person.[78] These cover firstly when in essence there is the

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[68]OGA Guidance, 8
[69] Department for Business, Energy and Industrial Strategy, ‘The Maximising Economic Recovery Strategy for the UK’ https://www.ogauthority.co.uk/media/3229/mer-uk-strategy.pdf accessed 27 April 2020 (MER Strategy). See also Gordon, chapter 5.
[70] Pursuant to PA, s9A(1), (2), (3), s9F, 9G
[71] MER Strategy, 8, section 7
[72] MER Strategy, 6
[73] MER Strategy, 7 section 2
[74] EA, s27(1)(a)
[75] PA, 9C(1) and (2)
[76] Pursuant to CDPA, s116
[77] Pursuant to Database Regulations, Sch 2
[78] Database Regulations, Sch 1 para 3

extraction of factual information, for a purpose which does not involve re-use;[79] and secondly when the database contains~~regarding~~ information about matters of general scientific, technical, commercial or economic interest, and extraction or re-utilisation is for the purpose of disseminating that information.[80]

The references to a statutory requirement, to factual information and to dissemination of information of scientific, technical, commercial or economic interest are relevant here regarding future activity by others. The NDR is open to anyone who registers[81] and the information is open to inspection pursuant to regulations. When these database exceptions were the subject of judicial consideration for the first time in the UK jurisdictions in 2019,[82] the court stressed that the relevant extraction involved access to the contents of the database, rather than the initial database which is the subject of the IP right.[83] This exception would then cover the NDR. The court also made it clear that the appropriate person who can authorise the activity was not the IP owner but the person required to make the database open to public inspection or to maintain the register. [84] Here, this would be the OGA.[85]

Interestingly, the court noted that these defences were to avoid frustration of the purpose of making information available[86] and that "the public as a whole, including commercial organisations as much as private persons, ought to be free to use that information at least to some extent".[87] The scope of the exceptions is, however, limited; so if one is seeking to prevent a conflict (or one is an IP owner) then the safeguarding provision is needed . Nonetheless, it will be interesting to see what use may be made of these database right possibilities in the future.

<b> Some Possibilities for Copyright

If copyright exists in respect of a set of information, arguments can be developed by both the OGA and by subsequent users for a new approach to the residual and non exhaustive public interest defence.[88] This can provide a defence to an infringement action,[89] such that there is no need for the safeguard provision. As noted at the start of this contribution in respect of the public interest approaches permitted by TRIPS, this argument would build upon the communal benefit which proponents of the oil and gas information disclosure regime argue would result. .

Another possibility is a new development~~s~~ in Crown copyright, such that the copyright owner was not the oil and gas company but the Crown. Looking again to Canada, in 2019 in *Keatley*

[79] Database Regulations, Sch 1 para 3 (1)
[80] Database Regulations, Sch 1 para 3 (3)
[81] Nic Grainger, 'Data repository deals with a number of needs' Energy Voice (9 May 2019) https://www.energyvoice.com/oilandgas/north-sea/198615/data-repository-deals-with-number-of-needs/ accessed 27 April 2020, para 6 'Everyone is invited'; and see Registered User Agreement https://ndr.ogauthority.co.uk/dp/pages/NDRDocuments/General_Information/NDR_TermsAndConditions.pdf in particular clauses 11, 14 accessed 27 April 2020
[82] *77M*
[83] *77M* [312]
[84] *77M* [312], see also Regulations Sch 1 para 3(4)
[85] Building on EA, s66
[86] *77M* [311]
[87] *77M* [311]
[88] CDPA, s171(3), see also consideration in *Ashdown.*
[89] Note that in *Ashdown* [58]-[59]; this could also be a base for a refusal to grant an injunction or a financial remedy [46]-[47]

Surveying v Teranet[90] the Supreme Court considered land surveys which were required to be deposited with the land register. The surveys were then digitised and made available through, broadly, a statutory scheme through private public partnership arrangement, by which members of the public could access the plans. The relevant Canadian legislation[91] provided that copyright would be owned by the Crown if work was "prepared or published by or under the direction or control of Her Majesty or any government department". The majority of the court found that this included the government determining how an exercise was to be done by influencing the process and the final version and that this test was met on the facts.[92] The court stressed, however, that "routine expropriation" by the Crown of the work of others should be avoided.[93]

The OGA information disclosure regime likely meets the definition of the statutory scheme on the Canadian model. At present, however, the UK oil and gas regime covers the retention and disclosure of information which already exists – it could not be said that the oil and gas regime, therefore, directs and controls the creation of the work. Further, the UK Crown Copyright provision is much narrower, covering work by "Her Majesty or an officer or servant of the Crown in the course of his duties".[94] It will be interesting to see if this area receives further attention in the UK to bring about wider access to the "national asset".

<b> Reflections on the Relationship

For now, in the UK, it seems that oil and gas and IP law are in fact existing largely in parallel. The MER strategy appears to not require disclosure and sharing of information if this would be inconsistent with the power of IP rights. Further, the registered user agreement of the NDR[95] provides that the OGA does not own IP rights in the information in the NDR and cannot authorise uses of it,[96] and that the OGA can terminate access to the NDR if there is conduct in breach of any law or harmful to the interests of a third party.[97] Indeed, the OGA user licence agreement under which the information is made available from the NDR makes clear that it does not affect copyright and database exceptions and does not cover rights of others over which the OGA is not authorised to grant rights.[98] This all appears to acknowledge the existence of IP rights in respect of the information and the possibility of a conflict, but to take no steps to address it. This means that the apparent victory of oil and gas over IP starts to fade – as does the gain for the oil and gas community (and at least arguably society) which was argued to be being brought about by wide information disclosure.

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[90] *Keatley Surveying v Teranet* 2019 SCC 43 (*Keatley*)

[91] Copyright Act 1985, s12

[92] *Keatley* [65] [69] - note also supporting judgments took a different approach, expressing concern about expropriation, and focussed rather on the purpose of the activity and who engaged in it [99][113] [127]-140]

[93] *Keatley* [43-5] [47] [54 (quote)]

[94] CDPA, s163(1)

[95] Via OGA site https://ndr.ogauthority.co.uk/dp/pages/NDRDocuments/General_Information/NDR_TermsAndConditions.pdf accessed 29 April 2020 (NDR Agreement)

[96] NDR Agreement, cl 17 see also cl 20, agreement does not affect fair dealing and copyright and database exceptions

[97] NDR Agreement, cl 26(a)(ii)

[98] Note these are two versions of this: one via https://www.ogauthority.co.uk/site-tools/access-to-information/ version headed June 2017 which provides that activities carried out using the information are to be for non commercial purposes, and a 2019 version linked to via https://data-ogauthority.opendata.arcgis.com which permits exploitation for commercial and non commercial purposes

It may be that there is no need for talk of victory or conflict, because no dispute will actually arise. The industry (or at least the operators) have engaged with the Wood Review and accepted the benefits for all which could arise from collaboration.[99] The consultation process saw significant support for the information sharing measures, with debate focussed in the main on the appropriate period. Key addressees of the disclosure obligations are holders of operator petroleum licences -, and if they also own relevant IP they may be comfortable to share information in the hope that they will obtain information from another operator, from which they will benefit in turn. It is noteworthy that discussion goes on regarding issues of this kind: in 2020 the NDR Advisory Committee considered how to monetise data and referred to a consultation on commercial seismic reporting.[100]

In summary, it may be that no IP owners choose to object to disclosure to the OGA or indeed to further use; if IP owners do indicate that they would object then there are means by which the information need not be disclosed or shared; and prospective future users may be nervous of engaging with material because of the contractual issues which could arise. But if information is shared via the NDR, there is use and the IP owner objects to either step, one clear possibility is for the IP owner to raise an IP infringement action. So far, no disputes have arisen in the UK. Yet lessons from, once again, Canada suggest this may not always be so. The next section will explore the landmark decision in *GSI v Encana* in some depth.

<a> THE HEART OF THE MATTER?

<b> The Meaning of Words in Oil and Gas Legislation

It is noteworthy that the activities discussed in *GSI v Encana* had been taking place alongside long standing pieces of legislation which required that information be disclosed to the regulators and that after certain period this would be published.[101] In the decision, the courts applied principles of statutory interpretation to engage with the key argument that information which was the subject of copyright should only be "exposed to view" by others, and that the oil and gas regulator could not authorise others to copy it and use it for their own commercial purposes.[102]

<b> The Goal of Oil and Gas Legislation

In so doing, the first instance decision reviewed the history of the oil and gas legislation and its predecessors regarding information disclosure and sharing,[103] and noted that this had been provoked by the oil crisis in the 1970s and by a need to bring about more efficiency in energy exploration.[104] It is interesting to note the similarities between this and the Wood Review and the following developments discussed above. Further, the first instance court's noted that 5 years had been chosen as the period after which there could be publication, as this

[99] Gordon 147, 148

[100] NDR Advisory Committee March 2020 Minutes https://www.ogauthority.co.uk/media/6424/ndr-advisory-committee-meeting-no7-authorised-minutes-actions.pdf accessed 29 April 2020, 2, 3

[101] Petroleum Resources Act 1985 (PRA), s101(7)

[102] *Geophysical Service Incorporated v Encana* (2017) ABCA 125 ("*GSI v Encana CA*")~~*GSI v Encana CA*~~ [8]

[103] *GSI v Encana First Instance* [145-212]

[104] *GSI v Encana First Instance* [150]

reflected an appropriate balance between the private desire of some to keep information secret forever and the public focussed desire to have it published immediately.[105]

<b> The Intersections with IP

In Canada, as in the UK, there had been no engagement with IP in developing the oil and gas legislation. The Canadian court did go on to note, however, that a balancing act between "commercialization of the information and the public interest in the wider dissemination of that information" was the same balance was as seen in the copyright legislation.[106] A court in the UK jurisdictions could choose to take the same view, and the same general balance was seen in the consultation process regarding the Information Regulations, as required by the Energy Act. Yet those challenging this argument could argue that the process was carried without engaging with the fact that this, or could be argued to be, the same balance which one sees in IP. The Canadian court also considered that the intention of sharing the data had been made clear to Parliament when the bill was introduced[107] and that the intention was that there were to be no restrictions on use after disclosure.[108] Again, this was also the position seen in the UK – however the fact that this could have implications for IP was not considered.

The Canadian court considered that "Parliament made the logical decision to deal with disclosure of material filed under the Regulatory Regime exhaustively through provisions contained within the Regime itself".[109] The court considered that when others used the information it was not the subject of copyright; and that, even if it was, then the oil and gas legislation created a compulsory licence regime after the end of the 5 year confidentiality period, in perpetuity, and that no compensation was to be payable to the copyright owner.[110] Further, the court concluded "[i]t is perhaps true that the provisions for submission have become more onerous over time and that the quality of the materials submitted have become better, further encroaching on GSI's ability to licence its data to others, but the provisions have always been there. Unfair as this may seem, it is not for this Court to re-write the legislation comprising the Regulatory Regime".[111]

The Court of Appeal of Alberta upheld this decision. It considered that it was "most compatible with common sense, [for]… there .. to be free and unfettered dissemination of acquired and retained data following the requisite privilege period to encourage national and international academic and entrepreneurial engagement" , and that "disclosure" must be interpreted as permitting copying and use.[112] The appeal court also considered that the oil and gas legislation was more specific and recent than the copyright legislation; so that if there was a conflict, the oil and gas legislation would prevail - and that the court was not aware of and would not endorse the view that legislators could not create an implied exception. This meant that the period of exclusivity ends after the confidentiality period and there was no infringement by the

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[105] *GSI v Encana First Instance* see in particular [171], [177]-[183]
[106] *GSI v Encana First Instance* [297] [298 quote]
[107] *GSI v Encana First Instance* [158]-[161]
[108] *GSI v Encana First Instance* [223] [235]-[6] [240]-[4]
[109] *GSI v Encana First Instance* [298]
[110] *GSI v Encana First Instance* [299]-[304] [317-23]
[111] *GSI v Encana First Instance* [322]
[112] *GSI v Encana CA* [100 - quote] [102]

regulators disclosing the data and allowing others to copy it.[113] The Supreme Court declined leave to appeal.[114]

<b> **Wider Implications and Risks**

On one view, this is a standard application of statutory interpretation to deliver a sensible, balanced result. The decision addresses the relationship between the fields, building on the decisions made by Parliament - and the court does not have the option of allowing the oil and gas and IP laws to continue to exist in parallel tracks. On another view, the decision is an unusual instance of a court reaching a clear decision which goes against the IP owner in an IP case, on the basis of a conflict with another field of law and its goals. As noted, it will be interesting to see what would happen in the UK. From the Canadian perspective, which view is to be preferred is likely be a key factor in a further litigation pathway which is being pursued. The national court decision was not the end of the road, notwithstanding the position taken by the Supreme Court. GSI reformed its dispute as an ISDS under the North American Free Trade Agreement (NAFTA) of 1994.[115]

<a> **A FURTHER ANGLE: INVESTOR STATE DISPUTE SETTLEMENT**

<b> **An Introduction to ISDS**

For this to be path to arise in a scenario, IP would need to be a protected asset in a relevant trade and investment agreement. This would need to between the state of the IP owner and the different state of the oil and gas regulator. It could not apply to a UK based owner of IP rights in the UK, who was concerned about a new UK regime. The agreement would also need to have an investor state dispute settlement process. If so, and the obligations of the IP owner as an investor are not met, then IP owners can raise an action directly against the state. This can lead to the payment of compensation. There is an efficiency and symmetry in this possibility: the fundamental dispute here can be framed as being not between the IP owner and the competitor (who is simply using the information as they have been encouraged to do by the regulator), but between the IP owner and the state which created the oil and gas regulatory regime.[116]

ISDS in itself has been the subject of significant controversy in that it enables companies to challenge the decisions which a state has made for its own governance and its prioritising of interests.[117]

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[113] *GSI v Encana CA* [103] [104]

[114] *GSI v Encana* SCC Case Information 37634 30 November 2017

[115] Note that although there is now a "new NAFTA" – the United States-Mexico-Canada Agreement 2019 which will came into force 1 July 2020 (USMCA) see text https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between accessed 16 May 2020), this dispute will continue under NAFTA 1994 (USMCA, Annex 14-5 art 5)

[116] See consideration in Brown, chapter 8; and Christophe Geiger, 'Regulatory and policy issues arising from intellectual property and investor-state dispute settlement in the EU: A closer look at the TTIP and CETA' in Christophe Geiger (ed.), *Research Handbook on Intellectual Property and Investment Law* (Edward Elgar Publishing, forthcoming 2020); Center for International Intellectual Property Studies Research Paper No. 2019-07 (Geiger)

[117] See consideration in Armand de Mestral, 'Investor-State Arbitration between Developed Democratic Countries' in Armand de Mestral (ed) *Second Thoughts: Investor State Arbitration between Developed*

There has also been criticism of the treating of IP as an investment asset ~~in itself~~: is it an investment, in the same manner as, say, building an oil pipeline is an investment?[118] There has ~~also~~ been concern~~fear~~ that engaging with IP in trade and investment agreements could lead to requirements that IP protection is conferred which goes beyond that required under TRIPS (say, with no exceptions to IP rights such as has been suggested above to reduce the risk of conflict).[119] There is also a fear that decisions will be reached in favour of the IP owner, even though there are examples of ISDS tribunals finding that innovative approaches to IP by national legislators (regarding plain packaging and tobacco)[120] or by courts (regarding interpretation of patent legislation)[121] are not in breach of obligations. Indeed, this~~e~~ view draws weight from instances of states reversing strategies on such issues, notwithstanding the tribunal outcome.[122] Here, this could lead to the UK being reluctant to include exceptions and clarifications in IP legislation, notwithstanding the policy benefits which have been argued in the MER process to arise from information sharing.

<b> Present Application

Regulation of oil and gas, IP and information and Canadian developments have once again, as noted, brought this conflict into life. The action was raised in 2018 by GSI against Canada.[123] The claim[124] pleads that Canada has breached its obligations under NAFTA to GSI in respect of copyright and also interestingly, regarding trade secrets [125] - both of which

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Democracies (MQUP Centre for International Governance Innovation, 2017). ISDS under the USMCA is much narrower in terms of application to Canada (art 14.4., Annex 14-6, 14-E) and also to IP (art 14.8.6, 14.10(b))

[118] Peter K Yu, 'The Investment- related Aspects of Intellectual Property Rights' (2017) 66(3) American University Law Review 829 879, 881, 883, 885–887, 893–895; Ruth Okediji, 'Is Intellectual Property "Investment"? Eli Lilly v Canada and the International Intellectual Property System' (2014) 35 University of Pennsylvania Journal of International Law 1121,1125–1127; Kathleen Liddell and Michael Waibel, 'Fair and Equitable Treatment and Judicial Patent Decisions' (2016) 19(1) Journal of International Economic Law 145 (Liddell/Waibel), 148 and 151.

[119] See consideration in Ernst-Ulrich Petersmann, 'Democratic Legitimacy of the CETA and TTIP Agreements?' and Carlos M Correa, 'Intellectual Property in the Trans-Pacific Partnership: Increasing the Barriers for the Access to Afford- able Medicines' in Thil Rensmann (ed) *Mega-Regional Trade Agreements* (Springer, 2017)

[120] *Philip Morris v Oriental Republic of Uruguay* ICSID Case no ARB/10/ 7 2016 https://www.italaw.com/cases/460 and *Philip Morris v Australia* (Aust/Hong Kong BIT, UNCITRAL) PCA https://www.italaw.com/cases/851 both accessed 30 April 2020; see consideration in Henning Grosse Ruse-Khan, 'Challenging Compliance with International Intellectual Property Norms in Investor-State Dispute Settlement' (2016) 19(1) Journal of International Economic Law 241
[121] *Canada v Eli Lilly* UNCT/14/2 ICSID https://www.italaw.com/cases/1625 accessed 30 April 2020 (*Eli Lilly*)
[122] 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, 481, 501, 513; Rochelle Dreyfuss and Susy Frankel, 'Reconceptualising ISDS: when is IP an investment and how much can states regulate it?' (2018) 21(2) Vanderbilt Journal of Entertainment & Technology Law 377, 378
[123] See https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta accessed 30 April 2020
[124] *Einarsson on behalf of GSI v Canada Notice of Intent to Submit a Claim* (10 October 2018) https://www.geophysicalservice.com/Uploads/NAFTA_Claim.pdf accessed 30 April 2020 (GSI ISDS), noted in Geiger at n56. See regarding compensation [142]-[3]
[125] GSI ISDS, [12]-[17] [26]-[36]

were covered investment assets.[126] This was on the basis of the oil and gas legislation[127] and the court decisions discussed here.[128] The obligations[129] involve minimum standards of treatment under international law (including fair and equitable treatment of assets);[130] transfer of technology or proprietary knowledge;[131] and expropriation (broadly, compulsory licensing) without compensation for the fair market value of the asset.[132]

Previous decisions in claims brought under NAFTA and in relation to IP suggest that the outcome in respect of the court decision could depend upon whether the ISDS tribunal considers that the court applied established principles of statutory interpretation or whether in drawing together the oil and gas regime alongside the copyright regime, it took an overly radical and inconsistent approach to IP rights.[133] It should be borne in mind, however, that decisions in one ISDS tribunal are not binding on another.

<b> Future Possibilities

If an analogous action were to be raised against the UK, an important issue may be that in the consultation process, the wider collection of pieces of information from across the oil and gas sector was seen as a "national asset". This is likely to be seized upon by those arguing that the information sharing system is an attack on covered investment assets. If the UK oil and gas regulatory community had had greater regard to IP rights and the landscape within which they exist – which must now, however controversial this may be considered to be, include ISDS – then a different approach might have been taken to creating the new oil and gas framework, and to managing future risks which may arise.

<A> CONCLUSIONS

This contribution has seen an intersection of three fields, each of which have significant power, enforcement regimes and are often the subject of criticism. It was seen that the oil and gas legislation and regulation in Canada and in the UK delivered clear frameworks for disclosure and use of information without engaging directly with the other legal regime (IP) with which the new oil and gas regimes may conflict. It was noted that solutions exist to remove or address the conflict – no relevant IP right, a finding of Crown copyright, a statutory scheme or defence, discretionary powers of regulators or statutory interpretation. Development of these has involved detailed legal analyses. Separate and deeper contributions could have been written on each of them.

Yet further pursuit of these practical and legally valid solutions would be an incomplete means of addressing the wider question of regime intersection. Taking a more direct engagement with the other area on the part of both IP and of oil and gas could have enabled a wider debate and consultation. New sets of licensing schemes and exceptions could have been introduced in each set of legislation to ensure that the goals of each can be delivered in a

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[126] GSI ISDS [25] referring to NAFTA, art 1139
[127] GSI ISDS [54[-[65]
[128] GSI ISDS [66]-83]
[129] GSI ISDS [47] [49(c)] [49(d)]
[130] NAFTA, art 1105; GSI ISDS [114]-[124] **[engage with Oke chapter in forthcoming ATRIP collection when available]**
[131] NAFTA, art 1106(1)(f); GSI ISDS [109]-[110]
[132] NAFTA, art 1110; GSI ISDS [125]-[131]
[133] *Eli Lilly* [307-379] (esp [325], [376]) and also [380-385], [416-418], [421], [426-430]; Liddell/Waibel 166-7, 169

balanced manner. There were indeed steps in this respect in the UK on the basis of confidentiality. The ISDS discussion is a reminder, however, that such an approach also could not have been considered to be complete. On this, it is useful to bear in mind arguments made in the context of developing new approaches to governance of artificial intelligence:[134] "a call to recognise the dynamics and composition of any regulatory governance system, even when introducing relatively minor changes, let alone seeking to design more radical approaches. … we suggest that whilst it is important that the overall regime for AI regulation is coherent, it does not need to, and indeed should not, operate in isolation from existing regulatory regimes…. There are also risks that if we leave it to existing regimes to respond then we will end up not with a coherent system but with patchwork regulation in which there are overlaps and underlaps, with conflicting goals and logics."[135]

This contribution has provided a new perspective for scholarship and policy action across all sectors in which responses to valuable societal challenges are sought to be brought about and through which the rights of others may be affected. Seeing other areas of law as a problem for someone else, or as irrelevant, or failing to explore them, should be avoided. Assuming that one can proceed because of the legal or policy justifications for one's own approach is unwise;. seeking rather to identify possible conflicts, and to address them creatively and holistically, is a valuable investment.

[134] Julia Black and Andrew Murray, 'Regulating AI and Machine Learning: Setting the Regulatory Agenda' 2019 10(3) European Journal of Law and Technology http://ejlt.org/article/view/722/978 accessed 30 April 2020 ((Black/Murray)

[135] Black/Murray, section 5