SCRIP Intelligence

# Prof Abbott on Lilly's 'borderline absurd' ISDS plaint and the TPP

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Anju Ghangurde

Frederick Abbott, the Edward Ball Eminent Scholar Professor of International Law at Florida State University College of Law, suggests that cases such as Eli Lilly's earlier complaint against Canada over patents concerning Strattera (atomoxetine) and Zyprexa (olanzapine) represent a fundamental change in the approach taken for investor-state dispute settlement (ISDS).

The controversial ISDS provisions currently figure in the Trans-Pacific Partnership (TPP) negotiations, a pact between the US and 11 other nations, and in the draft US/EU Transatlantic Trade and Investment Partnership (TTIP).

Lilly previously sued the Canadian government reportedly seeking $500m in compensation, based on similar provisions in North American Free Trade Agreement (NAFTA). The US firm had objected to a court ruling invalidating its patent for Strattera and Zyprexa.

In an interview with Scrip in Mumbai, Prof Abbott, considered an authority on intellectual property law, terms the Lilly complaint as "borderline absurd" from a patent law standpoint but underscores how such actions could fundamentally threaten the sovereignty of the host country to regulate.

NGOs have in the past warned that the TPP could allow firms to sue governments in "private supra-national arbitration" over pro-public health regulations or decisions that they believe may impinge on anticipated profits.

Scrip: As an IPR law expert, what do you make of the seeming new found bonhomie between India and the US on IPR issues? Has India, as some experts like Prof Brook Baker say, let the US IP fox into its IP policy hen house?

Prof Abbott: I don’t really think that's true. India is a very complex place. You have a very active Parliament. The government on IP policy, even if you look back when the law was under amendment in 2003, they ultimately adopted law based on the reaction from Parliament… it was quite a bit different from what the executive branch was promoting.

And if you look at the working group on IP report, it says some good things about the role that patents and IP can play in promoting innovation but at the very same time and in very next para it says India has a different context and considerations and has to give primacy to the interests of patients and consumers. If you read only the first para then you could come away thinking the government was shifting towards a more protective stance but if you read the second para, then you'd say I'm not exactly sure what the government or working group report is recommending at the end of the day. And the

report doesn’t contain very many specifics on therefore we would do 'x'. It doesn't make any recommendation for India to be doing anything that it is not already doing. I'm hard pressed to read that as a shift in government policy.

Scrip: The US Senate voted 62-37, boosting President Obama's effort to gain the fast-track trade promotion authority (TPA) he is seeking to try and seal the Trans-Pacific Partnership negotiations. And draft chapters leaked by WikiLeaks earlier draw attention to the ISDS clause. Does the developing world have much to worry about?

PA: First, it's difficult to say whether the TPP will get the authority passed through Congress. Typically at the end of the day, a President will get his way on getting the TPA by offering some kind of compromise, so Barack Obama offering some concessions to the Democratic members of Congress to have them kind of go along with the policy…..I think that is still an open question. I think this is a very tough one now because of the forthcoming election and so forth. I'm not sure where that's going to go.

The TPP certainly has provisions that are reasons for concern in the developing world and even in the US. Fixing a 12-year period of marketing exclusivity for biologic products would be problematic, particularly as the Obama administration itself is trying to scale that back to seven years for the US. So, it's a bit difficult to see how you can be pushing 12 years in the TPP and advocating seven years domestically.

Once you fix it in an international agreement, it will become a little bit more difficult to change although I wouldn't overstate that for the US. The US has never really considered itself bound by its international commitments on things like that. The United States Trade Representative tells Congress, don’t worry about it …that this only affects our international partners and not us and you can change the law if you want.

The ISDS is a bit puzzling because you have two very problematic examples – the Eli Lilly case against the Government of Canada, claiming that the Canadian court's application of its utility doctrine, the doctrine of sound prediction…somehow constitutes an expropriation under international law. The Eli Lilly complaint, I will call it borderline absurd from a patent law standpoint but that doesn't keep it from pressing it politically. The tobacco companies suing Australia over its plain packaging.

In both these areas you are not looking at anything like the classic case of an expropriation. You are looking at a challenge to very fundamental government public health regulation.

You would think that these cases would cause Canada and Australia to have real [concerns] about whether or not these provisions were desirable but what we understand so far is that those countries seem to be okay. I find it surprising. You do have more push back with the Europeans in the TTIP.

Scrip: You have previously referred to troublesome elements in the US proposals for the TPP IP chapter including efforts to foreclose the introduction in patent law of standards of invention modelled on India's Section 3(d).

PA: The TPP includes a negation of Section 3d of India's Patent Act. Of course that doesn't directly affect India but the idea is to keep that type of system from proliferating.

If India were ever to think about becoming a party to the TPP or an agreement like the TPP, that would be a big hurdle. I suppose you could say it's a long term mechanism to put pressure on India.

[Ed: Section 3(d) broadly deals with incremental inventions that are not patentable unless they show improved efficacy or unless a known process results in a new product or employs at least one new reactant.]

Scrip: The US proposals for the TPP include provisions regarding trademark packaging and labelling that are apparently similar to those included in the anti-counterfeiting treaty ACTA. Are we seeing a revival of ACTA?

PA: I was one of the few people with respect to ACTA who really drew attention to those provisions. I thought that those were among the most potentially troublesome provisions in ACTA because I viewed them as being directed towards parallel trade in medicines and potentially very troublesome to the generics industry in general.

I don't think the originator industry has given up on that and I suspect they are trying to get the same types of provisions in the TPP. They weren't in the ACTA by accident and it wouldn't surprise me that they are back.

Scrip: There has been political pressure in the EU against the ISDS clause contained in the draft US/EU Transatlantic Trade and Investment Partnership (TTIP). But others like Finland have voiced their support for the ISDS clause. Do you see such pressure holding?

PA: I suspect the way the Europeans might look at it is that if we don't provide some relief on the ISDS clause, we could well end up the same way as we ended up with the ACTA, which is to have ultimately rebellion in Parliament generated by public sentiment.

Traditionally, you've had reasons for having protection against egregious acts of expropriation under customary international law. The thing to be very conscious of is that cases like the tobacco case and Eli Lilly represent a fundamental change in the approach that one is looking at for ISDS going very directly against compelling governmental public health regulatory interests in a way that really fundamentally threatens the sovereignty of the host country to regulate.

You can be in favor of a general protection of investors against egregious government acts of taking property on one side and disfavor ISDS because of these types of abusive cases. The line that thoughtful people have to walk is how you draw distinctions between these kinds of things.

Prior to these cases we had much less reason for generally being concerned about ISDS when it purely dealt with takings of property as we would have understood it. Today we have a much different set of concerns.