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A reading of intra-EU BITs in light of recent developments of EU law

by

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The debate surrounding intra-European Union (EU) bilateral investment treaties (BITs) revolves around five key points: i) intra-EU BITs are incompatible with the logic of the EU internal capital market; ii) their application causes discrimination among EU investors; iii) the jurisdiction of (intra-EU BITs) investment tribunals threatens the exclusive competence of the Court of Justice of the EU; iv) the application of intra-EU BITs violates the principle of primacy of EU law and the autonomy of the EU legal order; and; v) payment of intra-EU BITs awards by an EU member state may constitute illegal state aid, prohibited by EU law.

However, recent developments in other EU law areas may require a new reading of intra-EU BITs. The first development is the tendency of member states to conclude economic agreements between or among themselves that operate outside the EU legal framework. For example, in response to the EU sovereign debt crisis, member states established the European Financial Stability Facility, the European Stability Mechanism and the Fiscal Compact. Each represents financial stability agreements enacted by the member states. Additionally, member states adopted the Agreement on a Unified Patent Court,¹ which established a court with exclusive jurisdiction for the litigation of European patent disputes. The judge of this court, acting as a rapporteur in the interim procedure, can resort to mediation and arbitration mechanisms under Article 52, which will be supported by the creation of a mediation and arbitration center, as required by Article 35.

These types of agreements between and among member states are similar to intra-EU BITs because they operate outside the EU legal framework, contain arbitration dispute-settlement mechanisms and pose threats to the autonomy of the EU legal order. Notwithstanding these similarities, EU institutions are adopting inconsistent approaches in relation to their legality under EU law. For example, while the EU Commission maintains that intra-EU BITs violate the principle of autonomy of the EU legal order, the patent system established under the Unified Patent Court agreement is deemed compatible with EU law.² This is inferred from the oral pleadings of the Commission

before the EU Court of Justice of July 1, 2014, in a case in which Spain – in proceedings against the Council and the European Parliament³ – challenged the validity of the regulation that implements the EU unitary patent system.⁴

Regardless of the merits of the parties’ opposing views in this dispute, it is suggested that, because of the above-mentioned similarities, intra-EU BITs and the Unified Patent Court agreement should be treated alike with respect to concerns regarding potential violations of the principle of autonomy and the existence of arbitration dispute-resolution mechanisms in intra-EU relations. Moreover, EU institutions are under a duty to adopt consistent positions on the same legal issues, as this promotes legal certainty in the application of EU law.

From a broader policy perspective, the outcome of the Spanish dispute on the unitary patent system will affect legal debates surrounding other areas of EU law. The EU’s Court of Justice has not formally addressed the legality of intra-EU BITs in any previous decision or legal opinion, but the judgment on the EU patent system will implicitly provide an answer to the intra-EU BIT issue.

Additionally, by siding with Council’s and Parliament’s positions on this topic, the EU Commission is indirectly departing from its previous position against intra-EU arbitration. The shift of the EU Commission’s position toward the legality of intra-EU arbitration may weaken the arguments against it, as presented before arbitral tribunals in several ongoing intra-EU BITs disputes.

Finally, all agreements between and among member states can be interpreted as instruments of enhanced cooperation and signs of a “multi-speed Europe” in selected areas of EU law. It can be argued that intra-EU BITs, concluded before the transfer of exclusive competence over FDI to the EU to remedy a perceived lack of investment protection, contribute in achieving differentiated integration in the area of investment protection. In other words, EU member states and institutions constantly tolerate some degree of asymmetry in EU economic relations. The time has come, therefore, for EU actors to recognize such asymmetry in the area of investment protection. As such, it is desirable that EU actors adopt a common framework on the use of arbitration in selected areas of intra-EU economic relations.

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¹ “Council Agreement on a Unified Patent Court”, *Official Journal of the European Union*, C 175/01, June 20, 2013, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2013:175:FULL&from=EN>.

² See Allen & Overy eAlert, “The Court of Justice of the European Union (CJEU) hears the Spanish challenge to the European unitary patent”, July 1, 2014, available at <http://www.allenoverly.com/publications/en-gb/Pages/The-Court-of-Justice-of-the-European-Union--CJEU--Hears-the-Spanish-Challenge-to-the-European-Unitary-Patent.aspx>.

³ *Kingdom of Spain v. European Parliament and Council of the European Union*, Case C-146/13, March 22, 2013, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=137928&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=197732>.

⁴ See “Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012, implementing enhanced cooperation in the area of the creation of unitary patent protection”, *Official Journal of the European Union*, L 361/1, December 31, 2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:361:0001:0008:EN:PDF>.

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