The EU’s Cumbersome Investment Law and Policy and Its Effects on IP Protection

Dr. Szilárd Gáspár-Szilágyi
Pluricourts, Oslo

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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
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C-284/16 SLOVAKIA V. ACHMEA

- Investor-state tribunals ‘such as’ the one under NL-SK intra-EU BIT ‘incompatible’ with EU law!!
- Autonomy of EU law
- Special features of EU law
- Mutual trust
- Removing cases from MS jurisdiction
- Art. 344 TFEU
- Art. 267 TFEU

Opinion 2/13
1. EFFECTS OF OP 2/15 ON THE CONCLUSION OF FTAs 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 principle)**

- **IP rights as ‘investment’ + ISDS/ICS included in ‘split’ BIT → mixity (in principle)**
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?**