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EDITORIAL

The TTIP and Its Investment Protection: Will the EU Still Be Able to Regulate Intellectual Property?

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The Transatlantic Trade and Investment Partnership (TTIP) is a bilateral trade agreement that is currently being negotiated between the European Union and the United States. This agreement is giving rise to a number of concerns within public opinion in Europe, in particular because of the secret nature of the discussions, which inevitably induces speculation about the potential content of the draft text and the commitments undertaken by each side. These worries recall those expressed on the occasion of the negotiations for the Anti-Counterfeiting Trade Agreement (ACTA), which led to considerable mobilisation of public opinion in Europe and ultimately to the rejection of the agreement by a very large majority in the European Parliament in July 2012.[1] The TTIP, although it clearly has a much broader range of content than ACTA, likewise contains a chapter dedicated to intellectual property. Its principal characteristic, however, consists in the inclusion of intellectual property rights under the investments protected by a specific and different section of the agreement, the implementation of which would be the responsibility of arbitration

[1] *See* on this protest movement, C. Geiger, "Weakening Multilateralism in Intellectual Property Lawmaking: A European Perspective on ACTA", W.I.P.O.J. 2012, Vol. 3, Issue 2, p. 166.

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tribunals or a special jurisdiction for investment protection still to be created.[2] Hence, the crucial question arises whether a regulation of intellectual property by the European Union or one of its Member States, which would affect the scope of intellectual property rights held by private companies, could be considered as a potential infringement of their protected investments and accordingly lead to proceedings being lodged against the European Union or one of its Member States. If this were the case, it would considerably limit the future room to manoeuvre of the European institutions and their power to regulate in order to implement a balanced and effective legislative framework for intellectual property,[3] at a time when the creation of an efficient ecosystem for innovation is more than urgently needed in the European Union.

Admittedly, it is not easy to put forth a comprehensive assessment of the agreement, given that the different versions of the negotiated draft have not been made public. This is a huge contrast to plurilateral treaties like ACTA, where the text was published beforehand as the result of pressure brought by the European Parliament on the European Commission, which made it possible for the draft agreement to be subject to a detailed and serious doctrinal analysis.[4] In the case of the TTIP, the precise wording of the provisions is not available and it is therefore necessary to rely on the different texts communicated by the Commission, i.e. in general the proposals submitted by the European Union within the framework of the negotiations, as well as EU position papers or the different notes drawn up by the Commission for pedagogic purposes in order to reassure the public at large.[5] In summary, what is officially available is a "wish-list" of the European Union and it

[2] On 15 September 2015, the European Commission proposed a new Investment Court System for TTIP and other EU trade and investment negotiations and started to work in parallel, together with other countries, on setting up a permanent International Investment Court, with the objective that over time this multilateral Court would replace all investment dispute resolution mechanisms provided in EU agreements. For a background reflection, *see* the European Commission's Concept paper, "Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court", 5 May 2015 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[3] On this problem *see* R.C. Dreyfuss and S. Frankel, "Reconceptualizing ISDS: When is IP an Investment and How Much Can States Regulate It?", Vanderbilt Journal for Ent. & Tech. L. 2018 (forthcoming).

[4] *See e.g.* R. D'Erme, C. Geiger, H. Grosse Ruse-Khan, C. Heinze, T. Jaeger, R. Matulionyte and A. Metzger, "The Impact of the Anti-Counterfeiting Trade Agreement on the Legal Framework for IP Enforcement in the European Union", in: C. Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, Cheltenham, UK/Northampton, MA: Edward Elgar, 2013, p. 394; C. Geiger, "Assessing the Implications of the Anti-Counterfeiting Trade Agreement for the European Union: Legitimate Aim but Wrong Means", in: P. Roffe and X. Seuba (eds.), *The ACTA and The Plurilateral Enforcement Agenda: Genesis and Aftermath,* Cambridge: Cambridge University Press, 2014, p. 313.

[5] *See e.g.* the document prepared by the Directorate-General for Trade of the European Commission, *The Transatlantic Trade and Investment Partnership (TTIP), towards an EU–US trade deal: an overview and chapter-by-chapter guide in plain English*, Luxembourg, Publication office of the EU, Feb. 2016, p; 45 sq.: https://publications.europa.eu/en/publication-detail/-/publication/8a6df498-d3ae-11e5-a4b5-01aa75ed71a1/language-en. The other public documents are available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230.

remains unknown what the US negotiators think of these proposals or what counterparts will be demanded in return.

On the basis of these documents, it must be noted that the space occupied by the provisions concerning the harmonisation of intellectual property rights is relatively modest, since of the four sections of the chapter dedicated to intellectual property, only one contains a certain number of binding commitments in two identified domains: geographical indications – an area where the concepts and rules applicable in the EU and in the US differ considerably, and a limited number of specific aspects in the field of copyright.[6] The three other sections list the international agreements to which the European Union and the United States are parties, recall several major basic principles emphasising the importance of intellectual property rights in the field of innovation, growth and employment, and lay down objectives in the field of cooperation, specifically with respect to technical assistance to third countries on the question of intellectual property enforcement. Hence, much ado about nothing?

In fact, the worries do not derive from the TTIP section on intellectual property strictly speaking, but from another chapter of the agreement concerning investment protection.[7] The agreement proposes indeed a very elaborate framework to protect investments, the enforcement of which is entrusted to a dispute settlement mechanism between States and investors through international arbitration (referred to as the "Investor-State Dispute Settlement", in short "ISDS"[8]). And among the definition of the investments protected by the agreement, intellectual property rights are specifically included.

The protection of investments is becoming more and more frequent in free trade agreements. Initially, their aim was above all to prevent enterprises – mostly transnational corporations – that invest in a country's infrastructure (by constructing a factory, for example) from being subsequently expropriated, specifically by means of nationalisation. Gradually, however, intangible assets have also been included in the list of investments protected by these agreements, without it being really clear what would be the relationship between the protection of intellectual property according to the international intellectual property rules and the protection of intellectual property according to international investments agreements, which have their own logic as well as their own mechanisms for settling disputes (most of the

[6] These are at least the areas systematically mentioned in the documents made available by the European Commission. Some negotiation documents list also custom enforcement of IP as one area of discussion: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153672.pdf.

[7] The exact content of this chapter again is not available. *See* the internal EU document, for which is specified that it is *not* a formal proposal http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[8] A recent decision of the CJEU, however, cast doubts about the legality of the ISDS mechanism foreseen in the TTIP Agreement with regard to EU law. In its judgment in case C-284/16, *Slowakische Republik v. Achmea BV*, the CJEU ruled that the arbitration clause regarding the protection of investments in a bilateral investment treaty (BIT) concluded between the Netherlands and Slovakia in 1991 was incompatible with EU law, as the ISDS mechanism to settle disputes within the framework of the agreement "[was] not capable of ensuring that those disputes [would] be decided by a court within the judicial system of the EU, only such a court being able to ensure the full effectiveness of EU law".

time by international arbitration).[9] If the question was long considered relatively theoretical, towards 2010, litigation began to be brought before international arbitration tribunals, specifically in a number of well-publicised cases in the field of trademarks and patents.[10] In all these cases, a multinational company brought an action before an international arbitration tribunal, claiming that legislation or a judicial decision which impacted on the scope of the intellectual property rights in a State that was a party to an investment protection agreement, constituted an infringement of its protected investments, irrespective of the fact that the regulation was adopted for reasons of public health or for the common interest.[11]

There has to date not been any decision or case in the field of copyright. Accordingly, at present, it is thus only possible to extrapolate and imagine what might be the areas of friction with investment protection. For instance, it is well known that the copyright systems of the United States and the European Union and many of its Member States differ considerably. For instance, it will be recalled that the protection of moral rights is practically non-existent in the United States and that it was in France where the heirs of American director John Huston prevailed before the French Supreme Court by using the right of integrity of his work to prevent the colourisation of his black and white movie "Asphalt Jungle". Will the Hollywood studios in the future in such a situation be able to bring an action before the arbitration tribunals on the grounds that their investment in the film has been endangered? Another area of friction could be the ownership of the work: As we know, copyright often vests ab initio in the investor or the employer in the United States because of the "work-made-for-hire" doctrine, while in Europe the creator in most cases remains the holder of the rights to his creation, independently of his employment situation. Could this situation in the future give rise to litigation because of the negative effect on the investments made? And will the European Union in the future be able to introduce specific contractual protections for creators (a so-called "EU copyright contract law"), such as already in place in many Member States embracing the continental copyright tradition? And finally what, for instance, would happen to the creation of new copyright exceptions and limitations to the benefit of libraries, educational establishments and archives or for the digitisation of out-of-commerce works, or other exceptions currently under

[9] For a discussion *see e.g.* H. Grosse Ruse–Khan, "Investment Law and Intellectual Property Rights", in: M. Bungenberg et al. (eds), *International Investment Law*, *A Handbook,* Baden-Baden, C.H. Beck/Hart/Nomos, 2015, p. 1741; C. Correa and J.E. Viñuales, "Intellectual Property Rights as Protected Investments: How Open are the Gates?", Journal of International Economic Law, 2016, Vol. 19, Issue 1, p. 91.

[10] *See e.g.* ICSID*, Philip Morris Brands SARL, Philip Morris Products SA and ABAL Hermanos SA v. Oriental Republic of Uruguay*, No. ARB/10/7, 8 July 2016, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/7; *Philip Morris Asia Limited v. the Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, https://www.pcacases.com/web/sendAttach/1711; ICSID, *Eli Lyly and company v. Canada*, No. UNCT/14/2, 16 March 2017, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf.

[11] *See* on this issue D. Gervais, "Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v Canada", Vanderbilt Law Research Paper 17-59; UC Irvine Law Review 2018 (forthcoming), examining how broader public policy objectives – in particular the protection of human rights – can and should be taken into consideration in the investment/ISDS context.

discussion within the framework of the proposed current copyright reform in the digital single market? Will these provisions be regarded as "expropriations" in the sense of the investment protection mechanisms of the TTIP?

Many questions arise, and will probably remain unresolved as long as intellectual property is included in the list of the investments protected by the TTIP as well as other bilateral trade agreements. It is thus more than urgent to engage in an open and transparent debate on the appropriateness of such an inclusion and more widely on the problematic relationship between intellectual property and investment protection.[12] It has to be recalled that intellectual property *does not* protect investments as such, but only those which lead to a creation, thus resulting is an added creative value to what already exists and hence an added value for society.[13] There are even some investments that can have very negative social consequences; the recent financial crisis has made this abundantly clear. The European Union should thus be very cautious before embracing a new logic that might significantly reduce its regulatory powers in the future.[14]

[12] For a critical discussion *see also* R.L. Okediji, "Is Intellectual Property 'Investment'? Eli Lilly v. Canada and the International Intellectual Property System", 35 University of Pennsylvania Journal of Int'l L. 2014, p. 1121.

[13] *See* more detailed C. Geiger, "The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP law", in: G.B. Dinwoodie (ed.), *Intellectual Property Law: Methods and Perspectives*, Cheltenham, UK/Northampton, MA, Edward Elgar, 2014, p. 153.

[14] While it is true that Chapter II of the internal EU document on investment protection seems to anticipate such criticisms by stating in its Art. 2(1) that "the provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity", it seems unlikely that this provision could make it as such in the final text of the Agreement. Moreover, some of these terms are rather vague and their implications for IP are uncertain. For example, what safeguards would "the protection of cultural diversity" really offer in the field of copyright law? The implementation of new exceptions and limitations at EU level would hardly qualify as a measure to protect cultural diversity. Finally, similar provisions in other bilateral or plurilateral trade agreements have not hindered disputes between investors and States in the past when legislators or courts have taken measures that affected the contours of IP rights.