How a 20-year-old patent application could upend Canada's biggest trade deal

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The Hill Times photograph by Jake Wright
International Trade Minister Ed Fast and Prime Minister Stephen Harper, pictured in this file photo.

By MICHAEL GEIST | Aug. 5, 2014

OTTAWA—In the early 1990s, pharmaceutical giant Eli Lilly applied for patent protection in Canada for two chemical compounds, olanzapine and atomoxetine. The company had already obtained patents over the compounds, but asserted that it had evidence to support new uses for the compounds that merited further protection. The Canadian patent office granted the patents based on the content in the applications, but they remained subject to challenge.

Both patents ultimately were challenged on the grounds that there was insufficient evidence at the time of the applications to support the company's claims. The Federal Court of Canada agreed, invalidating both patents. Eli Lilly proceeded to appeal the decision to the Federal Court of Appeal and later to the Supreme Court of Canada. The company lost the appeals, as the courts upheld the decision to invalidate the patents.

Under most circumstances, that would conclude the legal story as nine Canadian judges reviewed Eli Lilly's patent applications and ruled that they failed to meet the standards for patentability. Yet in June 2013, the company served notice that it planned to file a complaint under the North American Free Trade Agreement claiming that in light of the decisions, Canada is not compliant with its patent law obligations under the treaty. As compensation, Eli Lilly is now seeking $500-million in damages.

The Eli Lilly claim is winding its way through the legal process—the Canadian government filed its defence several weeks ago—but the implications are being felt far beyond the specifics of the case.

If the pharmaceutical giant succeeds, it will have effectively found a mechanism to override the Supreme Court of Canada and hold Canadian taxpayers liable for hundreds of millions in damages in the process. The cost to the health-care system could be enormous as the two Eli Lilly patents may be the proverbial tip of the iceberg and claims from other pharmaceutical companies could soon follow.

Indeed, it appears that the Canadian government has awoken to the danger associated with dispute resolution systems that risk trumping domestic regulations and place billions of dollars at risk.

Last week, reports out of Germany indicated that the German government might not support the Canada-European Union Trade Agreement (CETA) if it includes such a system (referred to as an investor-state dispute settlement or ISDS). ISDS has attracted considerable attention there, due to concerns over a multi-billion dollar claim involving Germany's decision to phase-out nuclear power.

While the ISDS concerns have centered on Germany, the reality is that the Canadian government has been holding up finalizing the agreement due to related fears stemming from fears of more Eli Lilly-style cases. The pharmaceutical industry is a powerful lobby group in Europe and some may be willing to pursue similar litigation over Canadian patent law.

According to leaked versions of CETA texts, Canada is requesting that court decisions and administrative tribunal rulings involving the creation or limitation of intellectual property rights be carved out of the treaty's ISDS provisions.

The European Union has thus far rejected the Canadian proposal. However, given the mounting opposition to ISDS in Europe, it may be willing to shift its position. From a Canadian perspective, the Eli Lilly case has provided a powerful reminder that the risks associated with ISDS may outweigh the benefits with legal cases that can take decades to resolve.

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