

The international law gaze: *Lilly v Canada*

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New Zealand is party to several free trade agreements (FTAs), such as those with China, Malaysia, and Korea, that include investment chapters aimed at protecting foreign investors. These chapters also contemplate investor/State arbitration to settle disputes. It is, then, important to keep an eye on recent decisions regarding other FTAs, in order to identify how similar potential disputes involving the government or New Zealand investors abroad are likely be framed. A recent award by an international tribunal in *Eli Lilly and Company v Government of Canada* applying the North America Free Trade Agreement (NAFTA) is one that deserves close evaluation. (International Centre for Settlement of Investment Disputes, *Eli Lilly and Company v Government of Canada*. Case No. UNCT/142. 16 March 2017. [*Lilly v Canada*]).

Although the award has a strong intellectual property component, this article deals with a different dimension: how far can a foreign investor dissatisfied with a final court's new interpretation of national law go in challenging this interpretation before an investor/State tribunal?

Not that far. This is the general answer to this question offered by the *Lilly* tribunal. ... but

The Facts and Claims in *Lilly v Canada*

Eli Lilly (Lilly) is a pharmaceutical company incorporated in the United States, which indirectly owns Eli Lilly Canada Inc, a Canadian subsidiary (Lilly Canada). Lilly obtained a Canadian patent for a compound called olanzapine in 1980 (the 687 patent). In 1991, Lilly also filed a patent application related to olanzapine, as a selection from the genus of the 687 patent, to be used in a product called Zyprexa to treat schizophrenia. Lilly's strategy was to seek to extend the protection to its invention after the first patents expired. The Zyprexa patent was issued by Canada in March 1998. (*Lilly v Canada* at [77]). In June 2007, a Canadian company, Novopharm, sought approval to market a generic version of Zyprexa. Canada granted the approval, and Lilly filed suit against Novopharm for patent infringement. (*Lilly v Canada* at [79] – [80]). The result of this process was a decision by the Federal Court that the Zyprexa patent was invalid for lack of utility. (*Lilly v Canada* at [82]).

The second relevant decision is related to a compound called atomoxetine, which is used as an anti-depressant. Canada granted Lilly a patent for this compound in 1979. (*Lilly v Canada* at [85]).

Subsequently, and following a similar business strategy, Lilly filed a new use patent application, because the compound could also be used to treat attention-deficit/hyperactivity disorder. (*Lilly v Canada* at [87]). In October 2002, Canada granted the new patent, and the medication was marketed under the name Strattera. (*Lilly v Canada* at [91]). Novapharm challenged the validity of this patent, and the Federal Court found that the Strattera patent was “invalid on the basis of inutility.” (*Lilly v Canada* at [93]).

Lilly regarded the judicial decisions as violations of Canada’s obligations under NAFTA. The two claims were, first, violations of the obligation not to expropriate investments without compensation under NAFTA Article 1110 (*Lilly v Canada* at [181]). This provision sets forth: “1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation ...”

The second claim raised by Lilly was Canada’s contravention of the obligation to grant investors fair and equitable treatment (FET) under NAFTA Article 1105. (*Lilly v Canada* at [183]). This precept establishes that “each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

Dramatic Change in the Utility Requirement under Canadian Law

The basis of the claims was that, according to Lilly, Canadian courts had *dramatically* changed their interpretation of the utility test at the time the Zyprexa and Strattera patents had been granted and before the patents were invalidated. (*Lilly v Canada* at [234]). Then, the traditional utility test was much easier to meet. According to Lilly, “A slight amount of utility satisfied the low threshold of utility required. ... so long as an invention was capable of being put to a specific use, even if that use had not commercial value, then it was ‘useful’ under the Patent Act.” (*Lilly v Canada* at [228]).

Lilly argued that a new test, “promise utility doctrine,” which required a higher requirement of utility, had been added to the traditional utility test. (*Lilly v Canada* at [235]). The higher requirement was evidenced by three new developments by Canadian courts, according to Lilly: (i) the promise standard; (ii) post-filing evidence; and (iii) disclosure of sound prediction.

Before proceeding, a brief description of the policy underlying patent law is in order. (E. Richard Gold and Michael Shortt, “The Promise of the Patent in Canada and Around the World”, 30 Canadian Intellectual Property Review (2014)). As the Canadian Supreme Court stated, “The patent system is based on a ‘bargain’, or *quid pro quo*: the inventor is granted exclusive rights in a new and useful invention for a limited period in exchange for disclosure of the invention so that society can benefit from this knowledge.” (*Teva Canada v Pfizer Canada*, 2012 SCC 60, [2012] 3 SCR 625. at [32]). The patent application contains the inventor’s promises that the invention is useful for certain purposes. The existence of the promises is also the basis of the granting of the patent. Or, as the House of Lords stated, “[patent] protection is purchased by the promise of results. It does not, and ought not to, survive the proved failure of the promise to produce the results.” (*Hatmaker v Joseph Nathan & Co* (1919), 36 RPC 231 (HL) at [237] Lord Birkenhead). The inventor must then be careful in its application to not overstate the promises of utility, because if any of them is proved not to exist, the whole patent can be invalidated.

Lilly then argued, as the first element, that as a result of the case law since 2005, the Canadian courts had identified or inferred additional promises of utility from the disclosure (in the patent application) that went beyond the utility of the claimed invention, imposing an elevated requirement of utility. (*Lilly v Canada* at [236]). This first element was labelled the “promise standard.”

The second element of the alleged new doctrine was related to the evidence required to prove promises of utility, and it was labelled “post-filing evidence.” According to the claimant, the Supreme Court of Canada changed its interpretation of patent law in this area in 2002 in *AZT*: post-filing evidence would not be admissible to prove promises of utility. So, for instance, evidence of scientific effectiveness and commercial success obtained after the patent application was filed could not be used to prove utility at the time of the application. (*Lilly v Canada* at [241]).

The third element of the new doctrine was also related to evidence and was referred to in the award as “disclosure of sound prediction.” According to Lilly, Canadian courts determined, since the 2008 Raloxifene decision, that pre-filing evidence not included in the patent application could not be admissible to prove predicted utility in the event of subsequent litigation. (*Lilly v Canada* at [245]). “Patent Office examiners were instructed to require the factual basis and line of reasoning for sound prediction to be in the patent itself.” (*Lilly v Canada* at [248]).

Based on this analysis, Lilly claimed that it had “legitimate expectations that its Zyprexa and Strattera patents would not be invalidated on the basis of a radically new utility requirement.” (*Lilly v Canada* at [261]). Lilly also argued that the utility requirement “was outside the ‘acceptable margin of change’ that investors must anticipate.” (*Lilly v Canada* at [269]).

The Utility Requirement Is Arbitrary and Discriminatory

Lilly also argued that the utility requirement was arbitrary and discriminatory. It claimed that the process of construing the promise of a patent was inherently arbitrary, differed from one court to the other, and led to conflicting decisions regarding the same patent. Lilly submitted evidence of the patent for Latanoprost: two Federal Court of Appeal panels reached opposite conclusions as to its validity. It was not an isolated event, according to Lilly. (*Lilly v Canada* at [391]).

Turning to the concept of sound prediction and the ban on post-filing evidence, Lilly argued that it was equally arbitrary. (i) Patent applicants did not know “how much, and what type of evidence a judge will require to demonstrate or sound predict a patent’s utility.” (*Lilly v Canada* at [392]). Finally, Lilly claimed that the promise utility doctrine was not based on any legitimate policy purpose, because the doctrines created the conditions for inconsistent results. (*Lilly v Canada* at [395]).

Finally, Lilly also claimed that the utility promise doctrine discriminated against pharmaceutical patents, contrary to NAFTA Article 1709(7). Since 2005, said Lilly, only pharmaceutical patents had been invalidated by courts for lack of utility. (*Lilly v Canada* at [398]). Finally, Lilly also based its discrimination claim on the fact that the main beneficiary of the doctrine had been the Canadian generic drug industry. (*Lilly v Canada* at [401]).

Canada’s Reply

Canada denied that there had been a dramatic change in interpretation of the utility requirement and began by arguing that the term “useful” was not defined in its Patent Act and, therefore, that its meaning would evolve through case law. (*Lilly v Canada* at [270]).

Then Canada addressed the three elements of the alleged dramatic change in the requirement. First, Canada posited that the promise standard was not novel in Canadian law and case law. “Utility has long been a bifurcated standard”. (*Lilly v Canada* at [271]). First, if the patent document made no promise of utility, the threshold was low, and a minimum useful result was enough. Second, if the

inventor made a promise of utility, the promise had to be fulfilled. The fact that there was a minimal useful result was not enough. (*Lilly v Canada* at [271 and footnote 350]).

As to post-filing evidence, Canada disagreed with the view that the Supreme Court's decision in *ATZ* constituted a dramatic change, and it submitted evidence of a comment by a prominent Canadian intellectual property law firm describing the decision as reaffirming a long-standing position on the topic and confirming the disallowance of this kind of evidence. (*Lilly v Canada* at [283]).

As to the disclosure of sound prediction, Canada argued that it had been recognized in its law since the 1979 Supreme Court *Monsanto* decision and that the Canadian Patent Office's practice during the 1990s illustrated that the *Raloxifene* decision did not establish the requirement. (*Lilly v Canada* at [286] – [287]).

Canada then argued that Lilly could not have legitimate expectations that its patents could not be invalidated by courts for lack of utility. (*Lilly v Canada* at [302]). Canada concluded that, even if a dramatic change had taken place, "it is trite to say that the common law evolves over time. Any sophisticated investor expects developments in the law, particularly in the area of patent law. It simply cannot be that every time a court overrules a precedent, it violated customary international law [and NAFTA FET]." (*Lilly v Canada* at [306]).

Arbitrary and Discriminatory Character of the Utility Doctrine: Canada's Response

Canada responded that identifying the promises in a patent was not inherently unpredictable. Patents are constructed as a whole, and according to well-established principles of construction. (*Lilly v Canada* at [403]). The existence of different results is owed "to the highly fact-dependent circumstance of each case." (*Lilly v Canada* at [404]).

Canada also asserted that the ban on post-filing evidence was necessary to preclude the granting of patents based on speculation, even if such speculation became reality later on. (*Lilly v Canada* at [406]). Also the ban "is 'rationally connected' to the goal of preventing patenting too far upstream." (*Lilly v Canada* at [406]).

As to the discriminatory nature of the utility doctrine, Canada stated that the understanding of the application of its patent law could not be limited to the results of litigation. A wider perspective showed a different picture: almost 26000 pharmaceutical patents had been granted between 1989

and 2013. (*Lilly v Canada* at [413]). Canada finally noted that 50% of the top generic drug makers were not own by Canadians and that the rules applied to Canadian companies as well. (*Lilly v Canada* at [415]).

Underlying Lilly's claims was the critical issue of whether a State could be internationally responsible for judicial decisions that did not constitute a denial of justice. Lilly sought to escape the high bar of a claim of violation of an international investment agreement (IIA) as a result of a denial of justice. A recent decision clearly illustrates this high bar: "For a denial of justice to exist under international law there must be 'clear evidence of ... an outrageous failure of the judicial system' or a demonstration of 'systemic injustice' or that 'the impugned decision was clearly improper and discreditable.'" (Award, *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No ARB/10/7, July 8, 2016. at [500]).

If a host State could be internationally liable for judicial acts beyond the event of denial of justice, investors could recover losses resulting from judicial decisions in which due process had been properly followed. This was Lilly's position. If this were not the case, according to Lilly, the result "would be to exempt all judge-made law from the requirements of international law." (*Lilly v Canada* at [177]). On the contrary, Canada was of the view that the acceptance of Lilly's claim would have had the following effect: "NAFTA Chapter Eleven tribunals will be transformed both into tribunals with plenary jurisdiction over all international treaties and supranational courts of appeal in domestic property law issues." (*Lilly v Canada* at [190]). The stakes were, then, high for both investors and States' judicial systems.

The Tribunal's Decision

Not Just Denial of Justice Claims

The tribunal took a middle ground based on a distinction regarding the type of claim of violation raised by the investor.

First, and regarding the claim that judicial decisions could be contrary to the fair and equitable treatment under NAFTA Article 1105(1), the tribunal endorsed some elements of Lilly's position and expressed that "there are distinctions to be made between conduct that may amount to a denial (or gross denial) of justice and other conduct that may also be sufficiently egregious and shocking, such

as manifest arbitrariness or blatant unfairness. ... It follows ... that a claimed breach of the customary international minimum standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that is not cast in denial of justice terms.” (*Lilly v Canada* at [223]). However, and in a key nod to Canada, the tribunal also pointed out that NAFTA Chapter 11 tribunals, those dealing with investor/States disputes, should pay *considerable* deference to domestic courts’ decisions. (*Lilly v Canada* at [224]). In sum, the possibility exists, but given the high degree of deference, the chances of success of this claim are, in principle, low.

Second, the tribunal stated that an investor/State tribunal could deem a domestic court’s decision a violation of the obligation not to expropriate when the judicial act or omission crystallized the taking of the investment. (*Lilly v Canada* at [221]). This conclusion could be reached even if a denial of justice, as defined above, did not exist, because the given national court followed its normal process. Investor/State tribunals would not owe any deference to the court’s decision. This approach favours investors.

Having made the afore-mentioned determinations, the tribunal proceeded to address the specific claims regarding the violations of NAFTA obligations by Canada as a result of the alleged change in the interpretation of its patent legislations.

No Dramatic Change in the Interpretation of Canadian Patent Law

The Utility Requirement

The tribunal rejected Lilly’s claim that there had been a change in the utility requirement under Canadian Patent law after 2005 in the sense that in addition to the “mere-scintilla” test, there was the promise standard. The double standard, the tribunal found, had been recognized by Canadian courts since the 1981 Supreme Court judgment in *Consolboard*, and courts had subsequently cited it as an authority regarding the co-existence of the two tests. (*Lilly v Canada* at [316] – [318]).

The tribunal pointed out that, although the promise standard had existed since the 1980s, it had not played a significant role until 2005. However, for the tribunal this lack of significance was irrelevant since “the rule was clearly ‘out there’, to be ignored at the patentees’s peril.” (*Lilly v Canada* at [324]).

Post-Filing Evidence

The tribunal also concluded that the Supreme Court's decision in *AZT* had not introduced a dramatic change regarding the inadmissibility of post-filing evidence. (*Lilly v Canada* at [337]). The tribunal looked at the record and found that, when reversing a decision by the Federal Court of Appeal, *Ciba-Geigy*, the Supreme Court had not changed law and that the *AZT* judgment was based on the Patent Law, the case law, and policy considerations. (*Lilly v Canada* at [331]). The tribunal also noted that experts had conflicting views on whether *AZT* had introduced a change to the law. On these bases, the tribunal arrived at the above-mentioned conclusion.

Disclosure for Sound Prediction

The tribunal found that the investor had raised the new requirement argument before the Canadian Court of Appeal in the Raloxifene case, in which one of its patents was at issue, and that the Court of Appeal had rejected it in 2008 based on prior case law by the Supreme Court. (*Lilly v Canada* at [340]). The tribunal also stated that disclosure of sound prediction had also been invoked by the Canadian Office Action in communications addressed to Lilly in 2003 and 2004, so the latter had been aware before Raloxifene. (*Lilly v Canada* at [345] – [346]). After examining all the evidence, the tribunal concluded that there was a “progressive development of the doctrine of sound prediction over decades ... This process had of course involved some elements of change, but based on the record, that change is more incremental and evolutionary than dramatic.” (*Lilly v Canada* at [349] – [350]).

Lilly's Alleged Legitimate Expectations

The tribunal also dismissed the allegation of violation of Lilly's legitimate expectations. Siding with Canada, the tribunal stated that all patentees faced the risk of invalidation as a result of challenges before courts based on the invention's lack of satisfaction of patentability requirements. (*Lilly v Canada* at [382]). No investor could then have the expectation that such an invalidation could not occur.

But in addition, the tribunal pointed out that Lilly's expectation that the utility of *Strattera* and *Zyprexa* had a low threshold to meet and could not be invalidated due to lack of utility could not be deemed a legitimate expectation. The reason was that the promise doctrine had basis in the Canadian law in existence at the time the patents were filed and that Lilly “should have, and could have, anticipated that the law would change over time as a function of judicial decision-making.” (*Lilly v Canada* at [384]).

Arbitrariness

The tribunal rejected the claim of arbitrariness of the promise utility doctrine based on the alleged unpredictability of results unpersuasive. To the tribunal, some degree of unpredictability was

expected regarding the application of any law, and inconsistencies in interpretation could also occur as a result of the adversarial process dealing with different facts. (*Lilly v Canada* at [421]).

The tribunal also found that there was no lack of predictability regarding the ban of post-filing evidence. “To the contrary”, it said, “it is a bright line rule that sets a clear date by which patentees must prove utility.” (*Lilly v Canada* at [425]). The tribunal also noted that Lilly had not been able to prove that patentees were unable to know how much evidence was required by Canadian courts to prove the utility requirement. There was no evidence that the courts had systematically applied a variety of evidentiary rules in similar cases or that evidence had been required based on personal preferences. (*Lilly v Canada* at [424 footnote 585]). Finally, although the tribunal acknowledged the difficulties that companies faced in timing investment and patentability requirements, such difficulties were the result of a policy decision by Canada. It was not the tribunal’s role to question Canada’s policy choices. (*Lilly v Canada* at [426]).

The tribunal also looked at the apparent arbitrariness of the sound prediction doctrine because of lack of policy justification and rejected the claim. According to the tribunal, it was not irrational that, in exchange for the monopoly granted by the patent, patentees had to make their predictions of utility public. (*Lilly v Canada* at [428]).

Discrimination

The tribunal also rejected the discrimination claim and concluded that Lilly had not proven that the promise utility doctrine discriminated against pharmaceutical patents as a technological domain. Indeed, there had been no evidence supporting the causal link between the doctrine and the high percentage of inutility decisions in this industry. Other reasons could well explain such higher percentage. (*Lilly v Canada* at [435]). As to the discrimination based on nationality, the tribunal responded that the evidence was insufficient to prove such claim. (*Lilly v Canada* at [441]).

Lessons to Learn from *Lilly v Canada*

This NAFTA case dealt more broadly with the scope of scrutiny under applicable international investment agreements by investor/State tribunals of courts’ interpretations of domestic law. There is no question that this is a systemic issue for international investment law in general, even if the wording of the FET obligation in IIAs might differ, and that future investor/States tribunals will look to *Lilly v Canada* for guidance.

The *Lilly* tribunal had to walk a fine line between not being too intrusive in the domain of domestic adjudication and recognizing the reality that courts in all countries were not fully independent and could also be under the influence of governments. Too much intrusion disturbs host States, those that are party to IIAs, and ignoring the institutional reality of some judicial systems leaves foreign investors lacking the protection that IIAs aim at ensuring.

The balance was achieved first by establishing that courts' decisions could be challenged even if due process has been followed and no denial of justice could be claimed. The tribunal was, though, cautious in the scope of the opportunity for review of judicial decisions. Mainly, courts' role in alleged expropriatory measures enacted by a government could be the subject of more scrutiny by investor/State tribunals. The tribunal was right, in the present author's view, in leaving this possibility open in general. This is a finding that clearly protects foreign investors at a time when they feel the urgency to get the operation of the protection granted by IIAs.

The tribunal was clear, though, that the situation was different if the investor was challenging stand-alone judicial decisions on the basis of a violation of the FET standard. Investors might expect that the odds of this claim were against them because investor/State tribunals would be deferential to domestic courts' judgments. New Zealand courts adjudicating disputes involving complainants who are nationals of States that have FTAs with investment chapters with New Zealand can be confident that investor/State tribunals will not lightly transform into appeal courts in the event of claims of this particular nature, as the tribunal in *Lilly v Canada* explicitly stated.

From the investor's perspective, it has the burden of proving (i) that there is a change in the interpretation, and (ii) that the change is dramatic. The existence of any change will be assessed in light of what other courts have expressed regarding the alleged existence of the change, and future investor/States tribunals finding *Lilly v Canada* persuasive will pay significant deference to such expressions. In effect, Lilly questioned how the Canadian Supreme Court's decision in *Consolboard* should be understood. Lilly's view differed from the position that other Canadian courts had taken on this case. The tribunal replied, "The Tribunal sees no basis for questioning the Canadian judiciary's interpretation of its own Supreme Court precedent." (*Lilly v Canada* at [321]).

It is also important to note that the *Lilly* tribunal assessed the dramatic nature of the change and when it took place in terms of how it emerged and not in terms of the extent of the change. This approach

favours host States: so long as the change arises incrementally, as in *Lilly v Canada*, the change might not be regarded as dramatic, even if it is significant.

Not less important for host States are the tribunal's findings that the unpredictability or inconsistency of outcomes resulting from the application of a judicial interpretation will not be deemed arbitrary and a violation of a FET obligation in IIAs. The tribunal was right that, even if such situations were undesirable, the threshold of violation of such obligation was usually high. Foreign investors should take note of these findings and properly assess their likelihood of success before making a claim against a domestic court's interpretation as a result of its alleged unpredictability and inconsistent results.

Open Questions after *Lilly v Canada*

There were, however, some issues left open in *Lilly v Canada*. As has been shown, the tribunal's conclusion was that the change in Canadian patent law had not been dramatic. The question is, then, whether a change in interpretation by domestic courts that is dramatic can constitute a violation of the FET for this reason alone. U-turns in case law do not happen often but they take place.

Dramatic changes of interpretation of pre-existent legislation not by courts but by public organs have been the subject of investment arbitration in the past under NAFTA and other international investment treaties. Assessed in isolation, they seem to have a mixed result. However, evaluated on the basis of their particular facts and law, a different picture emerges.

In *Occidental Exploration and Production Company v. the Republic of Ecuador*, an investor/State tribunal applying the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment dealt with what could be called a dramatic change in interpretation. Ecuadorian tax authorities had interpreted tax legislation in a way that granted Occidental a tax rebate. However, subsequently, the authorities altered the interpretation of the relevant legislation to conclude that, given the nature of its activities, Occidental did not meet the requirements to be granted the tax rebate. In addition, the authorities requested reimbursement of those accorded in the past. (Final Award in the Matter of an UNCITRAL ARBITRATION. London Court of International Arbitration. Administered Case No UN 3463. *Occidental Exploration and Production Company v. the Republic of Ecuador*. July 1st, 2004, at [134] – [135]. [*Occidental v Ecuador*]).

The tribunal in this case concluded that the change in interpretation constituted a violation of the FET provided for in the treaty. (*Occidental v Ecuador* at [187]). The basis for the conclusion was found in the preamble of the agreement. The tribunal stated that “although fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment ‘is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources’. The stability of the legal and business framework is thus an essential element of fair and equitable treatment.” (*Occidental v Ecuador* at [184]). This was a decision in the early years of investment arbitration, and such generous interpretations of preambular language are rare today.

Nonetheless, and although such language is absent in the investment chapters of New Zealand’s FTAs with China and Malaysia, it is worth noting that Article 10.1 of the New Zealand – Korea FTA includes, as an objective of the investment chapter, to encourage investment, the following phrase: “within a stable framework of rules ...” Despite this text, it is unlikely, in principle, that a dramatic change in interpretation of a legislation by a New Zealand governmental body adversely affecting a Korean investor could be deemed contrary to the treaty’s FTA. In effect, it can be said that the award in *Glamis Gold v United States of America* reflects much more how investor/States tribunals are dealing with dramatic changes of interpretation by public organs today. (*Glamis Gold v United States of America*, Award of 8 June 2009 [*Glamis v US*]). The reasoning equally applies to dramatic changes by courts.

Glamis v US was a NAFTA dispute between a Canadian investor and the United States as a result of a change in the interpretation of legislation by American federal and state authorities. The dispute arose out of the denial of approval of a mining project to protect the significant cultural value that Native Americans attached to the land in which the project would take place. The land was important because it had spirit circles, sight lines, and teaching areas (*Glamis v US* at [805]), and equally significantly, the land contained what the Quechan tribe called a Trail of Dreams, a place where they celebrated the creation of the world. (*Glamis v US* at [105]). The *Glamis* tribunal acknowledged that a key concept of the legislation, the “unnecessary and undue degradation” standard, was applied for decades in the sense that the discovery of aboriginal artifacts at a mining site would require mitigation measures, but not the denial of the project. (*Glamis v US* at [758]). The reason for the change was that, for the first time, a mining project had confronted “a significant unavoidable adverse impact to cultural resources and Native American sacred sites.” (*Glamis v US* at [760]). The tribunal deemed the change in interpretation dramatic. (*Glamis v US* at [761]). But despite this, the tribunal concluded that the change was not contrary to the NAFTA FET, as claimed by *Glamis*. (*Glamis v US* at [762]). The reasons were several: (i) the interpretation was not arbitrary but based on pre-existing statutory and

regulatory provisions; (ii) the interpretation did not have a manifest lack of reasons, since it consisted of several pages of legal and factual analyses; (iii) the decision did not create a blatant unfairness against the claimant because the decision was of general applicability; and (iv) claimant had not reasonable expectations induced by the United States that its project would be approved. (*Glamis v US* at [763] - [767]).

Following *Glamis v US*, it can be said that a dramatic change introduced by a court *per se* should not be deemed a violation of the FET. First, there is nothing unfair or unequitable when a court interprets the law in a novel way in response to a factual situation that previous courts have not dealt with, for instance. But even if the facts are not unique, a novel judicial interpretation still should not be deemed contrary to the FET, if the host State has not specifically created in the claimant investor the expectation that the existing legislation will not change as a result of either new regulations or new interpretations.

Basically, if, as *Glamis v US* illustrated, governmental organs are owed deference regarding the policy choices reflected in the novel interpretations, which respond to a political decision-making process, the deference is even more expected regarding courts, which lack such political motivation, in principle, and act on the basis of their impartial understanding of the law. In sum, courts' dramatic changes of interpretation should not constitute violations of the FET on their own.

In a Nutshell

A general portrait of the impact that *Lilly v Canada* may have on a potential investment dispute involving New Zealand courts as a result of an investor/State tribunal assessing claims by foreign investors could have some of the following elements.

(i) Denial of Justice claims against New Zealand judicial decisions as violations of FET obligations: possible but very low probability of success. (ii) Investors' claims as a result of judicial decisions crystallizing an expropriation: possible. (iii) Changes of interpretation by New Zealand courts as violations of the FET: possible but low probability of success if the change takes place incrementally. (iv) Dramatic changes of interpretation as contrary to a FET obligation: possible but low probability of success in light of the potential extension of the analysis carried out in *Glamis v US*.

