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Study on Compulsory Licensing Constituting Indirect Expropriation in the Context of International Investments

Zhang Yuanji and Eco Hamersma¹

Abstract

With the economic development and integration of the international community, the field of international investment has flourished and become an important link in the economic chain of nations. The intersection of compulsory licensing regimes in the field of intellectual property and indirect expropriation regimes in the field of international investment has become increasingly controversial with the formal inclusion of intellectual property rights as investment objects in national investment agreements and the broadening of the field of application of indirect expropriation.

The granting of compulsory licenses may upset the balance between the interests of the patent owner and the public interest of the host country, which in the area of international investment may be manifested by the loss of balance between the private investor with patent rights and the public interest of the host country, and then the compulsory licenses may give rise to disputes in the area of international investment. Such disputes may arise because the private investor believes that the granting of a compulsory license by the host government constitutes an indirect expropriation of the investment.

In view of the possibility of such disputes and the real disputes arising in this field in the international community, this paper attempts to conduct a fundamental study on the legal issue of whether compulsory licensing constitutes an indirect expropriation on the basis of an analysis of the criteria for determining indirect expropriation, with a view to providing some ideas on the relevant disputes in the field of international investment.

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International Investment Agreements, Compulsory Licensing, indirect expropriation, TRIPS Agreement, Substantive Clauses, International Investment Arbitration

Introduction

The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the TRIPS Agreement), while providing for compulsory licensing, imposes numerous restrictions. The difficulty of implementing compulsory licensing in the face of public health crises has caused dissatisfaction among developing countries. After the joint struggle of developing countries, the Doha Declaration on the TRIPS Agreement and Public Health (hereinafter referred to as the Doha Declaration) was reached, and since then, the compulsory licensing system has developed in the direction favorable to developing countries. Meanwhile, developed countries have found it difficult to achieve the level of intellectual property protection they desire under multilateral regimes such as the World Trade Organization (hereinafter referred to as the WTO), and have turned their attention to the bilateral and regional levels.

In recent years, the expropriation provisions of bilateral and regional investment agreements have included provisions linked to the compulsory licensing provisions of the TRIPS Agreement. Compulsory licenses may constitute an indirect expropriation and the conditions for the implementation of compulsory licenses have increased. At the same time, fair and equitable treatment clauses in investment agreements have also developed in recent years as the easiest way for investors to obtain compensation in international investment disputes because of the enormous discretionary space they provide to arbitral tribunals. The fair and equitable treatment clause plays a complementary role when it is difficult for an investor to rely on an expropriation clause to claim that a compulsory license violates the investment agreement. Compulsory licensing is intended to achieve a balance between patent rights and the public interest by restricting patent rights, but from the perspective of the investment agreement, the host country may face large amounts of compensation for the implementation of compulsory licensing, which also makes the efforts made since the Doha Declaration to ensure the application of the flexibility provisions of the TRIPS Agreement waste, and it is difficult to ensure public health for developing countries because of the cost and the fear of retaliation by developed countries.²

² Castro Bernieri, Rosa Julieta, "Compulsory Licensing and Public Health: TRIPS-Plus Standards in Investment Agreements," *Transnational Dispute Management TDM*, May 2009, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=2101574>

Therefore, we believe it is necessary to systematically analyze whether compulsory licensing constitutes an indirect expropriation, as well as the impact of compulsory licensing constituting an indirect expropriation from multiple perspectives. This would allow us to gain insights into improvements of the content of compulsory licensing in international investment agreements in the present post-pandemic period and explore whether there is a balance between the implementation of these two systems.

1. Relationship between compulsory licensing and indirect expropriation in international investment

First, what is an indirect expropriation. Taxes, excessive penalties and other types of action by a Government that may affect the investor's inability as an owner to use, enjoy or dispose of property for a reasonable period of time may constitute an indirect expropriation. Further, a measure constituting an indirect expropriation that does not directly transfer or deprive the property rights of the investor, but has an effect equivalent to a direct expropriation, or any other measure described as similar to or having the same effect as an expropriation, substantially deprives the investor of the economical use and enjoyment of its property rights.³ As for the compulsory licensing system, a compulsory license is a legal, non-exclusive license granted by an authority to a third party to make, use or sell an invention and to pay remuneration to the right holder, who maintains his or her legitimate intellectual property rights.⁴ Therefore, we cannot hold that any compulsory license constitutes expropriation.

The biggest premise for whether a compulsory license can constitute an indirect expropriation is whether there is an overlap in the scope of the objects of the two regimes, the object of a compulsory license is a specific intellectual property right, while the object of an indirect expropriation is a specific investment. Accordingly, for a compulsory license to be considered as constituting an indirect expropriation, it is necessary that the particular intellectual property right in the compulsory license constitutes an "investment" for indirect expropriation. In the definition of "investment", a typical international investment agreement generally uses a combination of abstract definitions and examples, we can see that Intellectual Property Rights (IPRs) are included as a form of investment in many investment agreements, for example, in the China-Japan BIT, intellectual property are included in the scope of investment,⁵

³ De Luca, Anna, "Indirect Expropriations and Regulatory Takings: What Role for the 'Legitimate Expectations' of Foreign Investors?" Giorgio Sacerdoti (editor), Pia Acconci, Mara Valenti, Anna De Luca (co-Editors), *General Interests of Host States in International Investment Law*, Cambridge University Press, 2014, p. 58-75

⁴ Kianzad, B, "Compulsory Licensing." (2021). In: Marciano, A., Ramello, G.B. (eds) *Encyclopedia of Law and Economics*. Springer, New York, NY. p. 1-4

⁵ China - Japan BIT (1988) Article 1: "(1) The term 'investments' comprises every kind of asset, used as investment

and in the Canada- Thailand BIT, intellectual property is directly recognized as an investment.⁶ From the specific enumeration of "investment" in various investment agreements, it is clear that patents are a type of "investment" and intellectual property rights have been included as "investment" in the vast majority of the world's investment agreements.

As to reason why compulsory licenses can constitute indirect expropriation, we can see that there are similarities between the two systems. Both in compulsory licensing and in indirect expropriation, public power has a great impact on the rights of patent holders, who are in a relatively weak position. Despite the different purposes of the two systems, the boundary between the two seems to be not so clear in some cases, and where intellectual property rights are considered to be investments, we cannot ignore the possibility that such a situation occurs. At the intersection between IIAs and the TRIPS Agreement, there will be a lot of questions arising that are worth considering.⁷ There is no doubt that the identification of both situations is very complex.

2. Determination of indirect expropriation

Nowadays, direct expropriations are easily identifiable and have become rare,⁸ in contrast, indirect expropriation is more common because it is a more covert means and the host country has more reasons to justify and claim the legality of its actions. The existing two ways of determining indirect expropriation are observing the effect or purpose of government action to determine whether this action constitutes an indirect expropriation. The former considers only whether the host State's action has a substantial impact on the investor, without regard to whether the action is in conformity with the host State's domestic law or whether it is based on a need in the public interest. We can find this doctrine in many cases such as *Siemens A.G. v. The Argentine Republic*,⁹ although tribunal approved that in the context of Argentina's fiscal crisis and the 2000 Emergency Law, would be sufficient to meet the public

by nationals or companies of one Contracting Party within the territory of the other Contracting Party in accordance with or not in violation of the laws and regulations of the latter Contracting Party at the time of investment, including: (d) Patents of invention, rights with respect to trade marks, trade names service marks and any other industrial property, and rights with respect to know how..."

⁶ Canada - Thailand BIT (1997) Article I. Definitions: "investment" means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws, and in particular, though not exclusively, includes: (v) Intellectual property rights..."

⁷ Gibson, Christopher, "A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation," *American University International Law Review* 25, no.3 (2010): p. 357-422

⁸ Ranjan, Prabhash and Anand, Pushkar, "Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal" (January 20, 2016), Leila Choukroune (Ed) *Judging the State in International Trade and Investment Law*, 2016, p. 127-151

⁹ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8

purpose requirement of expropriation under the Treaty, its application through Decree 669/01 to the specific case was still considered illegal. In another arbitration case *Norwegian Shipowners' Claims*, the tribunal's application of this doctrine was clearer, we can see the expression of the arbitral tribunal: "whatever the intentions may have been, the United States took...",¹⁰ it is obvious that in cases where this doctrine was applied, the effect produced by the act was regarded as an extremely crucial consideration. Based on this doctrine, there is a strong likelihood that the host country's compulsory licenses will be recognized as indirect expropriations.

And the latter is in determining whether the host country's conduct constitutes an indirect expropriation, if the governmental act has a legitimate public purpose, then it does not constitute an expropriation, which means if the measure is (or at least some combination of) rational, proportional and non-discriminatory, the state will not be liable for expropriation, even if the investor is substantially deprived of a property right.¹¹ But we do not think it is reasonable to apply this doctrine mechanically, first the determination of the public purpose is ambiguous, it is for public interest to license a drug patent because of an emergency pandemic, but is it also in the public interest to improve the overall standard of medical care for the population? The determination of public purpose is itself extremely difficult, and the fact that we have to rely on this determination leads to great instability. Furthermore, it cannot be ignored that even acts that actually constitute expropriation often pretend to serve a public interest purpose. The motives of individuals are often difficult to determine through a legal investigation, but surely such an investigation would be both impractical and impertinent for the state.¹² So arguments against this doctrine tend to say that it leads to the expansion of the power of the state, which acts without regard to the corresponding responsibility and always justifies it as a public purpose.¹³

¹⁰ *Norwegian Shipowners' Claims* (Norway v. United States of America), PCA Case No. 1921-01

The Tribunal is therefore of opinion: 1. That, whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed. 2. That in fact the claimants were fully and for ever deprived of their property and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of American municipal law.

¹¹ See *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paragraphs 291–301, 305; see also *Glencore Finance (Bermuda) Ltd v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, 8 September 2023, paragraph 201 (holding that if a state takes a measure in the lawful exercise of its police powers, no expropriation has taken place at all). Tribunals have also considered that a court judgment could constitute an expropriation. In those cases, however, the finding of a 'judicial expropriation is contingent on a finding of denial of justice' or at least subject to a standard similar to that of denial of justice claims. *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, paragraph 1202; *PACC Offshore Services Holdings Ltd v. United Mexican States*, ICSID Case No. UNCT/18/5, Award, 11 January 2022, paragraph 229

¹² Sir John Filscher Williams, "International Law and the Property of Aliens," 1928 BRIT. Y. B. INT' L L. 1, 26

¹³ Gudofsky, J.L. 2000, "Shedding light on Article 1110 of the North American Free Trade Agreement (NAFTA) concerning expropriations: An environmental case study", *Northwestern Journal of International Law & Business*, vol. 21, no. 1, p. 243-315

From the above, we believe that a balanced approach analyzing both the purpose and the effect of the act is more desirable when determining indirect expropriation in the cases under consideration. In this way, it is still possible for a compulsory licensing act to be considered an indirect expropriation, in making judgments in this way, the principle of proportionality was introduced. There is no doubt that this is interesting, because in the past we seem to have been more willing to talk about this principle in administrative law, but after thinking about it more carefully we find that it is also a collision between the public power and private rights, and it is also a requirement that public power should not be expanded without limits. In *Tecmed v. Mexico*, arbitral tribunal clearly expressed requirement regarding proportionality.¹⁴ In applying this process to the thinking, it is first necessary to find substantial damage, then to establish that a public interest actually exists in the case, and finally to see whether the host State's actions are indeed the necessary and least detrimental measure.¹⁵ Although there are many views that this standard is still too flexible, we believe that it is undoubtedly a reasonable balance between the two factors of judgment, effect and purpose, as well as the legitimate interests of the investor and the public interest of the host country. It is true that this principle needs to be applied with caution, but it is impossible to obtain a desirable arbitration result without giving the arbitral tribunal discretionary power and margin of judgment.

3. Standards for determining whether a compulsory license constitutes an indirect expropriation

The first factor we think should be considered is the economic aspect. The patents holders rely on the monopoly of the patented products to obtain profits, and the implementation of compulsory licensing by the government means that the rights of the patents holders are restricted, and the economic value of their patented products will be affected. Intellectual property is an intangible property, and the effect of patent rights can also be divided into two parts: the first is the economic effect, in which the right holder can obtain economic benefits through the implementation of its patent rights; and the second is the protection effect, in which the right holder can obtain better protection through the acquisition of patent rights. We would then need to consider carefully the specific content of the compulsory licenses issued and the impact on the economic benefits to the intellectual property rights that are the target of the compulsory licenses. The key function of property is not the tangibility of the "thing" but the ability of the

¹⁴ *Tecmed v. Mexico* (ARB(AF)/00/2), award of May 29, 2003, 43 ILM, 2004, para. 122.

"The Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments,"

¹⁵ Suzy H. Nikièma, "Best Practices: Indirect Expropriation," *The International Institute for Sustainable Development*, March 12, 2012, p. 16

right to earn a business return in a commercial and corporate environment and under a regulatory system.¹⁶

Therefore, the extent to which compulsory licensing can affect the future earnings of the right holder is what we need to focus on when considering whether it constitutes a indirect expropriation. For example, in the famous case of the first compulsory license in India, when India's Patent Control Authority has granted Indian generic drug company Natco Pharma Ltd a compulsory license for Nexavar for the treatment of liver and kidney cancer, the patient's monthly expenses were reduced to Rs. 8,880 (about US\$ 175).¹⁷ We do not want to judge the legitimacy of the Indian government's actions here, but in terms of the loss of economic returns discussed, with the price of Bayer's drugs dropping steeply in India and generic companies taking over market share, Bayer's financial losses are undoubtedly huge. It is clear that the patents cannot continue to be valuable, and investors can hardly expect to make their original gains in the market while the compulsory licenses are in force, since it is unimaginable that consumers with low incomes would not choose cheaper alternatives.

Secondly, the legitimate expectations of investors should also be taken into account. The principle of legitimate expectation has a long history in international law, while over time the concept of legitimate expectation has come to have a more fixed profile. It continues to be used in a variety of contexts. In the context of inter-state relations governed by general international law, as well as in the context of investment protection, the principle was the product of particular treaty agreements. In both cases, it was closely related to the basic principle of good faith.¹⁸ "Legitimate expectations" is in fact a consideration under fair and equitable treatment in the international protection of investments, and is not a sole factor in the determination of indirect expropriation. But when we are determining whether a compulsory licensing act constitutes an indirect taking, if the patent holder wishes to apply the doctrine of legitimate expectations, it needs to be clear what is the basis for that expectation, and the sources of this basis are diverse in practice, accompanied with controversies.

In *Metalclad Corporation v. United Mexican States* case, the arbitral tribunal found that statements or acts of a Government promising to protect investments, and the resulting reliance on investments is the basis of legitimate expectations, and the Government's acts constituted an indirect expropriation.¹⁹ In *Eli Lilly and Company v. Government of Canada* case, the tribunal found that the slow evolution of law through court decisions is natural and does not

¹⁶ T. Wälde, A. Kolo, "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law" (2001) 50 ICLQ 811, p. 835

¹⁷ Lynne Taylor, India's first - ever compulsory license - "a game-changing move", *PharmaTimes Magazine Online*, 12th Mar 2012, at: https://pharmatimes.com/news/indias_first-ever_compulsory_license_-_a_game-changing_move_975590/

¹⁸ Eirik Bjorge, *Legitimate Expectations*, *Max Planck Encyclopedias of International Law*, May 2023, at: <https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2236>

¹⁹ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1

automatically violate legitimate expectations, “this process has of course involved some elements of change, but based on the record, that change is more incremental and evolutionary than dramatic.”²⁰

Based on the above cases, we can find that whether a compulsory license constitutes an indirect expropriation needs to be judged based on the facts of the specific case. However, we think the Declaration on the TRIPS agreement and public health is a consensus declaration to address global health issues, restrictive measures on patent rights like compulsory licensing are legal options that are agreed by WTO members, investors should take into account the provisions of the host country's patent law before engaging in investment related actions. Most countries' patent laws define the premises for compulsory licensing, so investors' legitimate expectations should be based on the provisions of the host country's domestic law on compulsory licensing and the specific implementation of those provisions. In sum, the legitimate expectations of rights holders must have an objective basis and cannot be the result of illusions or over optimism.²¹

In the end, we still need to consider the characteristics and purpose of the government's actions, just like what we do when we consider whether the actions constitute an indirect expropriation. The context in which the action is taken, the specific measures and the underlying intent are all things to be considered, as mentioned earlier, the identification of purpose is difficult. At this time, analyzing the specific behavior of the compulsory licensing act is also helpful in determining whether the government has the purpose of expropriation. The TRIPS Agreement and the Doha Declaration framework provide legitimate purposes for compulsory licensing,²² so when a host country authorizes a compulsory license to respond to a serious public health crisis, giving priority to protecting the right to human health of a large part of the population, it does not constitute an indirect expropriation, even if it has a negative impact on the right

²⁰ *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2

²¹ *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23

²² “TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights”:

Article 31, Other Use Without Authorization of the Right Holder: ...

“Declaration on the TRIPS agreement and public health”:

5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.

c. Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

holder of the patent,²³ this is based on a human rights protection position and is the consensus of the international community. Whereas the likelihood that a compulsory licensing act that is not reasonably supported will be considered an indirect expropriation is significantly higher, of course, the determination of the purpose of the public interest needs to be made with caution in order to prevent the host state from using the legitimate purpose of preserving public health as a tool for its own expropriation or protectionism.

For example, if compulsory licensing is carried out in excess of demand for a prolonged period of time, or if the proportion of the population actually benefiting from compulsory licensing is insufficient to correspond to the term "public", or if the public crisis is not actually very urgent. The element of public purpose may preclude a compulsory license from being found to be an indirect expropriation, but of course this is not a given, and specific analysis and judgment is still required because different acts of compulsory licensing involve different scopes of interest in the realization of public purposes.

4. Effect of compulsory licenses constituting indirect expropriation and reflections

By analyzing the determination standard of compulsory licensing and indirect expropriation, it can be concluded that in individual cases, it is possible for compulsory licensing to constitute indirect expropriation. Then, once the compulsory licensing of patents in international investment is considered to be an indirect expropriation, it will certainly have an impact on the investor and the host country, and will have a great impact on the legal system as a whole.

On the positive side, assuming that the greater likelihood that a compulsory license will be found to be an indirect expropriation, the more beneficial it will be for the protection of intellectual property rights, the existence of an indirect expropriation clause under the fair and equitable treatment principle increases the probability of success of the right holder in protecting its intellectual property rights. At the same time, when the right holder believes that the compulsory licensing behavior is not legal, it can use the arbitration tribunal to solve the relevant disputes, compared with the WTO dispute settlement mechanism, the investment dispute settlement mechanism is more efficient and more in line with the interests of intellectual property investors.²⁴ Investment agreements are intended to protect investors and their

²³ Kou Shunping, Xu Quan, "The Origin and the Legal Response to the Expansion of the Indirect Expropriation in International Investment", *Modern Law Science*, Issue 1, 2014, p. 136-145

²⁴ Bi Ying, Zu Wentian, "From Investment Protection to Investment Facilitation: The "Rebalancing" of the Investor-State Dispute Settlement Mechanism and China's Responses" *Journal of Shanghai University of Finance and Economics*, 2023, 25(3), p. 123-137

property, and in addition to deciding on indirect expropriation, arbitral tribunals also have greater discretion on the content of compensation and restitution, which is more beneficial to the patent owner to obtain protection in substance and make up for its losses, obviously those are the positive parts.

Compulsory licensing constitutes an indirect expropriation that can also have negative effects. If there is a greater likelihood that compulsory licensing will be considered an indirect expropriation when applied in the area of international investment, it is clear that this will increase the restrictions on compulsory licensing, indirectly weakening the impact of the TRIPS changes and making the flexibility of the compulsory licensing rules since the Doha Round meaningless. The priority of the right to public health over intellectual property rights established by compulsory license regimes under the TRIPS Agreement and the Doha Declaration is clearly beneficial to developing countries. If a compulsory license can easily be claimed as an indirect expropriation, investors will be more inclined to claim the fair and equitable treatment clause before the investment tribunal. Due to the broad nature of the fair and equitable treatment provisions in international investment agreements, the investment tribunal may easily make an interpretation in favor of the investor in its decision, taking into account the legislative tendency of international investment law to protect the investor. Once fair and equitable treatment is adopted in compulsory licensing, the host country will have to undertake obligations to protect intellectual property rights that go beyond the obligations to protect intellectual property rights under international conventions on intellectual property, which is undoubtedly contrary to the value orientation of compulsory licensing to protect the public interest, thus obstructing the protection of the public interest of the host country of investment.

Through the above analysis, the legitimacy of the act of compulsory licensing is still essentially a weighing of interests and a conflict between different systems. we believe that it is still necessary to safeguard the host country's power to issue compulsory licenses for the purpose of safeguarding public health and safety. The Arbitral Tribunal considers that the criteria for a compulsory license to constitute an indirect expropriation need to be strict, for example, to see whether the duration of the compulsory license is much longer than the actual demand for the patented product. Because it is a matter of social justice, as we can see from the severe shortage of medicines and vaccines during the coronavirus epidemic, especially in its early stages, and the fact that many pharmaceutical-producing countries basically resorted to restricting their exports.²⁵ Which caused a social crisis in many of the countries where the

²⁵ Olga Iwona Piatek, James Chien-min Ning, Daniel R Touchette, "National drug shortages worsen during COVID-19 crisis: Proposal for a comprehensive model to monitor and address critical drug shortages, American Journal of Health-System Pharmacy", Volume 77, Issue 21, 1 November 2020, P. 1778-1785

pharmaceutical industry was relatively underdeveloped, Ongoing inequity is a direct consequence of commercial greed and political self-interest,²⁶ and we need to understand and improve the means by which we can promote equity.

Conclusion

Because of differences in the interpretation and determination of indirect expropriation and the public issues involved in compulsory licensing. As various States have set out provisions on compulsory licensing and indirect expropriation in international investment agreements, the question of whether compulsory licensing constitutes indirect expropriation and the investment disputes it may give rise is also a matter for consideration.

In this paper we first describe the relationship between compulsory licensing and indirect expropriation, then discuss the definition of indirect expropriation, and then discuss the situations in which compulsory licensing constitutes indirect expropriation, period finally analyze the effects of interpretations that find compulsory licensing constitutes indirect expropriation. International trade law is a multilateral trade law under the framework of the WTO for the purpose of trade freedom, while international investment law is a law at the bilateral and regional levels for the purpose of protecting foreign investment and pursuing investment liberalization. provisions linking indirect expropriation and compulsory licensing have appeared in international investment agreements, which make compulsory licensing constrained by both international trade law and international investment law. From the perspective of international investment agreement provisions, there is a possibility that compulsory licensing may constitute indirect expropriation. For developing countries in particular, there may be a greater need to consider how to improve the investment provisions in the agreement and the licensing arrangements at a later stage to avoid being found to be indirect expropriation.

Reference

- [1] Wu Handong, Intellectual Property Law (Fifth Edition) [M], Law Publishing House, 2015
- [2] Yu Jinsong, International Investment Law (Fourth Edition) [M], Law Press, 2014
- [3] Gao Zhen, Global governance of international investment disputes [M],

²⁶ Hassan F, Yamey G, Abbasi K, "Profiteering from vaccine inequity: a crime against humanity?" *BMJ* 2021, 374: n2027

Beijing: Social Science Literature Press, 2018

- [4] Yi Jiming, "Public Policy of Patents--The Case of India's First Patent Compulsory License" *Journal of Huazhong University of Science and Technology (Social Science Edition)*, 2014, 28 (02): p. 76-82
- [5] Xu Chongli, "Balance of Interests and the Recognition and Compensation of Indirect Expropriation of Foreign Capital", *Global Law Review*, 2008 (06): p. 28-41
- [6] Gibson, Christopher, "A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation," *American University International Law Review* 25, no.3 (2010): p. 357-422
- [7] Dineke Z P, David P, "The essential role of law in achieving the health-related Sustainable Development Goals," *European Journal of Public Health*, Vol.30, 2020: p. 32-35
- [8] Sariola S, "Intellectual property rights need to be subverted to ensure global vaccine access," *BMJ Global Health* 2021, 6: e005656
- [9] Giorgio Sacerdoti (editor), Pia Acconci, Mara Valenti, Anna De Luca (co-Editors), "General interests of Host States in International Investment Law," Cambridge University Press, 2014, p. 58-75
- [10] Ranjan P, Anand P, "Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law," In: Choukroune, L. (eds) *Judging the State in International Trade and Investment Law, International Law and the Global South*, p. 127-151
- [11] Ajibo Collins, Oguejiofor Chikodili, Egbom, Chidi Onyia, Gloria Okwulehie, Iwu Nkokelonye, Adaeze, (2022), "Standard of Review in Indirect Expropriation: Reconciling the Effect Rule with the Doctrine of Intent," *Global Journal of Comparative Law*, 11, p. 36-56