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The question of compulsory licensing and software patents from the perspective of investment arbitration

Despite the inclusion of intellectual property rights as a form of investment in most investment treaties, their presence in investment arbitration remains highly contested among experts. One of the chief ways IP rights can become involved in investment disputes is through compulsory licensing. This presentation examines the theoretical situation that could arise if a software patent was subjected to such compulsory licensing. Such patents increasingly play an increasingly bigger role in the value of an investment, due to the proliferation of information and communication technology investments. Therefore, if they were forcibly shared with competitors, the value of the investment could significantly decrease, causing damages to the investor. Existing case law and literature has mostly focused on either trademarks or pharmaceutical patents in the context of investment arbitration, thus this presentation seeks to tread a new, theoretical ground, making reasoned conjectures about the evolution of investment arbitration with regards to software patents, and how their compulsory licensing should be treated.