PROTECTION OF IP RIGHTS AS AN INVESTMENT

Fikri Mülkiyet Haklarının Yatırım Olarak Korunması

Banu Fatma GÜNARSLAN*

Abstract

Intellectual property (IP) rights are embedded as an asset under the definition of investment in most international investment agreements. These agreements ensure protection and promotion of investment. Where IP rights are treated as an investment, they do benefit from the protection standards afforded by the international investment agreements. However, it is highly debated that to what extent an IP right constitutes an investment. Does the inclusion of IP rights under the investment definition of agreement suffice to be qualified as an investment? Or are there any other requirements? Over the last few years, these questions have attracted considerable scholarly interest.

This article aims to analyse protection of IP rights as an investment and legal issues deriving from intersection between IP law and international investment law. Accordingly, it will attempt to answer the question as to when IP rights constitute an investment. In this sense, the article will initially discuss the inclusion of IP rights under the definition of investment afforded by several investment agreements. Subsequently, protection of IP rights in ICSID Convention will be discussed critically. Thirdly, the article will try to underscore the roles of international investment law and domestic law in determining whether an IP right is investment.

Key Words: IP rights, international investment agreement, ICSID Convention, trademark, patent.

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Özet

Fikri mülkiyet hakları, çoğu uluslararası yatırım anlaşmasında yatırım tanımı altında bir varlık olarak yer almaktadır. Bu anlaşmalar, yatırımların korunmasını ve teşvik edilmesini sağlar. Fikri mülkiyet haklarının yatırım olarak değerlendirildiği durumlarda, bu haklar uluslararası yatırım anlaşmaları tarafından sağlanan koruma standartlarından faydalanmaktadır. Ancak, bir fikri mülkiyet hakkının ne ölçüde bir yatırım teşkil ettiği konusu oldukça tartışmalıdır. Fikri mülkiyet haklarının anlaşmanın yatırım tanımı kapsamına dahil edilmesi yatırım olarak nitelendirilmesi için yeterli midir? Yoksa başka koşullar da bulunmakta mıdır? Son birkaç yıldır, bu sorular önemli ölçüde akademik ilgi çekmektedir.

Bu makale, fikri mülkiyet haklarının bir yatırım olarak korunmasını ve fikri mülkiyet hukuku ile uluslararası yatırım hukuku arasındaki kesişimden kaynaklanan hukuki sorunları analiz etmeyi amaçlamaktadır. Bu doğrultuda, fikri mülkiyet haklarının ne zaman bir yatırım teşkil ettiği sorusu cevaplanmaya çalışılacaktır. Bu bağlamda, makale ilk olarak çeşitli yatırım anlaşmaları kapsamında fikri mülkiyet haklarının yatırım tanımına dahil edilmesini tartışacaktır. Daha sonra, ICSID Sözleşmesi'nde fikri mülkiyet haklarının korunması eleştirel bir şekilde tartışılacaktır. Üçüncü olarak, makale bir fikri mülkiyet hakkının yatırım olup olmadığının belirlenmesinde uluslararası yatırım hukuku ve iç hukukun rollerinin altını çizmeye çalışacaktır.

Anahtar Kelimeler: Fikri mülkiyet hakları, uluslararası yatırım anlaşması, ICSID Sözleşmesi, marka, patent.

INTRODUCTION

Investment agreements are signed between countries in order to develop natural resources, to provide opportunities such as new employment areas and technology transfer, to attract foreign investors, to protect and promote investments.

In international investment agreements, the notion of “investment” is often defined directly and broadly. However, investment definition in international investment agreements varies in treaty practice. Today, IP rights are included in the investment definition in most international investment agreements. IP rights are often explicitly stated as an asset under the definition

of investment[1]. Arbitration decisions provide guidance in defining the concept of investment.

This article will examine the investment definition of international investment agreements in which IP rights are protected, the protection of IP rights as an investment within the scope of ICSID Convention, and the roles of international investment law and domestic law in qualifying IP rights as an investment.

In this context, the inclusion of IP rights in international investment agreements and the legal issues arising from the interplay between IP and investment law will be discussed critically in light of numerous arbitration decisions. This article will endeavour to make a comprehensive analysis by including the provisions of various investment agreements and the discussions in the doctrine. It will conclude taking notes of the critical aspects of the article.

I. PROTECTION OF IP RIGHTS IN INTERNATIONAL INVESTMENT AGREEMENTS

Today, international investment agreements mostly incorporate IP rights. If an investment agreement covers IP rights within the scope of investment definition, then IP rights, as a rule, do benefit from the protection of treaty obligations. Where IP rights are considered under the protection of an international investment agreement, for instance, a patent owner, as an investor, may have right to be protected against discriminatory, unjust or expropriatory actions of the host state. However, the sole inclusion of the IP rights under the definition of investment assets may not suffice in order for them to benefit from the protection of the investment agreement[2]. International investment agreements, which formed as either bilateral investment treaties (BITs) or chapters under free trade agreements (FTAs), are aimed to protect foreign investors' investments. Such agreements give obligations to states in order to protect investment and permit private actors

[1] Nath Upreti Pratyush, "Enforcing IPRs Through Investor-State Dispute Settlement: A Paradigm Shift in Global IP Practice," *Journal of World Intellectual Property* 19, no. 1-2 (2016): 54.

[2] Simon Klopschinski, Christopher Gibson, and Henning Grosse Ruse-Khan, *The Protection of Intellectual Property Rights Under International Investment Law* (Oxford: Oxford University Press, 2021), 21.

(investors) to bring claims against states before arbitration tribunals[3]. The interplay between IP rights and international investment law has been subject to scholarly debate in recent years[4].

[3] Susy Frankel, "The Object and Purpose of Mingling Intellectual Property, Trade and Investment" in *Research Handbook on Intellectual Property and Investment Law*, ed. Christophe Geiger (Cheltenham, Northampton: Edward Elgar Publishing, 2020), 48-49. Also see, Banu Fatma Günarslan, *Fikri Mülkiyet Haklarının Uluslararası Yatırım Tahkimine Konu Olması* (Ankara: Seçkin Yayıncılık, 2022).

[4] Ermias Tekeste Biadleng, "IP Rights under Investment Agreements: The TRIPs-plus Implications for Enforcement and Protection of Public Interest," *South Centre, Research Papers* No. 8, (2006); Christophe Geiger, ed., *Research Handbook on Intellectual Property and Investment Law* (Cheltenham, Northampton: Edward Elgar Publishing, 2020); Lahra Liberti, "Intellectual Property Rights in International Investment Agreements: An Overview," *OECD Working Papers on International Investment*, 1 (2010): 1-39; Christopher S Gibson, "Latent Grounds in Investor-State Arbitration: Do International Investment Agreements Provide a New Means to Enforce Intellectual Property Rights?," in *Yearbook on International Investment Law & Policy 2009–2010*, ed. Karl P. Sauvant (Oxford: Oxford University Press, 2010); Christopher S Gibson, "A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation," *American University International Law Review* 25, no. 3 (2010); Henning Grosse Ruse-Khan, "Protecting Intellectual Property under BITs, FTAs, and TRIPS: Conflicting Regimes or Mutual Coherence?," in *Evolution in Investment Treaty Law and Arbitration*, ed. Kate Miles, Chester Brown (Cambridge: Cambridge University Press, 2011), Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11-02; Henning Grosse Ruse-Khan**,** "Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation," *Fourth Biennial Global Conference of the Society of International Economic Law (SIEL) Working Paper* No. 2014-21, (2014); Ruth Okediji, "Is Intellectual Property "Investment"? Eli Lilly v. Canada and the International Intellectual Property System," *University of Pennsylvania Journal of International Law* 35, no. 4 (2014); Rochelle Dreyfuss and Susy Frankel, "From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property," *Michigan Journal of International Law* 36, no. 4 (2015); Brook Baker and Katrina Geddes, "The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS," *Loyola University Chicago Law Journal* 49 (2017); Bryan Mercurio, "Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements," *Journal of International Economic Law* 15, no. 3 (2012); Susy Frankel, "Interpreting the Overlap of International Investment and Intellectual Property Law," *Journal of International Economic Law* 19, no. 1 (2016); Henning Grosse Ruse-Khan, "Challenging Compliance with International Intellectual Property Norms in Investor-state Dispute Settlement," *Journal of International Economic Law* 19 (2016); Gabriel

Application of international investment agreements requires the analysis of the definitions of both "investment" and "investor". The protection provided under the investment agreements solely becomes available when an "investor" makes an "investment". Whereas the analysis of the term "investor" generally relies upon adopted standards such as nationality, domicile or residence, the notion of the "investment" includes various legal options[5].

In determining whether an IP right is protected as an investment, it requires to consider the approach adopted in the investment agreement with regard to the investment definition. The vast majority of the international investment agreements include IP rights under the definition of investment by referring to term "intellectual property rights" or by adding a list showing several kinds of IP rights such as copyrights, trademarks, and patents. It is observed that the form of expression referring to IP rights in the investment definition of the agreements has changed over time. Under the modern approach, IP rights are incorporated in almost all investment definitions in international investment agreements. Nevertheless, there is no specific standard in the way of referring to IP rights in investment agreements[6].

International investment agreements mostly refer to the IP rights by listing them explicitly within the categories of assets under the definition of investment. It has been argued that even in the case of broader terminology used for investment definition such as "every kind of asset" or "every kind of investment" without expressing IP rights directly, IP rights are still assumed to be an investment[7].

M Lentner, "Nomos and Narrative: The Protection of Intellectual Property Rights in International Investment Law," *Stanford – Vienna Transatlantic Technology Law Forum, TTLF Working Papers* No. 34 (2018); Günarslan, *Fikri Mülkiyet Haklarının Uluslararası Yatırım Tahkimine Konu Olması*.

5 Carlos Correa, "Intellectual Property as Protected Investment: Redefining the Reach of Investors' Rights," in *Research Handbook on Intellectual Property and Investment Law*, ed. Christophe Geiger (Cheltenham, Northampton: Edward Elgar Publishing, 2020), 123.

6 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 149-151.

7 Flavia Marisi and Julien Chaisse, "Is Intellectual Property Investment: Formation, Evolution, and Transformation of the Intellectual Property Rights - Foreign Direct Investment Normative Relationship," *Ohio State Journal on Dispute Resolution* 34, no. 1 (2019): 130; Julien Chaisse and Puneeth Nagaraj, "Changing Lanes: Intellectual

It has been suggested that there are four main approaches as to how IP rights would fall under the scope of the investment in international investment agreements[8]. Firstly, international investment agreements may refer to "property" or "assets" without explicitly mentioning IP rights. This approach is an old one embraced in the investment definition of the North American Free Trade Agreement (NAFTA), referring to "property, tangible and intangible"[9]. Secondly, the investment agreement may cover a general expression of "intellectual property rights" or "intangible property" without further detail. For instance, the bilateral investment treaty between the USA and Rwanda includes the term "intellectual property rights" within the list of assets under the definition of investment[10]. Thirdly, IP rights may be covered by including a specific reference to a list of intangible assets. One of the current examples is the bilateral investment agreement between Canada and Mongolia, which includes "intellectual property rights" under the definition of "investment", and "copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights" under the definition of "intellectual property rights"[11]. The fourth possibility is that the definition of IP rights may clearly refer to domestic law.

In terms of agreement practice, some bilateral investment agreements include "intellectual property rights" within the scope of investment definition in a general sense, without enumerating the types of IP rights under the investment term[12]. Investment agreements may also use a broader terminology

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Property Rights, Trade and Investment," *Hastings International and Comparative Law Review* 37, no. 2 (2014): 252.

8 Carlos Correa and Jorge E Viñuales, "Intellectual Property Rights as Protected Investment: How Open are the Gates?," *Journal of International Economic Law* 19, no. 1 (2016): 93; Marisi and Chaisse, "Is Intellectual Property Investment," 130.

9 NAFTA Chapter 11, Article 1139 (g) "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes".

10 U.S.-Rwanda, Treaty Between the Government ofthe United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (19.02.2008).

11 Agreement Between Canada and Mongolia for the Promotion and Protection of Investments (08.09.2016).

12 See, the United States–Bahrain BIT, Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the

as "every kind of asset" without explicitly listing IP rights[13]. For instance, IP rights are included within the scope of investment definition of the bilateral investment agreement between Australia and India, stating that " 'investment' means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party"[14].

Although IP rights are not explicitly mentioned under the definition of investment in the investment agreement, such agreements may implicitly include IP rights within the content of investment. Under the Chapter Eleven (Investment) of the NAFTA, Article 1139 does not involve the term "intellectual property rights" within the definition of investment. It rather covers "…real estate or other property, tangible or intangible…"[15]. However, this did not preclude Eli Lilly from filing an investment claim against Canada and from being heard and settled in investment arbitration.

However, non-reference to IP rights is not a preferred approach in international investment agreements. Many investment agreements explicitly include "intellectual property rights" under the definition of investment. For instance, Article 14 of the Agreement between the USA, Mexico and Canada stipulates that "investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include: (…) (f) intellectual property rights"[16].

Encouragement and Reciprocal Protection of Investment, signed at Washington on 29 September 1999, entered into force 30 May 2001.

13 UK–Ecuador BIT, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ecuador for the Promotion and Protection of Investments, signed 10 May 1994, entered into force 24 August 1995; Netherlands–Brazil BIT, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federative Republic of Brazil (25.11.1998).

14 Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (26.02.1999).

15 NAFTA Chapter 11, Article 1139.

16 Agreement between the United States of America, the United Mexican States, and Canada, Article 14.

Likewise, bilateral investment treaty between the USA and Uruguay defines "investment" as "every asset" and also includes "intellectual property rights" within the examples of assets under the investment definition[17].

The general reference to "intellectual property rights" raises the question of whether it covers IP rights that arise after the signing of the investment agreement. Parties to the investment agreement may not desire to assume liability for rights that were not protected as IP at the time of signing the applicable agreement. However, an arbitral tribunal may hold the state responsible for IP rights that did not exist at the time of signing due to the general reference to IP rights. This risk could be eliminated with more detailed provisions by including more specificity[18].

Another way that international investment agreements include IP rights as investment is to explicitly enumerate IP types under the definition of investment. This method, which is used in the most bilateral investment agreements, may provide legal certainty beyond doubt[19]. "Patents" and "technical knowledge" were explicitly mentioned for the first time in the 1959 bilateral investment agreement between Germany and Pakistan. Article 8(1)(a) of the Agreement states that "The term 'investment' shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge" [20].

The German 2008 model bilateral investment agreement has also listed the assets that should be regarded as investments: "(d) intellectual property rights, in particular copyrights and related rights, patents, utility-model patents, industrial designs, trademarks, plant variety rights;

(e) trade-names, trade and business secrets, technical processes, know-how, and good-will"[21].

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17 Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investments, Article 1.

18 Correa, "Redefining," 125.

19 Lukas Vanhonnaeker, *Intellectual Property Rights As Foreign Direct Investments: From Collision To Collaboration* (Cheltenham, Northampton: Edward Elgar Publishing, 2015), 9.

20 Pakistan and Federal Republic of Germany Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes) (25.11.1959), Article 8.

21 Treaty Between the Federal Republic of Germany and ____ Concerning the Encouragement and Reciprocal Protection of Investments, Article 1.

A similar approach can be found in the French 2006 model bilateral investment agreement. According to this agreement, the term investment includes the following items: "1. The term 'investment' means every kind of assets, such as goods, rights and interests of whatever nature, and in particular though not exclusively:

d) intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks, industrial models and mockups, technical processes, know-how, tradenames and goodwill"[22].

Another example demonstrating the types of IP rights in the scope of investment is the bilateral investment agreement signed between Brazil and Ethiopia in 2018. Pursuant to the Article 1.3(f) of the Agreement, IP rights covered within the investment definition are: "Intellectual property rights such as trademarks, trade names, trade secrets, copyrights, know-how, goodwill associated with an investment, industrial designs and technical processes to the extent they are recognized under the law of the Host State and international agreements to which the Contracting Parties are parties" [23].

The 2009 Germany-Pakistan bilateral investment agreement also made a detailed reference to IP rights. This agreement includes not only basic categories such as copyright, patent and trademark, but also IP rights such as "trade and business secrets", "technical processes", "know-how" and "goodwill" [24].

One of recent agreements, the 2019 EU-Vietnam bilateral investment agreement, includes "intellectual property rights and goodwill" under the forms of investment list, and also refers to the IP categories that are referred to the TRIPS Agreement. In addition, it specifically enumerates the types of IP rights[25].

In investment agreements to which Türkiye is a party, IP types are clearly included under the definition of investment. In this respect, the bilateral

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[22] Draft Agreement Between the Government of the Republic of France and the Government of the Republic of . . . on the Reciprocal Promotion and Protection of Investments.

[23] Agreement Between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation.

[24] Agreement Between the Islamic Republic of Pakistan and the Federal Republic of Germany on Encouragement and Reciprocal Protection of Investments (1.12.2009), Article 1(1)(d).

[25] Investment Protection Agreement Between the European Union And Its Member States, of the One Part, And The Socialist Republic of Viet Nam, of the Other Part, Article 1.2(h)(vi).

investment agreement between Türkiye and Austria, which was published in the Official Gazette dated February 10, 1991, refers to "copyrights; industrial property rights such as patents for inventions, trademarks, industrial designs and utility models, technical processes, know-how, trade names and goodwill" under the definition of investment[26]. More recently, under the definition of investment of the bilateral investment agreement between Türkiye and Georgia published in the Official Gazette dated 1 June 2021, IP rights are expressed as follows: "intellectual and industrial property rights such as patents, industrial designs, technical processes, as well as trademarks, goodwill, and know-how which are related to an investment" [27].

Besides BITs, FTAs mostly incorporate an investment chapter and under such agreements IP rights are generally considered as investment[28]. In other words, in addition to intellectual property chapters, these agreements also contain investment chapters which protect intellectual property as investment assets. For instance, US-Australia FTA contains Chapter 11 dealing with investment. Article 11.17:4 states that "investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(f) intellectual property rights"[29].

Article 10.28(f) of the Dominican Republic-Central America FTA (CAFTA– DR)[30], Article 10.27(f) of the US– Chile FTA[31], Article 10.28(f) of the US– Peru Trade Promotion Agreement (TPA)[32], and Article 15.1:17(f) of the US– Singapore FTA[33] contain the same investment definition[34].

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[26] Agreement between the Republic of Turkey and the Republic of Austria for the Reciprocal Promotion and Protection of Investments, Article 1(1)(d).

[27] Agreement between the Government of Republic of Turkey and the Government of Georgia Concerning the Reciprocal Promotion and Protection of Investments, Article 1(1)(d).

[28] Henning Grosse Ruse Khan, *The Protection of Intellectual Property Rights Under International Investment Law* (Oxford University Press, 2016), 156.

[29] US– Australia FTA.

[30] Dominican Republic-Central America FTA (CAFTA– DR).

[31] US– Chile FTA.

[32] US– Peru Trade Promotion Agreement (TPA).

[33] US– Singapore FTA.

[34] Similarly see US FTAs incorporating articles on investment (as well as IPRs) with Jordan, Morocco, and the Central American countries.

In the same vein, Agreement between Japan and the Republic of Indonesia for an Economic Partnership Agreement between Japan and the Republic of Indonesia has an investment chapter including a list of IP rights under the investment definition. According to Chapter 5, Article 58(f): "the term "investments" means every kind of asset invested by an investor, in accordance with applicable laws and regulations, including, though not exclusively:

(vi) intellectual property rights, including copyrights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information"[35].

More recently, Canada's most comprehensive free trade agreement, the Comprehensive and Economic Trade Agreement between Canada and the European Union (CETA) also includes an investment chapter. Under the investment chapter, the agreement makes definitions of intellectual property and investment for the purposes of this chapter. According to Chapter 8, Article 8.1 "intellectual property rights means copyright and related rights, trademark rights, rights in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders' rights; and, if such rights are provided by a Party's law, utility model rights. The CETA Joint Committee may, by decision, add other categories of intellectual property to this definition". IP rights fall within the definition of investment under the CETA as follows: "investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(g) intellectual property rights"[36].

Another recent FTA is Comprehensive and Progressive Trans Pacific Partnership (CPTPP) which incorporates investment definition in the investment chapter: "investment means every asset that an investor owns or

[35] Agreement between Japan and the Republic of Indonesia for an Economic Partnership Agreement.

[36] Comprehensive and Economic Trade Agreement between Canada and the European Union (CETA).

controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(f) intellectual property rights"[37].

Such recent definitions include IP rights as an investment, but nevertheless require to have the characteristics of investment. Thus, if those rights are not used in a way having the economic characteristics of an investment, investment tribunals should not simply protect them as an investment[38].

According to Article 31(1)-(2) of the Vienna Convention on the Law of Treaties, the term "investment" should not be interpreted as limited to the wording of the relevant article, but the whole agreement, its goals and objectives should also be taken into consideration. The application of these interpretation rules and the open-ended terminologies, often with non-exhaustive lists, demonstrate the flexible nature of the term "investment"[39]. It is argued that since IP rights are intended to be under investment protection today and in the future, international investment agreements deliberately include IP rights in a manner that is open to new interpretations[40].

Nonetheless, the inclusion of IP rights within the broad definition of investment may give rise to several questions. What rights are included in the treaty? To what extent the acquisition, exercise, limitations or exceptions to these rights abide by the provisions of international agreements? Considering the principle of territoriality of IP rights, as to be discussed below, the most appropriate answer to these questions could be the domestic law of the country where the investment has made. That is to say, since the agreement does not create new rights, the rights to be protected and the limits of these rights will be determined according to the domestic law. International investment agreements, per se, cannot create or modify IP rights. Therefore, if there is no protection for a particular IP right under the domestic law, the investor would

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37 Comprehensive and Progressive Trans-Pacific Partnership.

38 Susy Frankel, "The Object and Purpose of Mingling Intellectual Property, Trade and Investment" in *Research Handbook on Intellectual Property and Investment Law*, ed. Christophe Geiger (Cheltenham, Northampton: Edward Elgar Publishing, 2020), 54.

39 Vanhonnaeker, *Intellectual Property Rights*, 11-12.

40 Marisi and Chaisse, "Is Intellectual Property Investment," 131.

not have any asset to be protected as an IP right, in the first place, and accordingly there would not be an IP right covered as an investment[41].

The use of broad language leads to a general acceptance that bilateral investment agreements cover intangible assets. This approach has later been adopted through the explicit inclusion of IP rights under the definition of investment in bilateral investment agreements. Therefore, this has given rise to the presumption that although IP is not explicitly mentioned, it can be considered in the broad definition of investment as a form of property. However, such an interpretation may cause various issues, as can be seen from the negotiations of the Multilateral Agreement on Investment[42], where the exclusion of IP rights from the definition of investment has been argued by some states[43]. Nevertheless, the reference to IP rights under the definition of investment in various ways has been a long-standing manner in investment treaty practice[44].

II. PROTECTION OF IP RIGHTS IN ICSID CONVENTION

Most of the investment treaties refer to ICSID arbitration owing to the protections under this dispute resolution mechanism. The most important advantage of this mechanism is related to the enforcement process of the ICSID arbitration awards. The Convention stipulates that these arbitral awards should be considered to have the same force and effect as courts' decisions of the member states[45]. That is to say, the decisions rendered by the ICSID arbitration are not subject to an enforcement process unlike other international arbitrations[46].

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41 Correa, "Redefining," 124; Grosse Ruse Khan, *The Protection of Intellectual Property Rights Under International Investment Law*, 156.

42 OECD (1997), 'Report to the Negotiating Group on Intellectual Property', Negotiating Group on the Multilateral Agreement on Investment (MAI), 26 March 1997, DAFFE/MAI(97)13.

43 Vanhonnaeker, *Intellectual Property Rights*, 13.

44 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 157.

45 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - ICSID Convention (18.03.1965), art 53 and 54.

46 İlhan Yılmaz, "ICSID Kurallarının Gelişimi ve Önerilen Kapsamlı Son Değişiklikler," *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi* 19, no. 1 (2020): 457.

ICSID arbitration is specifically important since it is the only mandatory enforcement option in some bilateral investment agreements[47]. Other dispute resolution mechanisms are not often afforded under the international investment agreements. Therefore, ICSID arbitration is generally the only option for the foreign investors. Given these issues, ICSID arbitration can be perceived as the regular way of resolution method for investment disputes[48].

For the ICSID arbitration, it is not sufficient to solely meet the requirements of the investment definition under the international investment agreements. It should also satisfy the requirements for the Article 25.1 of the ICSID Convention[49].

As has been recently stated in Bridgestone v Panama, "It is common ground that the Tribunal will only have jurisdiction in relation to a claim brought by BSAM if (i) there is an 'investment' out of which the dispute directly arises within the meaning of Article 25 of the ICSID Convention; and (ii) that "investment" also falls within the definition in Article 10.29 of the TPA" [50].

Requirements for ICSID arbitration are stipulated in Article 25 of the Convention:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that

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47 See, Agreement between the Republic of Austria and Malaysia for the Promotion and Protection of Investments (12.04.1985), art. 9(2); Agreement Between the Government of Mongolia and the Government of the Republic of Singapore on the Protection and Promotion of Investments (24.07.1995), art. 13(2); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments (21.05.1981), art. 7.

48 Vanhonnaeker, *Intellectual Property Rights*, 21.

49 Simon Klopschinski, "Public Policy Considerations in Intellectual Property-Related International Investment Arbitration," in *Research Handbook on Intellectual Property and Investment Law*, ed. Christophe Geiger (Cheltenham, Northampton: Edward Elgar Publishing, 2020), 242; Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 157.

50 Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 157.

State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

Article 25.1 of the ICSID Convention stated that ICSID arbitral tribunals shall have jurisdiction over "legal dispute arising directly out of an investment", but did not provide a definition to the term "investment". It has been argued that the absence of a definition in the Convention enables flexibility and functionality to the notion of investment[51].

However, it is controversial whether the lack of definition of investment in the Convention is a conscious choice to give states discretion through international investment agreements, or the investment has an inherent meaning within the context of the Convention[52]. As has been stated in Bridgestone v Panama, "There is much jurisprudence and academic discussion as to whether the meaning of 'investment' in the ICSID Convention can be more restrictive than the definition of 'investment' in a BIT or other agreement under which the jurisdiction of the Centre is invoked" [53].

In Global Trading v Ukraine[54], the tribunal emphasized that although there was a broad definition of the investment in the bilateral investment agreement, the requirements for an investment need to be satisfied within the context of the ICSID Convention's understanding. A number of more recent cases, such as Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain[55], Abaclat v. Argentina[56] and GEA Group Aktiengesellschaft v. Ukraine[57] pointed out that the investment has an inherent meaning under the Convention,

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51 Sêbastien Manciaux, "The Notion of Investment: New Controversies", *The Journal of World Investment & Trade* 9 (2008): 447.

52 Krista N Schefer, *International Investment Law: Text, Cases and Materials* (Cheltenham, Northampton: Edward Elgar Publishing, 2016), 82.

53 Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 158.

54 Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Award (01.12.2010).

55 Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (16.05.2018).

56 Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (04.08.2011).

57 GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (31.03.2011).

along with being enumerated under the list of assets in bilateral investment agreements.

Since the ICSID Convention does not define the investment, the meaning of the term has been determined by case law. In practice, the arbitral tribunals have introduced some criteria to define the investment. A four-element test which is known as "Salini test" was developed in Salini v Morocco[58]. In this respect, four criteria have been put forward to qualify a commercial transaction as an investment. These criteria have been listed as (i) commitment of money or other resources, (ii) assumption of risk, (iii) duration, (iv) contribution to the economic development of the host country. Accordingly, an investor has to contribute with assets in the host country, assume more risks than the usual business hazards, have a long-term relationship with the host country, and contribute to the economic development of the host country[59]. In addition to these, there have been decisions in which the regularity of profit and return is adopted as a separate criterion[60]. The requirement of the contribution to the economic development of the host country has been the most debated criterion[61]. In this respect, it is argued that even if a small-scale sales contract is covered under the investment definition in the applicable treaty between the parties, it should not be characterized as an investment within the scope of Article 25 of the ICSID Convention[62].

The tribunal in MHS v Malaysia assessed the hallmarks of the investment as follows: "The classical Salini hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an 'investment'. If any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of 'investment'. However, even if they are all present, a tribunal will still examine the nature and degree of their

58 Salini et al. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (31.07.2001).

59 Schefer, *International Investment Law*, 87-91.

60 Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, (06.08.2004), para. 53; Helnan International Hotels v. Egypt, ICSID Case No: ARB/05/19, Decision of the Tribunal on Objections to Jurisdiction, (17.10.2006), para. 77.

61 Quiborax S. A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, (27.09.2012), para. 220-225.

62 Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration*, Sixth Edition (Oxford: Oxford University Press, 2015), 456.

presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID 'investment' "[63].

In recent arbitration decisions, it has been seen that all elements of the Salini test have been moved away from the strict application. As was held in Philip Morris v Uruguay, "in the Tribunal's view, the four constitutive elements of the Salini list do not constitute jurisdictional requirements to the effect that the absence of one or the other of these elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not 'a set of mandatory legal requirements'. As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case" [64].

It should be noted, however, that in modern treaty practice, international investment treaties incorporate at least the first three elements of the Salini test criteria (which are commitment of capital or other resources; expectation of gain; element of risk)[65].

The first element of the Salini test requires the foreign investor to commit substantial capital or other resources to the project or activity[66]. If the foreign investor owns merely an IP right (for example, a registered trademark) but this right is not exploited in the economic activities, holding an IP right alone may not be sufficient to be qualified as an investment, since in this case, it may not be possible to mention commitment of capital or other resources in the host state[67].

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63 Malaysian Historical Salvors Sdn, Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, (17.05.2007), para. 106.

64 Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (02.07.2013), para. 206.

65 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 160.

66 Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Award (09.03.1998); Salini et al. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (31.07.2001), para. 52.

67 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 162.

The second element of the Salini test is the expectation of gain or profit[68]. IP rights constitute an important part of the profits of international businesses. The values of modern companies increasingly rely on innovation and intangible assets, and hence the importance of IP in the business operations increases. Although the sole existence of an IP right itself does not bring profit or gain, the right holder generally aims to benefit from these rights economically through using them in the market or licensing them. Accordingly, the IP rights generally satisfy the expectation of gain or profit[69].

The third element of the Salini test is the risk assumed by the foreign investor. The risk covered by the ICSID Convention's understanding of investment must go beyond the risk in normal business transactions[70]. Considering IP rights, the exercise of them often involves inherent risk and uncertainty. That is to say, it is unclear whether the use of IP rights in products and services will bring commercial success in the market. Also, there is a risk that IP rights may be infringed by third parties. The concern of inadequate or ineffective protection mechanisms of the host state against the infringements by third parties could be another risk assumed by the foreign investor[71].

The fourth element required for the existence of an investment within the meaning of the ICSID Convention is the duration condition. Accordingly, the activity of the investor must involve a certain period of time. It is generally suggested in arbitral awards that this period should be at least two to five years[72]. For instance, in the Salini v. Morocco, the tribunal pointed out that "the transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years"[73]. On the other hand, some commentators have argued that the minimum duration is not a mandatory element in qualifying the transaction as an investment. From this point of

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68 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 162.

69 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 162-163.

70 Malaysian Historical Salvors Sdn, Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (17.05.2007), para. 112.

71 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 163.

72 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 163.

73 Salini et al. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (31.07.2001), para. 54.

view, even if the duration is less than two years, determining as to whether a transaction qualifies as an investment requires analysis together with all other surrounding conditions[74].

Once IP rights are acquired, the duration of these rights generally includes long periods[75]. Right owners often hold these rights with the expectation that they will support relevant economic activities for a significant period of time. Hence, "duration" element is generally satisfied[76]. For instance, in Philip Morris v Uruguay, where trademarks were sued as investments, the tribunal hold that "having maintained operations in Uruguay for more than 30 years, the Claimants easily satisfy the Salini criterion of duration of the investment"[77].

The most debated element of the Salini criteria is that the investment should contribute to the development of the host state[78]. Various ways such as increasing tax income, generating job opportunities, raising the living standard of the population in the host state could be assessed as the contribution to the development of the host state[79].

It has been observed that there has been a departure from this element in recent cases. For instance, in Victor Pey Casado and President Allende Foundation v Republic of Chile, the tribunal held that "it is true that the Preamble to the ICSID Convention mentions the contribution to the economic development of the host state. However, this reference is presented as a consequence and not as a condition of the investment: by protecting investments, the Convention facilitates the development of the host state. This

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74 Jean-Pierre Harb, "Definition of Investments Protected by International Treaties: An On-Going Hot Debate," *Mealey's International Arbitration Report* 26, no. 8 (2011).

75 See TRIPS Agreement art. 33: The term of protection available shall not end before the expiration of a period of 20 years counted from the filing date.

76 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 164.

77 Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (02.07.2013), para. 190.

78 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 164; Emmanuel K Oke, *The Interface Between Intellectual Property And Investment Law: An Intertextual Analysis* (Cheltenham, Northampton: Edward Elgar Publishing, 2021), 60.

79 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 164.

does not mean that the development of the host state is a constitutive element of the notion of investment. This is why, as was noted by certain arbitral tribunals, this fourth condition is in reality encompassed by the first three" [80].

In addition, the arbitral tribunals have mentioned the difficulty of objective evaluation as to whether an investment would contribute to the economic development of the host state. As was noted in Philip Morris v Uruguay, "the most controversial one has been held by some tribunals to be the contribution to the economic development of the host State due to the subjective character of this element and the resulting difficulty to ascertain its presence in a given investment" [81].

On the other hand, in Bridgestone v Panama, the arbitral tribunal did not categorically exclude the criterion of contribution to the economic development of the host state[82]. The tribunal assessed the characteristics required for a trademark to be qualified as an investment. In this sense, the tribunal contemplated that "the mere registration of a trademark in a country manifestly does not amount to, or have the characteristics of, an investment in that country" [83]. Further, it was stated that "the effect of registration of a trademark is negative. It prevents competitors from using that trademark on their products. It confers no benefit on the country where the registration takes place, nor, of itself, does it create any expectation of profit for the owner of the trademark" [84].

On the contrary, a trademark which is exploited can constitute an investment[85]. The tribunal outlined that a trademark is exploited by means of the manufacture, promotion and sale of goods bearing that trademark, and this

[80] Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2 (2008) para. 232, see Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 165.

[81] Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (02.07.2013), para. 207.

[82] Oke, *Interface*, 92.

[83] Bridgestone Licensing Services, Inc v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 171.

[84] Bridgestone Licensing Services, Inc v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 171.

[85] Bridgestone Licensing Services, Inc v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 172.

exploitation provides the trademark with characteristics of an investment[86]. The tribunal emphasized that the exploitation of a trademark includes its commitment of resources[87]. It was also noted that this exploitation involves significant duration of time, expectation of gain, and assumption of the risk[88]. Further, the tribunal highlighted that the exploitation of the trademark contributes to the economic development. In this regard, the tribunal expressed the view that "this exploitation will also be beneficial to the development of the home State. The activities involved in promoting and supporting sales will benefit the host economy, as will taxation levied on sales"[89].

In Turkish law, Article 9 of the Law on Industrial Property includes a provision regarding the revocation of the trademark due to non-use, stating that "It is decided to revocate the trademark which is not used seriously in Türkiye within five years from the date of registration, without a justified reason, by the trademark owner in terms of the goods or services for which it has been registered, or whose use has been suspended for five years." The exclusive right conferred by the trademark provides the right holder with the opportunity to prevent the infringement of the trademark by third parties and to prohibit the use of the trademark. On the other hand, the unreasonable increase of the trademarks that are not used by the trademark owners but continue to confer rights to the owner by being closed to the use of third parties may inflate the registry. Therefore, there is a public interest in the revocation of the trademark due to non-use[90]. Considering that non-use of the trademark is regulated as a reason for revocation in Turkish law, a trademark that is not

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86 Bridgestone Licensing Services, Inc v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 172.

87 Bridgestone Licensing Services, Inc v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 172.

88 Bridgestone Licensing Services, Inc v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 169.

89 Bridgestone Licensing Services, Inc v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13.12.2017), para. 172.

90 Arzu Oğuz, "Markanın Hükümsüzlüğü ve İptali," in *Fikri Mülkiyet Hukuku Çalıştayı Bildiriler Kitabı*, ed. Hasan Kadir Yılmaztekin, Banu Fatma Günarslan (Ankara: Türkiye Adalet Akademisi Yayınları, 2020), 206; in the same vein see Uğur Çolak, *Türk Marka Hukuku* (İstanbul: On İki Levha Yayıncılık, 2012), 892; also see Hayri Bozgeyik, "Tescilli Markanın Kullanılması ve Kullanmamaya Bağlı Sonuçlar," in *Prof. Dr. Fırat Öztan'a Armağan*, Cilt I-II, Cilt I, (Ankara: Turhan, 2010), 457.

used in commercial and economic activities should not constitute an investment[91].

IP rights could make a contribution to the economic development of the host state when they are used by the owner. Trademarks exploited in the domestic market could assist in consumer choice and increase the job opportunities and tax revenues in the host state. In addition, foreign patent registrations are considered important in terms of technology transfer to developing countries[92].

All these issues demonstrate that the analysis of whether the IP rights contribute to the development of the host state requires a case-by-case assessment. In this regard, it is important how IP rights are genuinely exploited in the host state[93].

An IP right should be considered an investment when exploited in the economic activities. This argument is also in accordance with the aim of international intellectual property law and international investment law regimes. The investor-state dispute resolution system may be utilized as an appellate authority for legitimate court decisions by some foreign investors. Abusing the system through this way may give rise to regulatory chill[94], particularly for developing countries. Hence, it is critical that solely investors who make genuine investments by exploiting their IP rights in commercial and economic activities in the host state be able to initiate investment arbitration against the state[95].

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91 Günarslan, *Fikri Mülkiyet Haklarının Uluslararası Yatırım Tahkimine Konu Olması,* 90.

92 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 165.

93 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 166.

94 With regard to the regulatory chill, see Cynthia M Ho, "Sovereignty under Siege: Corporate Challenges to Domestic Intellectual Property Decisions," *Berkeley Technology Law Journal* 30, no. 1 (2015): 233; Peter K Yu, "The Investment-Related Aspects of Intellectual Property Rights," *American University Law Review* 66 (2017): 859; Ruth L Okediji, "Eli Lilly," 1133; Plamen Dinev, "Regulatory Chill and the TTIP: An Intellectual Property Perspective," *European Intellectual Property Review* 39, no. 6 (2017): 345; Jane Kelsey, "Regulatory Chill: Learnings from New Zealand's Plain Packaging Tobacco Law," *QUT Law Review* 17, no. 2 (2017); Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science," in *Evolution in Investment Treaty Law and Arbitration*, ed. Kate Miles, Chester Brown (Cambridge: Cambridge University Press, 2011.

95 Oke, *Interface*, 103-104; Günarslan, *Fikri Mülkiyet Haklarının Uluslararası Yatırım Tahkimine Konu Olması,* 90.

In light of these considerations, it could be argued that, as a common view, in order to be considered investment, IP rights should satisfy the requirements of the ICSID Convention along with the investment definition of the applicable treaty between the parties.

Other issues that need to be focused relate to the roles of international investment law and domestic law of the host state in determining whether an IP amounts to an investment.

III. ROLES OF INTERNATIONAL INVESTMENT LAW AND DOMESTIC LAW IN DECIDING WHETHER AN INTELLECTUAL PROPERTY IS INVESTMENT

The roles of international investment law and domestic law are crucial in determining whether an IP constitutes an investment.

In the vast majority of the international investment agreements, investment is generally defined as "any kind of asset" including a non-exclusive list of various assets. However, the critical question to be asked in determining the existence of investment, in the first place, is whether these types of assets legally exist. The issue of the legal existence of the types of assets listed in the definition of investment is not a matter of international law, but of domestic law of the host state[96]. That is to say, the relevant applicable law to determine the existence of legal rights underpinning the constitution of an investment is the domestic law of the host state.

After determining the existence of the asset listed under the definition of investment, the evaluation of the requirements for an asset to be considered an investment, and the violation of investment protection standards are the matters of international investment law[97]. Therefore, IP rights compatible with domestic law may constitute investments and enjoy the protections provided in the investment treaty[98].

Regarding the role of domestic law and international law, the tribunal in Philip Morris v Uruguay made the following assessment: "Uruguayan law

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96 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 169-170.

97 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 173.

98 Katarzyna Jozwik, "Investment Regulation and Intellectual Property," *Global Trade and Customs Journal* 6, no. 7-8 (2011): 353.

may be relevant for establishing the rights the State recognizes as belonging to the Claimants. The legality of a modification or cancellation of rights under Uruguayan law, while relevant, would not determine whether such an act may constitute a violation of a BIT obligation.

Rather, whether a violation has in fact occurred is a matter to be decided on the basis of the BIT itself and other applicable rules of international law, taking into account every pertinent element, including the rules of Uruguayan law applicable to both Parties" [99].

In other words, international investment law cannot create IP rights subject to investment treaty protection. Therefore, the arbitral tribunal examining the existence, scope and ownership of the investor's IP right will refer to national (or regional) intellectual property law, and accordingly will analyse whether the investment actually exists. In this sense, assessment of the existence of an IP right under national (or regional) law is a starting point to decide whether the asset at issue constitutes an investment[100]. After understanding the IP in question legally exists, the rules of international investment law come into play in determining whether the asset is investment.

An issue with regard to the intellectual property-based investment disputes is the possibility that IP rights protected in one country are not protected in another[101]. Due to the principle of territoriality, it is likely that IP rights protected in the investor's home state are not protected in the host state. In this case, domestic law of the host state plays a significant role in the creation and scope of IP rights[102]. An international investment agreement cannot be deemed a direct resource of an IP right. If the domestic law of the host state recognizes the IP rights, only those could be considered protectable asset[103].

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99 Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (08.07.2016), para. 178-9.

100 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 176.

101 Carlos M Correa, "Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses," *Michigan Journal of International Law* 26, no. 1 (2004): 340.

102 Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 157; Jozwik, "Investment Regulation," 352.

103 Correa, "Redefining," 132.

The role of domestic law seems particularly significant when patents are at issue. Patents are granted within the territory of the relevant state, and since the requirements for patentability vary from country to country, a patent granted in a country is not necessarily expected to be recognized in other countries[104]. Even if an invention is patented in the investor's home country, it may not be protected under a bilateral investment agreement until the patent is granted to the investor by the host country. In such a situation, an invention patented from the investor's home country will not qualify as an investment under the relevant agreement until the investor is granted the patent protection by the host country's authorities[105]. It has been argued that under this scenario, the investor may face a situation which would weaken the rationale behind the rules of international investment law[106]. According to this view, the fact that the protection of the investor under the bilateral investment agreement would be dependent on the host country's discretion to grant a patent may put the investor in a dangerous position[107].

Alternatively, it has been suggested that the investor should be protected from the moment s/he enters the application procedure for a domestic patent. From this point of view, when the investor has conducted the application procedure in the host country, the IP in question is deemed a part of the investor's property, even if it has not yet been protected by a patent[108]. This argument has been embraced in some investment treaties, such as the United States-Jamaica bilateral investment treaty, which ensures investment protection for patentable inventions[109].

Similarly, the Canada-Argentina bilateral investment treaty provides investment protection for "rights with respect to . . . patents"[110]. It has been

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104 Vanhonnaeker, *Intellectual Property Rights*, 15.

105 Vanhonnaeker, *Intellectual Property Rights*, 16.

106 Vanhonnaeker, *Intellectual Property Rights*, 16.

107 Vanhonnaeker, *Intellectual Property Rights*, 16.

108 Vanhonnaeker, *Intellectual Property Rights*, 16-17.

109 Treaty between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, signed 4 February 1994, entered into force 7 March 1997, art. 1(a)(iv).

110 Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment, signed 5 November 1991, entered into force 29 April 1993, art. 1(a)(iv).

argued that this wording may aim to cover not solely the granted patents but also the applications[111].

More broadly, the United States-Mongolia bilateral investment treaty ensures protection for "inventions in all fields of human endeavor"[112]. It has been argued that the formulation in this agreement may intend to incorporate the inventions beyond those which are patented by the host country's authorities, and that patentability requirements may also not be sought[113].

As an example for a further step, the Peru-Germany bilateral investment agreement incorporates "technological knowledge and processes patented or not, technical documents and instructions" within its investment protection[114].

Whether or not patent applications would be under the protection of the relevant investment agreement often arises as an issue[115]. While some investment agreements[116] tend to exclude patent applications from the investment protection, some of them include provisions such as "rights…with respect to copyright, patents..." [117] and "patentable inventions"[118]. In addition, some commentators have argued that investment agreements which stipulate "intangible property" under the definition of investment may also intend to protect patent applications. From this view, even though a patent application

[111] Correa, "Investment Protection," 340; Correa, "Redefining," 132; Jozwik, "Investment Regulation," 353.

[112] Treaty between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment, art. 1(1)(iv).

[113] Vanhonnaeker, *Intellectual Property Rights*, 17.

[114] Convenio entre la República del Perú y la República de Alemania sobre Promoción y Protección Reciproca de Inversiones, signed 30 January 1995, entered into force 1 May 1997.

[115] Lahra Liberti, "Intellectual Property Rights in International Investment Agreements. An Overview," *OECD Working Papers on International Investment* 1 (2010): 8.

[116] See, 2009 ASEAN Comprehensive Investment Agreement, art. 4(c)(iii): intellectual property rights which are conferred pursuant to the laws and regulations of each Member State.

[117] Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investment, Austl.-H.K., art. 1(e)(iv), Sep. 15, 1993, 1748 U.N.T.S. 385; Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment, Arg.-Can., art. l(a)(iv), 5.11.1991, 2467 U.N.T.S. 97.

[118] Treaty between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, signed 4 February 1994, entered into force 7 March 1997, art. 1(a)(iv).

may afford only an expectation of acquiring the right, it could provide the applicant with the ability to act against infringers, and accordingly may be considered "intangible property" even if not an IP right[119].

The issue of whether "patent applications" and "patentable inventions" are considered an investment should be analysed in accordance with the domestic law introducing the scope of the intellectual property law along with the exact wording and the purpose of the investment agreement[120]. Unregistered inventions do not benefit from a patent protection and patent applications merely create expectation of obtaining a patent. However, international investment agreements introduce a mutual bargain in which states give up some sovereign rights to attract foreign investment[121]. Thus, the text of the agreement reflects the voluntary consent of the state[122]. If the investment agreement explicitly prefers broad definition, including "patent applications" or "patentable inventions", such wording could be arguably understood as extending the scope of the investment beyond the registered rights[123]. Nevertheless, from our view, it would not be an appropriate argument that investment protection should cover unregistered invention or patent applications even though the investment agreement does not explicitly include such a wording.

Another issue that could be raised relates to a grey area where the types of IP rights which are not available under domestic law are specified under the definition of investment in the international investment agreement[124]. Some commentators have argued that particularly where the role of domestic law is not explicit in the investment agreement, a broad definition of investment may provide higher protection for the assets in question than the

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[119] See Lahra Liberti, "Intellectual Property Rights in International Investment Agreements. An Overview," *OECD Working Papers on International Investment* 1 (2010); Jozwik, "Investment Regulation," 353; Correa, "Investment Protection," 340.

[120] Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 157; Gibson, "Latent Grounds," 433.

[121] Valentina S Vadi, "Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investments," *New York University Journal of Intellectual Property & Entertainment Law* 5, no. 1 (2015): 154.

[122] Vadi, "Towards," 155.

[123] Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights,* 157.

[124] Jozwik, "Investment Regulation," 353.

protection afforded in domestic law for those[125]. There could be an obvious difference between the scope of the investment agreement and domestic law, as in the Ethiopia-Israel bilateral investment agreement[126]. Although Ethiopia's domestic law did not protect geographical indications and plant breeders' rights at the time of signing this agreement, these IP rights are incorporated under the investment definition of the agreement. In such a case where the investment agreement covers types of IP rights which are not recognized under the domestic law of the host state, are those rights still considered investment since there is an explicit provision? Or could one say that they do not qualify as investment as they do not actually exist?

Under these circumstances, some commentators have argued that the explicit provisions of the investment agreement should be taken into consideration by the tribunals in case of conflict, without giving priority to the domestic law of the host state[127].

However, it should not be ignored that rules of domestic law are decisive in the creation of IP rights and in determining their validity, scope and limits, accordingly investment agreements do not create new IP rights. As discussed above, in principle, it should not be possible to protect an IP right within the scope of an investment agreement if it is not recognized by the rules of domestic law.

It would be very hard to assert that an IP right which has not been available yet under the domestic law could benefit from the investment protection, particularly taking the principle of territoriality into account, even if it is explicitly written under the definition of investment in the agreement. In our opinion, it appears difficult to give priority to the investment agreement in determining the existence of an asset. Rather, it could be possible to make an argument that an investment agreement such as Ethiopia-Israel bilateral investment agreement would intend to foresee future regulations by

[125] Vanhonnaeker, *Intellectual Property Rights*, 18; Jozwik, "Investment Regulation," 353.

[126] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, signed 26 November 2003, entered into force 22 March 2004, art. 1(1)(d).

[127] Vanhonnaeker, *Intellectual Property Rights*, 18; Jozwik, "Investment Regulation", 354; see Camuzzi International S.A. v. The Argentine Republic, Case No. ARB/03/2, Decision on Jurisdiction (11.05.2005), para. 56-57.

introducing broad investment definitions. In such scenarios, when domestic law adopts new types of IP rights such as geographical indications and plant breeders' rights only then those could be assessed whether they qualify as an investment. A question may come to mind here as to whether the host country is obliged to create such new types of IP rights. Our answer to this question would arguable seem to be negative since IP rights are conferred on the basis of principle of territoriality. In this sense, countries should have adequate policy space to tailor their IP laws in accordance with their socio-economic and technological improvement. Nevertheless, if the IP rights that are not protected by the domestic law of the host state are specifically included in the investment agreement, an appropriate method would be to assess the formulation and the purpose of the agreement, and the intentions of the parties together. In this respect, it is crucially important that the formulation and wording of the investment agreements should be prepared in a way that reflects the real intentions of the parties without creating ambiguity and blur.

In summary, assessment of the existence of IP rights should be distinguished from the assessment of the exercise of the existing, valid and enforceable rights. For example, regulatory measures that prohibit or impose conditions on the exercise of such rights might be subject to investment arbitration. However, the very existence of given rights should not be deemed a matter of international investment law. Arbitral tribunals should refrain from elevate themselves as a supranational legal platform by developing their interpretations of IP rights to expand the obligations undertaken by states[128].

CONCLUSION

The primary purpose of the international investment law is to protect and to promote foreign investment. The IP regime is also vital for the modern requirements and development of a country. In the context of international trade and foreign investment, particularly in the modern market economy, IP rights provide the owner with the legal protection needed to enter the foreign market and maintain its competitive position. In this sense, IP rights serve as a strategic asset that allows its owner to rise in the market[129]. IP rights account

[128] Correa, "Redefining," 135; also see Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 503; Günarslan, *Fikri Mülkiyet Haklarının Uluslararası Yatırım Tahkimine Konu Olması,* 107.

[129] Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 35.

for a large part of the growth in modern economies. This trend, which emerged as a necessity, has led to a shift in emphasis from property in tangible assets to IP. In this respect, IP rights are now included under the definition of investment in almost all international investment agreements. The recognition of IP as an investment opens the way for foreign investors to challenge state actions affecting their investments before investor-state arbitration.

International investment agreements can include IP rights under the definition of investment by stating "intellectual property rights" in a general manner or enumerating several types of IP rights. Even if the term "intellectual property" is not included in the definition of investment, this does not mean that IP rights are not protected as an investment since they are also recognized as an "intangible asset". On the other hand, the inclusion of IP rights in the definition of investment may not be considered sufficient for investment protection. The intersection of IP with international investment agreements requires a comprehensive legal and economic analysis[130]. Arbitration decisions shed light on the interpretation of the investment. In this respect, an investment should have some characteristics adopted by several arbitration decisions along with satisfying investment definition of relevant international investment agreement.

IP rights that are not adopted by the domestic law of the host state but recognized in the investment agreement create a controversial grey area. The roles of domestic law and international investment law are important in determining whether an IP right constitutes an investment. In this respect, the protection of IP rights as an investment is primarily governed by the provisions of the international investment agreement. Accordingly, it should be analysed as to whether an IP right under the definition of investment has investment characteristics. On the other hand, agreement provisions cannot create IP rights. The existence, scope and limits of IP rights are determined by domestic law of the host state. Therefore, considering principle of territoriality, domestic law rules are determinative in constructing the rights protected by international investment law[131]. Accordingly, arbitral tribunals should construe the provisions of the investment agreements in accordance with the principles of IP law regime.

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[130] Jozwik, "Investment Regulation," 352.

[131] Klopschinski, Gibson, and Grosse Ruse-Khan, *The Protection of Intellectual Property Rights*, 502.

In order to mitigate controversial issues, it is of paramount importance that the parties carefully negotiate and draft the terms of the agreement to protect their interests. In this sense, states negotiating to encourage foreign investment should follow current trends in treaty practice. In the process of drafting an agreement, negotiators should draft the provisions of the agreement in such a way as to ensure that they are construed in accordance with the real intentions of the parties. In this respect, considering past claims and possible future disputes, the definition of investment should be carefully shaped and ambiguous statements should be avoided[132].

[132] Günarslan, *Fikri Mülkiyet Haklarının Uluslararası Yatırım Tahkimine Konu Olması,* 288.

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