JUDICIALLY DEVELOPED PATENT LAW AND EXPROPRIATION UNDER INVESTOR-STATE DISPUTE SETTLEMENT

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ABSTRACT

Eli Lilly v. Canada *is the first international investment arbitration case that renders final award that deals with patents under the international investment regime. This case is, therefore, critical in understanding the development of protecting patents under investment protection and its impact on the domestic patent regimes. Patents can be object of direct expropriation or that of indirect expropriation. As demonstrated in* Eli Lilly v. Canada*, a new frontier in claiming expropriation of patents is the invalidation of the patent by courts. This paper agrees with the Eli Lilly arbitral tribunal's rejection of expropriation claim, but argues that the tribunal's approach in the case is not correct because it did not recognize the uniqueness of the judicial acts in expropriation claims, as well as its misunderstanding of the concept of patent and the relationship between patents and expropriation. The case could be misleading in terms of pursuing investor protection with regard to patents in the future. This paper argues that there is no retrospective application of patent law in the case. In addition, there can be no patents being expropriated by judicially developed patent rules interpreting existing patent laws when it is a legitimate application of domestic law from the perspective of international investment law.*

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