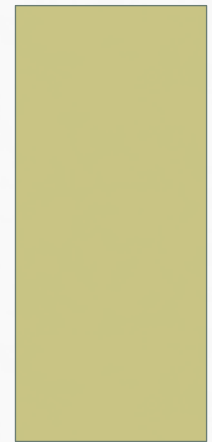


**THE EU'S CUMBERSOME INVESTMENT
LAW AND POLICY AND ITS EFFECTS ON IP
PROTECTION**

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OVERVIEW

1. The Source of All the 'Problems'
2. Post-Lisbon Issues Surrounding Investment
3. *Opinion 2/15* and mixity
4. C-284/16 *Slovakia v Achmea*
5. What effects on IP Protection?

THE SOURCE OF ALL THE 'PROBLEMS'

Pre-Lisbon

Art. 133(1) TEC

- Tariff and trade agreements
- Trade protective measures: anti-dumping + subsidies

Post-Lisbon

Art. 207(1) TFEU

- Tariff and trade agreements **goods + services**
- Trade protective measures: anti-dumping + subsidies + **FDI** + **commercial aspects of IP**

POST-LISBON ISSUES SURROUNDING INVESTMENT

Existence of old MS BITs
Override?
Reg. 1219/2012

Extra-EU BIT/FTAs
Who concludes them?
Opinion 2/15

ICS and MIC
Compatible with EU Law?
Opinion 1/17 (P)

Conclusion of new MS BITs
Exception from CCP exclusivity
Reg. 1219/2012

Correction of Opinion 2/15
Facultative mixity not 'dead'
C-600/14 OTIF

Intra-EU BITs
Compatible with EU Law?
C-284/16, Achmea

OPINION 2/15 - 'MIXITY'

No	Chapter	Advocate General	CJEU
1	Objectives and Definitions	Exclusive EU	Shared *
2	Market Access for Goods	Exclusive EU	Exclusive EU
3	Trade Remedies	Exclusive EU	Exclusive EU
4	Technical Barriers to Trade	Exclusive EU	Exclusive EU
5	Sanitary and Phytos. Measures	Exclusive EU	Exclusive EU
6	Customs and Trade Facilitation	Exclusive EU	Exclusive EU
7	Non-Tariff Barriers to Trade	Exclusive EU	Exclusive EU
8	Services, Establishment and Electronic Commerce	Exclusive EU except air, maritime, inland water ways transport (shared)	Exclusive EU
9	Investment - Includes IP rights!	Exclusive over FDI / ISDS except non-direct investment and ISDS related to it (shared) Termination of MS BIT excl. MS	Exclusive EU over FDI except Non-direct investment and ISDS (shared) Termination of MS BIT excl. EU if covered by exclusive EU comp.
10	Government Procurement	Exclusive EU except Procur. for trans. services (shared)	Exclusive EU
11	Intellectual Property	Exclusive except non-commercial aspects of IP rights (shared)	Exclusive EU
12	Competition and Related Matters	Exclusive EU	Exclusive EU
13	Trade and Sustainable Development	Some components shared while others exclusive	Exclusive EU
14	Transparency	Shared *	Shared *
15	DS Between the Parties	Shared *	Shared *
16	Mediation Mechanism	Shared *	Shared *
17	Institutional, Final Provisions	Shared *	Shared *

FTA

BIT

FTA

C-284/16 *SLOVAKIA V. ACHMEA*

- Investor-state tribunals 'such as' the one under NL-SK intra-EU BIT 'incompatible' with EU law!!

Opinion 2/13

- Autonomy of EU law
- Special features of EU law
- Mutual trust
- Removing cases from MS jurisdiction
- Art. 344 TFEU
- Art. 267 TFEU

WHAT EFFECTS ON IP PROTECTION (1)?

1. EFFECTS OF OP 2/15 ON THE CONCLUSION OF FT(I)As WITH IP PROTECTION

- IP Protection falls under EU Exclusive, External competences! (even non-commercial aspects)
- BIT 'split' from FTA: EU-Singapore, EU-Japan, EU-Australia will be two separate agreements
- IP chapter included in FTA → no mixity (in principal)
- IP rights as 'investment' + ISDS/ICS included in 'split' BIT → mixity (in principal)

WHAT EFFECTS ON IP PROTECTION (2)?

2. EFFECTS ON JUDICIAL PROTECTION OF IP RIGHTS

- IP rights constitute 'investment' → ISDS/ICS protection

However!

- The international judicial protection mechanism (ISDS/ICS) will *not* be found in the FTA, but the 'split' BITs → FTA leaves enforcement of IP chapter up to the parties.
- **Split BITs fall under shared competence** → potential problems with them coming into force, due to mixity
- ICS/ISDS might be incompatible with EU law (**Opinion 1/17**)

WHAT EFFECTS ON IP PROTECTION (3)?

- Intra-EU Member State BITs will need to be **terminated**: no protection of IP rights under them anymore

However

- **Extra-EU Member State BITs still in force**: protection of IP rights as 'investment' still possible

Compatible with EU Law?