I. Introduction

For years IPRs have been defined as protected investments under IIAs. And for years this relationship had been tucked away, far from the big stage of international law. However, since recently things started to change. IPRs have taken center stage in international investment arbitration with publicly available cases finally surfacing. Among them is *Eli Lilly v. Canada,*[1] a NAFTA[2] investment arbitration case. *Eli Lilly v. Canada* was the first investment arbitration case that addressed the issue of patent rights as protected investments. Eli Lilly, a US based pharmaceutical producer, had lost two of it commercially successful patents through revocation by the Canadian courts. Eli Lilly tried to redeem its lost patents through international investments proceedings, albeit unsuccessfully.[3] However among the many complex claims set forth by Eli Lilly, one of them stated that Eli Lilly's legitimate expectations, a standard of protection commonly found in international investment law, have been violated by Canada's law on the patent utility requirement for its alleged inconsistency with the relevant international IP treaty – the NAFTA IP Chapter.[4] By introducing an international IP treaty, an instrument of public international law addressed at states, into the sphere of investment arbitration, and the reach of private persons, Eli Lilly attempted to break the barriers between the two areas of law – public international law and private law. Eli Lilly asked the Tribunal to recognize its right to rely on an international IP treaty directly. Such a claim raises a number of issues. First of all, can an international IP treaty be applied in investment arbitration? If so to what extent will it be applied and how will the investment Tribunal understand it? The issues seem even more intriguing as, on the one side, IP laws

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1 Eli Lilly & Co. v. Canada, ICSID, Case No. UNCT/14/2 (2012), available at: http://www.italaw.com/cases/1625 (Visited last on Mar. 6, 2018) [herein after: *Eli Lilly v. Canada*].

2 North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

3 *Eli Lilly v. Canada,* Supra note 1, Final Award, available at: https://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf (Visited last on Mar. 6, 2018) [herein after: Final Award].

4 NAFTA, Supra note 2, Chap. 17.

are carefully crafted by the state to suit its domestic goals and policies. On the other side are investment Tribunals who have their own purpose and understanding of the law. Behind this seemingly dry legalistic problem a much bigger background emerges. IPRs are tools of policy and are recognized as such on an international level.[5] By placing IPRs and international IP treaties into the system of international investment law and arbitration there is a risk that the delicately crafted policy objectives become disrupted by the broad protection standards found in IIAs, such as legitimate expectations. However, investment Tribunals can hardly be prevented from exercising their powers, which might include assessing and applying international IP treaties as the relevant law. As jurisprudence on the matter is still developing and academic writing having only recently started addressing this issue, it remains unclear how the Tribunals will address the legal and policy measures with IPRs as their object. This remains true even after the award was rendered by the Tribunal, as it never actually debated the issue.

This thesis will try to show that investment Tribunals nevertheless have limited interpretation space, mostly stemming from the wording of IIAs and to an extent from the rules of international IP treaties themselves. Furthermore, the thesis will attempt at demonstrating, should the investment Tribunals be consistent with the current jurisprudence and take the appropriate approach in applying the law, the policy flexibilities offered by international IP treaties should nevertheless be left unfettered. A two-fold approach will be taken. Firstly, the specific relationship of international IP treaties and legitimate expectations in the *Eli Lilly v. Canada* case itself will be analyzed. Secondly a broader analysis, that is outside of the specific scope of the NAFTA, will be conducted by applying the principles derived from the case onto a global legal environment. The thesis will be structured in the following manner. Chapter II will set out the international legal framework. It will introduce the relevant international treaties and shortly survey their characteristics important for the analysis. A part of the chapter will be devoted to the protection of IPRs in international investment law. Chapter III will present the background and the summary of the relevant facts from the *Eli Lilly v. Canada* case. The emphasis will be on the argumentation relevant to the claim of basing legitimate expectations

5 Ruth L. Okediji, Is Intellectual Property "Investment"? Eli Lilly v. Canada and the International Intellectual Property System, 35 U. Pa. J. Int'l L. 1211, 1226&1133 (2013-2014).

in the NAFTA IP Chapter. Chapter IV will present the "promise utility doctrine", the contentious legal doctrine pivotal to the case. The doctrine will be reflected against the backdrop of Canadian patent law. The chapter will conclude with a small analysis regarding the consistency of the doctrine with international IP standards. Chapter V will address two major areas. It will try to explain the FET standard and legitimate expectations as its constituent part. The focus will be on NAFTA investment arbitration case law which will be relevant for assessing the relationship of international IP treaties in establishing legitimate expectations. The chapter will conclude with the observation of the two recent investment law cases that have addressed the issue of legitimate expectations and IPRs. Chapter VI will attempt at giving an analysis of the validity and possible success of the claim. A parallel analysis will be attempted with a focus on the broader legal environment of IPRs and international investment law. Chapter VI will address the issues of using policy justification for changes in IP legislation pertaining to the defense in investment arbitration. The thesis will conclude with a small summary and a few general recommendations.