

*A New Challenge to Domestic Ability to Determine Intellectual Property Rights
Evaluating Eli Lilly's Investor-State Arbitration Claim for
Invalidation of Patent Rights*

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Nations are currently faced with the possibility that companies will be seeking substantial compensation from them when the nations do not provide desired protection of intellectual property rights. Although nations have the discretion to decide on the scope of such rights so long as they abide by minimum standards of protection under internationally agreed standards such as TRIPS, that ability may be compromised if companies bring claims against them for compromising their investments under so-called "investor-state arbitration" claims. This is not a theoretical problem - Eli Lilly is currently seeking \$500 million in compensation from Canada for invalidation of two patents. This article provides a detailed analysis of Eli Lilly's claims to highlight the unique issues and problems with permitting companies to follow in Eli Lilly's steps to use investor-state arbitration claims to challenge domestic intellectual property laws, especially when they are consistent with international norms. A thorough understanding of Eli Lilly's claims and why they should be rejected is especially important because there are current negotiations that aim to expand the ability of companies to use such claims. In addition, although investor-state arbitration claims have been broadly criticized in recent years, there are unique issues and problems associated with expanding this remedy to intellectual property rights that are covered by international norms. If Eli Lilly's claim were to succeed, it would fundamentally challenge not only traditional patent laws, but threaten to disrupt internationally agreed norms that explicitly permit countries to have different standards of protection. This is fundamentally different than most investor-state arbitration claims that do not interfere with any international norms. Accordingly, this article provides a framework for how claims such as Eli Lilly's should be properly rejected under existing agreements and also argues that pending agreements should not further expand incursions into domestic intellectual property laws.

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