

Enforcing Intellectual Property via Trade and investment agreements 通过贸易与投资协议执行知识产权

A closer look at the Transatlantic Trade and Investment Partnership (TTIP) and the
Comprehensive Economic and Trade Agreement (CETA)

近看跨大西洋贸易与投资伙伴协议 (TTIP) 和综合性经济贸易协议 (CETA)

Fourth EU-China IP Academic Forum in the context of EUCIPAN

欧盟-中国知识产权学术网络(EUCIPAN)背景下的第四届欧盟-中国知识产权学术论坛

Organized by IP Key/ EUIPO

组织方: IP Key/欧盟知识产权局

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Many policy documents underline the economic importance of IP for the EU in the context of the 4th industrial revolution.

许多政策文件强调第四次工业革命背景下知识产权对欧盟经济的重要性。

- As a EPO/EUIPO study demonstrated, IPR-intensive industries generated **45% of the total economic activity** (worth 6,6 trillion euros) and 29,2 % of all employment in the EU (63 million jobs)
- 欧洲专利局/欧盟知识产权局开展的一项研究表明，在欧盟，知识产权密集型行业的产出占**经济活动总量的45%**（价值6.6万亿欧元），提供了29.2%的就业机会（6300万个工作岗位）。

(EPO/EUIPO, *Intellectual property rights intensive industries and economic performance in the European Union*, Industry-Level Analysis Report, 3rd ed., September 2019)

（欧洲专利局/欧盟知识产权局，*欧盟的知识产权密集型行业以及经济表现*，《行业级分析报告》（第3版），2019年9月）

“**Digital innovation**, driven by the combination of Big Data, Cloud Computing, Mobile technologies and Social media, **is one the most powerful drivers of change and the best opportunity for Europe to move back to a growth path** (...), and is therefore a powerful value generator and constitutes a real benefit for Europe's economy as a whole”.

“大数据、云计算、移动技术和社交媒体组合驱动的数字创新是欧洲重回增长轨道的最强大变革推动力和最佳机会.....也是一台有力的价值引擎，能为欧洲经济整体带来真正的效益。”

(European Commission, *The European Data Market Study: Final Report* (Brussels, European Commission, Feb. 2017), Executive Summary, p. 5).

（欧委会，《欧洲数字市场研究：最终报告》（布鲁塞尔，欧委会，2017年2月）），执行总结，第5页）



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- **But it is not only about economy 但是它不仅涉及经济**

According to the European Commission 欧委会指出,

“Innovation [...] is indispensable to address the big challenges that humankind is facing in the 21st century: ensuring food security, containing climate change, dealing with demographic change and improving citizens' health. It also has an essential role to play in the quality of daily life by fostering cultural diversity.”

“创新[...]是解决人类在21世纪面临的重大挑战——确保食品安全、抑制气候变化、应对人口变化、改善公众健康——所不可或缺的；通过促进文化多样性，创新在提高日常生活质量方面也发挥关键作用。”

(Communication from the Commission, “A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe”, Brussels, 24 May 2011, COM (2011) 287 final, p. 3

(欧委会通信, 《知识产权的单一市场——促进创意与创新, 为欧洲提供经济增长、高品质工作和一流产品与服务》, 布鲁塞尔, 2011年5月24日, (2011) 287号通信最终稿, 第3页)

Thus, it is crucial for the EU to be able to regulate IP to create the most attractive framework for economic players but **also a balanced system taking into account ethical values to be accepted by its citizens**
因此, 规范知识产权保护, 为经济主体创造最优营商环境, 对欧盟而言至关重要; **同样重要的, 是根据社会认可的道德价值, 建立一套平衡的体系。**

However, the EU or its Member States might in the future **be very limited in their possibilities of action!**
Also international harmonization of IP endangered since States have already committed to certain standards bilaterally

然而, 欧盟或其成员国未来可能**采取的行动非常有限!** 而且, 由于成员国已经承诺履行特定双边标准, 知识产权的国际协调工作亦会被危及。



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The Reason: Bilateral Trade and Investment Agreements (such as the planed TTIP, CETA and many others)!

原因：双边贸易和投资协议（比如所计划的TTIP、CETA以及许多其他协议）！

- The Transatlantic Trade and Investment Partnership (TTIP): proposed trade agreement between the European Union and the United States.
- 跨大西洋贸易与投资伙伴协议(TTIP)：欧盟与美国之间拟议的贸易协议
- negotiations started in 2013; seems to have been put –temporarily?- on hold since the 2016 United States presidential election; **but not officially frozen or abandoned**
- 谈判始于2013年；似因美国2016年大选而（暂时？）停滞；**但并未正式冻结或放弃**
- Since 2017, there have been expressions of willingness form the administrations on both sides to resume the negotiations
- 自2017年开始，双方均表达了恢复谈判的意愿。
- On 15 April 2019, the EU Council gave a new mandate to the European Commission to negotiate a Bilateral Trade Agreement with the US (also January 2019: Resolution of the Committee on International Trade of the European Parliament)
- 2019年4月15日，欧盟理事会向欧盟委员会发出与美国进行双边贸易协议谈判的新授权令（另参见同年1月欧委会关于欧洲议会国际贸易的决议）



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- Echo's another bilateral trade agreement between the European Union and Canada, **the Comprehensive Economic and Trade Agreement (CETA)**
- 与欧盟和加拿大之间的另一份双边贸易协议——**综合性经济贸易协议(CETA)**——相呼应
- Signed on 30 October 2016
- 2016年10月30日签署
- European Parliament approved on 15 February 2017
- 2017年2月15日经欧洲议会批准
- 90% of the Agreement in force on 21 September 2017 (the remaining 10% relating to the ISDS mechanism needs to be ratified by the 28 Member States as it is a shared competence with the EU).
- 2017年9月21日该协议90%生效 (剩下10%与投资者和国家间争端解决机制(ISDS)相关, 涉及成员国与欧盟共享权职, 需经过28个成员国分别批准)
- Request by the Kingdom of Belgium for an Opinion of the Court of Justice on the compatibility with EU law on 7 Septembre 2017
- 2017年9月7日, 比利时王国要求欧盟法院就ISDS机制与欧盟法律的兼容性出具意见
- Opinion 1/17 of 30 April 2019: the ISDS mechanism implemented in CETA was compatible with EU law, (*CETA Investment Court*) [2019] ECLI:EU:C:2019:341.
- 2019年4月30日第1/17号意见: CETA协议中实施的ISDS机制与欧盟法律兼容 (CETA投资法院) [2019] ECLI:EU:C:2019:341



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- Secret nature of the discussions of these agreements: induces speculation about the potential content of the draft text and the commitments to be undertaken by each side.
- 协议商讨的保密性质：包括对协议草稿文本的可能内容以及各方会做出哪些承诺的推测
- Recalls the negotiations for the **Anti-Counterfeiting Trade Agreement (ACTA)**, which led to the rejection of the agreement by a significant majority in the European Parliament in July 2012
- 让人想起关于**反假冒贸易协议(ACTA)**的谈判，2012年7月，欧洲议会以显著多数的反对票驳回该协议
- At the difference from ACTA, the different versions of the negotiated draft have not been made public.
- 针对反假冒贸易协议的分歧，谈判过程中的各草案版本都未公之于众
- Assessment relies on the different texts communicated by the Commission, *i.e.*, the proposals submitted by the EU within the framework of the negotiations, EU position papers, and the different notes drawn up by the Commission for pedagogical purposes, used to reassure the public at large
- 外界的评估主要依赖于欧委会传达的不同文本，即欧盟在谈判框架内提交的各项建议书、欧盟立场文件、以及欧委会为指导目的而撰写的备忘录；在很大程度，这些文本用于稳定民心



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- Content of the IP chapter uncertain due to the secrecy of the negotiations
- 由于谈判的保密性，知识产权一章的内容不确定
- The harmonisation of intellectual property rights is relatively modest, since out of the four sections of the chapter dedicated to intellectual property, only one contains a certain number of binding commitments.
- 知识产权的协调相对适度，因为知识产权一章的四节内容，只有一节包含特定数量的约束性承诺
- The three other sections: - list the international agreements to which the European Union and the United States are parties
- 其他三节：列出了欧盟与美国分别作为缔约方的国际协议
- recall several major basic principles emphasising the importance of intellectual property rights in the field of innovation, growth and employment-
- 回顾了几项主要基本原则，强调了知识产权在创新、增长与就业领域的重要性
- lay down objectives in the field of cooperation, specifically with respect to technical assistance to third countries on the question of intellectual property enforcement.
- 制定了合作领域的目标，特别是就知识产权执法问题向第三国提供技术援助方面



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Known content of the IP provisions 知识产权条款的已知内容:

- ‘Wish-list’ of the European Union: 欧盟的 “愿望清单”
 - Limited number of specific aspects in the field of copyright law
 - 在著作权法具体层面的内容数量有限
 - Remuneration rights for broadcasting and communication to the public (public performance) for performers and producers in phonograms
 - 录音制品中的表演者和制作者向公众（公开表演）提供广播和传播服务所享有的报酬权
 - Full right of communication to the public for authors in bars, restaurant and shops
 - 作者在酒吧、餐厅和商店向公众传播的充分权利
 - A resale right (droit de suite) for creators of original work of art
 - 原创艺术作品创作者的转售权（追续权）
- Geographical Indications
- 地理标识
- Custom enforcement of IP? (only some negotiation documents)
- 知识产权的海关执法？（仅部分谈判文件涉及）



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More interestingly (and troublesome!): 更有趣 (同样也麻烦) 的是:

Chapter II Investment 第二章 投资

For purposes of this Title: 为施行本篇之目的:

[...]

*'investment' means every kind of asset which has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. **Forms that an investment may take include:***

*‘投资’指的是具有投资特征的各类资产，这些特征包括特定持续期和其他方面，如资本承诺或其他资源承诺、预计收益或利润、风险承担等。 **投资形式可包括:***

[...]

g) Intellectual property rights

g) 知识产权

Mirrors Chap. 8, Art. 8.1 CETA

Mirrors 《综合性经济贸易协议》第8章第8.1条

Source: The European Union's proposal for Investment Protection and Resolution of Investment Disputes

信源：欧盟的投资保护与投资争端解决建议：

http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf



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The enforcement of the investment protection is entrusted to international arbitration tribunals:
投资保护的执行委托国际仲裁庭：

- Investor-State Dispute Settlement
- 投资者与国家间争端解决机制
- Or special jurisdiction - New Investment Court to be created (ICS, as foreseen for example in CETA, Chapter 8, Section F: “Resolution of investment disputes between investors and states”)
- 或特别司法管辖区——待成立的新投资法院（可预见会成立，依据包括在CETA协议第8章第F节中提到的：“要解决投资者与国家间的投资争端”）

See 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

见欧委会概念文件：*“TTIP与其他协议中的投资——改革路径，加强监管权利并从当前的临时仲裁安排转向投资法院”* 2015年5月5日

=> Which implications for IP rightholders? 对知识产权权利人意味着什么？



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- I. The Conceptualization of the Relation Between IPRs and Investment within BITs (on the example of the TTIP)
双边投资协定 (以TTIP为例) 背景下知识产权与投资之间关系的概念化
- II. The Adjudication of IPRs before the Arbitral Investment Court
由仲裁投资法院裁决知识产权争端

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I. The Conceptualization of the Relation Between IPRs and Investment within the TTIP

TTIP背景下知识产权与投资之间关系的概念化

- Trade and investment agreements increasingly include provisions on intellectual property
- 贸易与投资协议越来越多地包含知识产权条款
- Interaction did not catch much attention until recent arbitration cases raised concerns with regards to the protection of intellectual property as investment
- 这两者的交集之前并未引起太多注意，直到近期的仲裁案件，人们才开始关注将知识产权作为投资进行保护这一课题
- Is the practice legitimate?
- 这种做法是否合法?
- What are the interactions with other bodies of law such as WTO law or Human rights law ?
- 与其他法律（比如世贸组织法或人权法）之间存在哪些交集?



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I. The Conceptualization of the Relation Between IPRs and Investment within the TTIP TTIP背景下知识产权与投资之间关系的概念化

- The integration of IP in IIAs (Bilateral Investment treaties (BITs) and Preferential Trade and Investment Agreements (PTIAs)) is not a new phenomenon.
- 将知识产权纳入双边投资协定(BIT)和优惠贸易投资协议(PTIA)并非一种新现象。
- From the German Pakistan BIT 1959 to the CETA or TTIP: what are the trends?
- 从1959年的德国 - 巴基斯坦双边投资协议到CETA或TTIP: 有什么趋势?
- Different ways including IP in investment agreements have been used, whether explicitly or implicitly, by referring generally to “any kind of assets” or “intangible property”, or directly to “intellectual property”.
- 知识产权纳入投资协议的方式存在不同: 明示或暗示、笼统称为“任何类型资产”或“无形资产”, 或者直接称为“知识产权”。

“In 2016, 37 new International Investments Agreements (IIA) were concluded, bringing the total number of treaties to 3324; in 2018, countries signed 40 IIAs with a total of 2658 in force

“2016年签订了37份新的国际投资协议, 协议总数增加至3324份; 2018年, 各国签署了40份国际投资协议, 有效协议总数为2658份。

UNCTAD, World Investment Report 2017 and 2019
联合国贸易和发展会议, 2017和2019年世界投资报告

+37
in 2016
Total IIAs
3,324

C. Correa and JE. Viñuales, ‘Intellectual Property Rights as Protected Investments: How Open are the Gates?’ (2016) 19 Journal of International Economic Law 91, p. 93

C. Correa, JE. Viñuales “将知识产权作为投资进行保护: 开放力度有多大?” (2016) 19《国际经济法期刊》91, 第93页



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TTIP背景下知识产权与投资之间关系的概念化

- The rationale for granting and protecting intellectual property rights is being undermined in the framework of investment law.
- 在当前的投资法框架下，授予和保护知识产权的依据遭到削弱。
- Recent cases have demonstrated the tension between the protection of investments and the necessity to protect higher public interest concerns.
- 近期的案例揭示，保护投资与保护更高公众利益关切之必要性之间，存在一定的分歧
- **How to safeguard of the social function of IP** in the context of investment arbitration cases adjudicating IP disputes?
- **如何在裁决知识产权争端的投资仲裁案件中，保障知识产权的社会性功能？**
- BTA and BITs might restrict the possibilities to regulate IP in order to preserve a fair balance of interest and societal interests?
- **为了在相关方利益和社会利益之间维持公平、平衡，需考虑双边贸易 / 投资协议是否会限制规范知识产权保护的可能性。**

“The social function is inherent to any legal rule. It allows for the rights of individuals to be weighed against competing rights”

“社会性功能是任何法律规定固有的性质。它使个体权利与竞争权利之间能够相互权衡。”

Christophe 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, 2013, pp. 153-176

Christophe Geiger, “知识产权的社会性功能，或道德观如何影响知识产权法律的形成和使用”，收录于G.B. Dinwoodie (编辑) 编撰的《知识产权法：方法与视角》，英国切尔滕纳姆镇 / 马萨诸塞州北安普顿镇，爱德华·埃尔加出版社，2013年，第153~175页。



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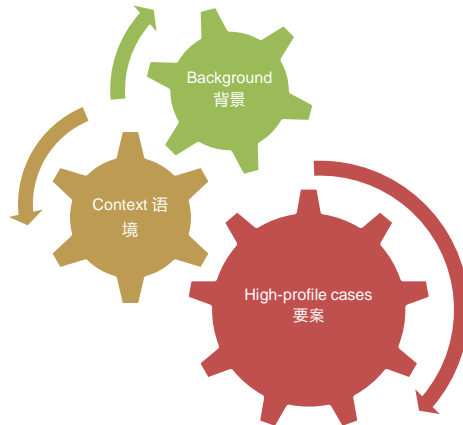
Enforcing Intellectual Property via Trade and investment agreements

通过贸易与投资协议执行知识产权

A closer look at the TTIP and CETA

近看跨大西洋贸易与投资伙伴协议 (TTIP) 和综合性经济贸易协议 (CETA)

I. The Conceptualization of the Relation Between IPRs and Investment within the TTIP TTIP背景下知识产权与投资之间关系的概念化



- When IP is covered in the definition of investment, does it also cover non-economic aspects of IP ?
- 当投资的定义涵盖知识产权时，是否也涵盖知识产权的非经济层面？
- Should IP be considered an investment and what are the implications of such qualifications? The rationales of the IP regime must here be taken into account.
- 是否应将知识产权视为投资，其影响几何？在此，必须考虑知识产权制度的依据。
- The legitimacy of protecting **IP as an investment** has been put into question.
- 将**知识产权作为投资**进行保护的合法性已经受到质疑。

H. Grosse Ruse-Khan, 'Challenging Compliance with International Intellectual Property Norms in Investor-state Dispute Settlement' (2016) 19 Journal of International Economic Law 241

H. Grosse Ruse-Khan, “在投资者与国家间争端解决中对国际知识产权惯例的挑战” (2016) 19《国际经济法期刊》241



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立法机构
LEGISLATOR

- When theory is put into practice: the actual adjudication of IP disputes in ISDS.
- 理论付诸实践: ISDS机制下对知识产权争端的实际裁决
- Philip Morris: challenging public health regulations in private arbitration (*Philip Morris v Uruguay* ICSID Case No ARB/10/7, Award, July 8, 2016 & *Philip Morris Asia v Australia* PCA Case No 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015)
- 菲利普·莫里斯: 在私下仲裁中挑战公共卫生条例 (菲利普·莫里斯诉乌拉圭案, 国际投资争端解决中心案件号ARB/10/7, 2016年7月8日判决; 菲利普·莫里斯亚洲公司诉澳大利亚案, 海牙常设仲裁法案件号2012-12, 2015年12月17日作出符合管辖权与可受理性裁决)

法院
COURTS

- Eli Lilly: seeking compensation after domestic court's interpretation of the utility doctrine (*Eli Lilly v Canada* ICSID Case No UNCT/14/2, Final Award, March 16, 2017)
- 礼来: 在国内法院对实用性原则作出解释后寻求赔偿 (礼来诉加拿大案, 国际投资争端解决中心案件号UNCT/14/2, 2017年3月16日终判)
- The TRIPS agreement entails flexibilities to allow regulations in the public interest: does ISDS constitute a threat?
- 《知识产权协定》要求一定的灵活性, 允许对公众利益做出规定: ISDS机制是否对此构成一种威胁?

“The suits fundamentally challenge TRIPS flexibilities at the very time the Declaration on Patent Protection and Regulatory Sovereignty under TRIPS, as well as the UN High Level Panel Report seek to encourage countries to utilize them”

“就在依据TRIPS协议拟定的《专利保护宣言》和《联合国高级别小组报告》试图鼓励各国运用灵活性原则时, 这些诉讼案从根本上挑战了TRIPS协议的灵活性。”

Cynthia M. Ho, 'A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings' 6 UC Irvine Law Review 74 (2016)
Cynthia M. Ho “知识产权协定灵活性与投资者和国家间程序之间的碰撞轨迹”, 6《加利福尼亚大学欧文分校法律评论》74 (2016)



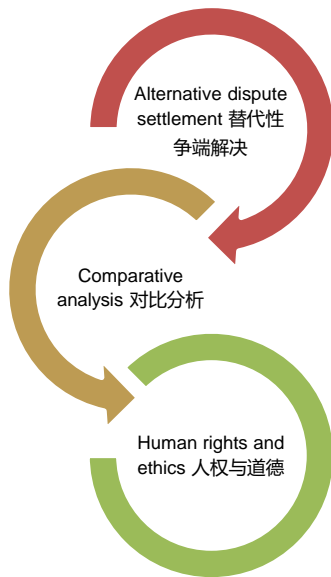
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- Forum shopping: domestic regulations are not only challenged in arbitral tribunal, but also inter alia in the WTO State-to-State dispute settlement.
- 选择对己方有利的法院: 国内规定不仅在仲裁庭受到挑战, 而且在世贸组织的国家间争端解决中也受到挑战。
- The plain packaging cases brought by Philip Morris also raise important issues in the framework of WTO. **Important decision of the WTO panel of 28 June 2018 (*TM protection to be read in the light of Art. 7 and 8 of TRIPS*)!**
- 菲利普·莫里斯公司提起的烟草素面包包装案也引发了世贸组织框架内的重要问题。世贸组织小组在2018年6月28日做出重要决定 (需要依据TRIPS协议第7、第8条解释商标保护) !

Par. 7.2403 of the decision: “Article 7 reflects the intention of establishing and maintaining a balance between the societal objectives mentioned therein. Article 8.1, for its part, makes clear that the provisions of the TRIPS Agreement are not intended to prevent the adoption, by Members, of laws and regulations pursuing certain legitimate objectives, specifically, measures “necessary to protect public health and nutrition” and “promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of the Agreement”.”

该决定第7.2403段: “第7条反映了在TRIPS协定中提到的、在社会目标之间建立和维持平衡的意图。第8.1条清楚表明, TRIPS协议的条文并不意在阻止成员为寻求特定合法目标而采纳法律和规范, 尤其是“为保护公共卫生和公共营养”、“促进对社会经济与技术发展至关重要的行业内公众利益”所必要的措施, 前提是该等措施符合TRIPS协定的条文。”

Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, WTO Panel Report, 28.6.2018.

澳大利亚 - 有关适用于烟草产品和包装的商标、地理标识和其他素面包包装要求的特定措施, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 世贸组织小组报告, 2018年6月28日 <https://www.wto.org>



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What Role for Human Rights and Ethics in IP, Investment and Trade Disputes?

人权与道德在知识产权、投资和贸易争端中作用为何?

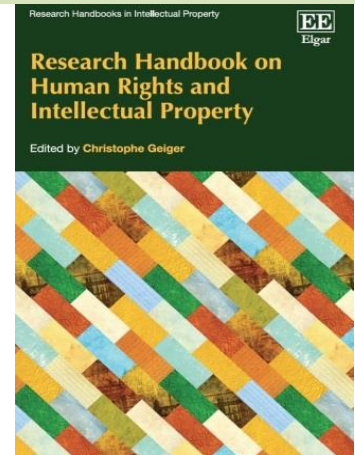
- IP is **not** like any other property right: Increased social function in the case of IP – specific ethical issues are exacerbated by ISDS cases when regulating IP in the public interest, such as right to health in the patent and TM, access to information in the copyright context.
- 知识产权**不像**其他任何财产权利：知识产权案件中的社会功能增加，当在公共利益相关领域规范知识产权时，ISDS案件加剧了特定道德问题的严重性，如专利 / 商标与健康权、版权与信息获取权等。
- It is accepted now that Human rights and ethics are an integral part of IP discussions; they are taken into account by Courts to determine the boundaries of its protection
- 人权与道德是知识产权讨论不可或缺的部分，这是得到普遍认可的；法院在确定其保护界限时必须考虑这两个因素。
- Pending questions: How to apply HR's in ISDS context? What legal framework is applicable? Internationally (UDHR, ICESCR, others?) Regionally (ECHR, Charter)?
- 待决问题：如何将人权在ISDS中进行应用？适用何种法律框架？国际框架（世界人权宣言，经济、社会和文化权利国际公约，其他？），还是地区框架（欧洲人权法院、宪章）？

Daniel Gervais, "Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v Canada", *UC Irvine L. Rev.* 2018, Vol. 8/3, 459.

Daniel Gervais, "投资者和国家间争端解决：礼来诉加拿大案的相关人权与监管经验", 《加州欧文分校法律评论》2018年第8/3卷, 459.

Christophe Geiger (ed.), *Research handbook on human rights and intellectual property*, Edward Elgar Publishing (2015).

Christophe Geiger (编辑) 《关于人权和知识产权的研究手册》，爱德华·埃尔加出版社 (2015)



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- The recent cases have attracted criticism of the IP world with respect to ISDS.
- 近期案件导致知识产权界因ISDS机制而广受批评。
- ISDS is going through a crisis of legitimacy and the adjudication of IP by investor-state tribunals might well amplify the criticisms.
- ISDS正在经历一场合法性危机。投资者和国家间争端仲裁庭对知识产权的裁定可能会加剧这些批评。
- Whether ISDS is an opportunity or a threat, its relevance for IP is under scrutiny.
- ISDS机制到底机遇还是威胁？其与知识产权的相关性正受到密切关注。

“Despite these sound objectives, the existence of ISDS-mechanisms has been criticized on several grounds, among which”:

“尽管存在这些合理的目标，ISDS机制的存在一直受到非议，主要理由包括：”

- *Inconsistency and incoherence between awards*
 - 不同案件的裁决不一致、不统一
- *Reduction in states' power to regulate*
 - 削减了国家规制权
 - Forum shopping
- *导致选择对己方有利的法院*
 - Lack of transparency
 - 缺乏透明性
 - Arbitrators' impartiality
 - 仲裁员公正性
 - High costs
 - 成本高昂

European Parliament, *From Arbitration to the Investment Court System (ICS) - The Evolution of CETA Rules* (2017), p. 9-11

欧洲议会《从仲裁到投资法院制度——CETA规则的演变》(2017) 第9~11页。



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Are the Investment Protection Mechanisms in FTA's **compliant with EU Law** (including the Competency of the EU and Authority of the CJEU) and what are possible Consequences for IP Protection?

自贸协议中的投资保护机制是否**符合欧盟法律**（包括欧盟的权职和欧盟法院的权限）？知识产权保护可能会有哪些后果？

- Case C-284/16 from 6 March 2018 rules out ISDS in intra-EU BIT for being contrary to Articles 267 and 344 TFEU.
- 2018年3月6日裁决的C-284/16号案件禁止采用ISDS机制处理欧盟内部的双边投资协议纠纷，理由是该机制与《欧盟运行条约》第267、第344条冲突。
- Adoption of investment chapters in free trade agreements are considerably complicated after the Opinion 2/15 of 16 May 2017 with regard to competence with regard to investment and ISDS chapters (mixed competence)
- 在2017年5月16日有关投资和ISDS的章节之权利的第2/15号意见出具后，向自贸协议加入投资章节变得相当复杂。

“The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law”.

“荷兰与斯洛伐克有关投资保护的协议中，仲裁条款与欧盟法律不一致。”

Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* [2018]

C-284/16号案：斯洛伐克共和国诉Achmea BV一案

“The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone”

“与新加坡的自贸协议，以其目前形式，不能仅由欧盟单方签订。”

“The provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the EU, so that the agreement cannot, as it stands, be concluded without the participation of the Member States”

“协议中与非外国直接投资相关的条款，以及与投资者和国家间争端解决相关的条款，不属于欧盟的独占性权利。所以，未经成员国参与，按当前情况，不能签订这一协议。”

Opinion 2/15 of the Court (Full Court) (Court of Justice of the European Union), 16 May 2017

欧盟法院（合议庭）第2/15号意见，2017年5月16日



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- Opinion 1/17 of the CJEU on CETA 欧盟法院针对CETA的第1/17号意见

Question submitted to the Court: *Is the Investment chapter in CETA compatible with EU Law?*
提交法院的问题: CETA中的投资章节是否与欧盟法律兼容?

Is Chapter Eight ('Investments'), Section F ('Resolution of investment disputes between investors and states') of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?
加拿大和欧盟及其成员国于2016年10月30日在布鲁塞尔签订的《综合性经济贸易协议》第八章 ('投资') 第F节 ('投资者和国家间投资争端解决'), 是否与其他协定 (包括与基本权利) 兼容?

Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU
比利时依据《欧盟运行条约》第218(11)条向欧盟法院提交意见请求

Reason: the Investment court to be set up does not have a system of preliminary ruling to the CJEU
理由: 待设立的投资法院对欧盟法院不具备初步裁决制度。

- CJEU 30 April 2019: compatible with EU since agreement **with a third country**; the Investment court would only be allowed to apply the international agreement and not EU law. *Rather political decision!*
- 欧盟法院2019年4月30日: 与欧盟法律兼容, 因为这是与**第三国**签订的协议; 投资法院只适用国际协议, 不能适用欧盟法律。这是非常政治性的一项决定!



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Towards an Investment Court System (ICS) for the EU: Current Proposals and Possible Implications for IP Enforcement

欧盟的投资法院制度之路：当前建议及对知识产权执法的可能影响

- In this unstable landscape for investment and IP, the possibility of establishing an ICS or a multilateral investment court could be a way forward by tackling all major criticisms mentioned before.
- 在当前投资和知识产权局面不稳定的情况下，建立投资法院制度或者多边投资法院可能是解决上述所有主要批评的出路之一。
- Will the ICS (and eventually the Multilateral Investment Court) be relevant for IP adjudication?
- 投资法院制度（以及最终的多边投资法院）会与知识产权裁决相关吗？
- The ICS will raise specific questions in particular with regards to the interaction with other IP courts (competency, hierarchy between courts), in particular in the EU context with the CJEU.
- 投资法院制度会引发许多具体的问题，尤其涉及与其他知识产权法院（法庭之间的职能和级别）交叉领域，尤其在欧盟法院层面。



II. The Adjudication of IPRs before the Arbitral Investment Court

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- ISDS is particular under the spotlight in the EU (not only IP, but environment, social and other norms)
- ISDS机制在欧盟尤其受到关注（不仅涉及知识产权，而且涉及环境、社会和其他规范）
- Civil society and academics have raised their voice against ISDS in the framework of the negotiations of the CETA and the TTIP:
- 民间社会和学术界在CETA和TTIP的谈判框架中，已经表达了对ISDS机制的反对意见：

Can the EU still regulate IP without risking a lawsuit in from ISDS court ?

欧盟是否依然能规范知识产权，而不面临来自ISDS法庭的诉讼风险？

Christophe Geiger, “The TTIP and its investment protection: Will the EU still be able to regulate intellectual property?”, *International Review of Intellectual Property and Competition Law (IIC)* 2018, 631.

Christophe Geiger, “跨大西洋贸易与投资伙伴协议及其投资保护：欧盟未来是否依然能够规范知识产权？”，《知识产权和竞争法国际评论(IIC)》2018,631.



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Problematic since the standards for IP protection very different in the EU and US (and the way to safeguard public interest/ societal issues also);

这一做法存在问题，因为欧盟和美国的知识产权保护标准存在巨大差异（保障公众利益 / 处理社会问题的方式也存在巨大差异）；

Copyright law a very good example due to the remaining differences.

在未解决的分歧方面，版权法是很好的前车之鉴。

Possible areas of friction between investment protection and copyright law:

投资保护和版权法之间可能发生摩擦的领域：

- Moral rights 道德权利
- Ownership of the work 作品所有权
- Copyright contract law 版权合同法
- Exceptions and limitations 例外与限制规定

Ch. Geiger, “BITS and the Harmonisation of Copyright Law at International Level”, in: T. Synodinou (ed.), “Pluralism or Universalism in International Copyright Law”, 2019 (forthcoming).

Ch. Geiger, “双边投资和贸易协议以及版权法的国际协调”，收录于T. Synodinou编撰的《国际版权法中采用多元主义还是普遍主义》，2019（即将出版）



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New propositions, safeguards or improvements are put forward – sufficient or irrelevant for IP ? *Why include IP as investment in the first place?*

新主张、新保障措施或改善措施——对知识产权充分吗？相关性如何？为什么最初要将知识产权视为投资、纳入协议？

CETA – Article 8.12 “Expropriation”

《综合性经济贸易协议》第8.12条 “征用”

For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with the TRIPS Agreement and Chapter Twenty (Intellectual Property), do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS Agreement or Chapter Twenty (Intellectual Property) does not establish an expropriation.

为进一步澄清，对知识产权的撤销、限制或创造，如果符合TRIPS协议和第二十章（知识产权），就不构成征用。此外，确定这些措施不符合TRIPS协议或第二十章（知识产权），并不能证明这些措施构成征用。

TTIP - Article 2(1)

《知识产权协定》第2(1)条

*“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**”*

“本节之条文**不影响**双方在其领土内采用为实现合法政策目的而必要的措施，来**规范知识产权的权利**；此处所述的合法政策目标，包括保护公众健康、安全、环境或公德，保护或促进社会或消费者权利，**保护文化多元性等**。”

See Michael Geist blog at 见Michael Geist的博客 <http://www.michaelgeist.ca/tech-law-topics/ceta>



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Enforcing Intellectual Property via Trade and investment agreements

通过贸易与投资协议执行知识产权

A closer look at the TTIP and CETA

近看跨大西洋贸易与投资伙伴协议 (TTIP) 和综合性经济贸易协议 (CETA)

II. The Adjudication of IPRs before the Arbitral Investment Court

由仲裁投资法院裁决知识产权争端

Interesting recent developments 近期值得关注的进展:

United States–Mexico–Canada Agreement (USMCA) (30.11.2018), replacing NAFTA:

美国 - 墨西哥 - 加拿大协议(USMCA) (2018年11月30日) , 替换了北美自由贸易协议 (NAFTA) :

Investment claims over IP still included in the list of protected investments !

针对知识产权的投资索赔依然包含在受保护投资清单中!

Chapter 14, Art. 14.1: 第14章第14.1条

“An investment may include: f) intellectual property rights” “一项投资可能包括: f) 知识产权”

- Article 14.8: Expropriation and Compensation ... 第14.8条: 征用与补偿...

Par. 6 *This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that the issuance, revocation, limitation, or creation is consistent with Chapter 20 (Intellectual Property) and the TRIPS Agreement*

第6款: 本条不适用于依据《知识产权协定》授予的、与知识产权相关的强制许可之出具, 也不适用于知识产权的撤销、限制或创造, 前提是前述出具、撤销、限制或创造与第20章 (知识产权) 和TRIPS协议不符。



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And: ISDS to be abolished in Canada-US relations (at the initiative of Canada)!
而且：ISDS机制将在美加之间废除（由加拿大主动发起）！

ISDS possible only for 3 additional years between Canada and the US for **Legacy investment claims and pending claims** (Annex 14 C): investments made or acquired from 1994 until termination of NAFTA; then national court.

美加之间的ISDS机制只可能继续存续3年，以解决**历史投资索赔和待决索赔**（附件14C）：1994年之后以及《北美自由贸易协议》终止之前做出或者获取的投资；在国内法院发起的索赔。

However: may still be available through other legal instruments, such as the Trans-Pacific Partnership (TPP) to which both Mexico and Canada are a party.

然而：依然可通过其他法律工具使用这一机制，比如，《跨太平洋伙伴协议》（墨西哥和加拿大是缔约方）。

ISDS in the classic form under pressure?
ISDS机制是压力下的经典形式吗？



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Are these safeguards sufficient or irrelevant for IP ? *Why include IP as investment in the first place? No clear added value*

这些保障措施对知识产权充分吗？相关性如何？为什么当初将知识产权视为投资纳入协议？增值效应无法明确

Solutions 解决方案:

- ***Exclude IP from the list of protected investments in the TTIP (and BTA and BITs in general)***
- **将知识产权从TTIP (以及普遍意义上的双边贸易协议和双边投资协议) 受保护投资清单中剔除**
- Engage in an open and transparent debate on the merit of regulating IP in FTA's and BIT's and what should be the content of these new standards
- 应进行开放、透明的辩论，探讨在自贸协议和双边投资协议中规范知识产权所具有的优势，以及新标准应包含的内容



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The Impact of Bilateral Trade and Investment Agreements on the Regulation of IP Law at International Level

双边贸易和投资协议对国际层面规范知识产权法律的影响

Further information 更多信息

Christophe Geiger (ed.), *Research Handbook on Intellectual Property and Investment Law*, Edward Elgar, 2019 (Forthcoming)

Christophe Geiger (编辑), 《知识产权和投资法研究手册》, 爱德华·埃尔加出版社, 2019 (即将出版)

- “Enforcing Intellectual Property in Trade and Investment Agreements: What Safeguards for its Social Function?”
- “贸易与投资协议与执行知识产权保护：如何保障其社会功能？”

Conference organized by the CEIPI in the European Union Parliament, April 2018

会议由于2018年4月在欧盟议会召开，由国际知识产权研究中心组织

Video recordings and presentations available 点击链接获取视频和演讲文件:

<http://www.ceipi.edu>



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