

Indirect Expropriation of Intellectual Property Rights in International Investment Arbitration (Original Research)

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Persian Text pp. 63-88

(DOI) : 10.22066/cilamag.2025.2045155.2650

Date Received: 17 Nov.2024

Date Accepted: 1 May.2025

Extended Abstract

Governments can intervene in and restrict the property rights of intellectual property owners through three primary means: first, by issuing compulsory licenses for the exploitation of intellectual property rights; second, through the process of parallel importation of goods; and third, by revoking or reducing the term of protection for the investor's intellectual property rights. This article examines these three methods and analyzes the solutions and innovations provided by investment treaties in this regard.

In this article, after introducing the concept of expropriation, we will delve into the methods of expropriating intellectual property rights and explore how foreign investors can be protected against the seizure of their intellectual assets. Finally, we will examine the arbitral practice of investment tribunals regarding this matter.

Whether compulsory licenses for the exploitation of intellectual property rights can be considered expropriation requires an analysis of three factors: the extent of government intervention, the nature of the measures taken, and the nature of the government's act. It is important to note that this assessment can vary due to the unique circumstances of each situation. To provide a more comprehensive perspective, one must consider both the government's actions and the scope of the deprivation resulting from the issuance of compulsory licenses, as well as the conduct of the foreign investor or company in terms of its misuse of its intellectual property rights. However, if the government's act possess the proper requirements to expropriate, namely; the actions is within the framework of the law, it is carried out in

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good faith, and the underlying reason is to protect the public interest and non-discriminatory in nature, then the State will not be obligated to pay compensation. The practice of investment treaties and arbitration tribunals supports this view. Although a limited number of cases can be found where investors have filed claims against host States for violations of intellectual property rights in arbitration tribunals, the reality is that there is no rich and effective judicial practice regarding investor-State disputes over violations of intellectual property rights. Arbitral awards have not played a significant role in strengthening intellectual property rights standards. This is primarily because many infringements of foreign investors' intellectual property rights are typically committed by private individuals that cannot be attributed to the state. In general, disputes regarding intellectual property rights between private individuals are resolved through the judicial institutions of the host State. Another reason is the exorbitant costs of arbitration. In practice, initiating an investment claim against a host State is very costly. Nevertheless, the investor-State arbitration mechanism is a powerful tool for creating security for foreign investment and an effective means of providing investors with peace of mind. Consequently, it can be argued that arbitration institutions can contribute to the strengthening of intellectual property rights. In the second part of this article, we have examined arbitral awards related to the subject matter. Given the novelty of this issue and the lack of a rich arbitral practice in this regard, there is a divergence of views in the awards of arbitral tribunals. The awards of arbitral tribunals support the existence of various methods of examining and evaluating this issue. It seems that one of the most effective methods in this regard is to examine the rules and practices of international intellectual property law, as stipulated in the TRIPS Agreement. This method is particularly useful when the two parties to a bilateral treaty are also parties to the same intellectual property treaties such as the TRIPS Agreement or treaties under the auspices of WIPO. In such a case, if international intellectual property law does not consider the action taken to be expropriation, the courts of the two countries in question will also not consider it expropriation.

Keywords

Indirect Expropriation, Investment Treaties, Intellectual Property Rights, International Arbitration.

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