INTELLECTUAL PROPERTY RIGHTS AS INVESTMENT ASSETS

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Abstract

This legal article discusses the nature of intellectual property rights as an investment and its value. The recent development of intellectual property rights has included it in the scope of investment treaties, making it an attractive investment for states. Firstly, the article discusses the economic value of intellectual property and the difference between intellectual property as an asset and other physical assets. The article then addresses how intellectual property rights issues are reflected in investment agreements. The article provides an overview of Lilly vs. Canada, an investment dispute related to intellectual property. Also, the relationship between international law and domestic legislation in the background of this issue was analyzed. This legal article provides an easy understanding of the issue with examples referring to various bilateral investment treaties.

Key words: intellectual property rights, international investment, investment agreement, BIT (bilateral investment agreement), domestic law.

In today's world, the value of the intellectual property is increasing day by day, and unlike in the past, investors pay more attention to this concept. In most of the currently existing international investment agreements, we find clauses characterizing intellectual property rights as investment, and this trend stems from the economic value of intellectual property, as well as the requirements of international conventions that have emerged in this field in recent years.

First and foremost, it is important to note that companies and investors who protect intellectual property rights and have a strong intellectual property strategy are considered more reliable partners in the market. In other words, a company that does not protect its intellectual property rights has a poor image and is taken lightly. On the other hand, one of the main factors that make intellectual property an attractive investment comes from its own nature. IP has no boundaries. Unlike physical assets, which have a fixed value, intangible assets have an unlimited potential for growth. If you invest in a startup whose IP has already been protected, you can be sure that as the business expands, the value of its IP (including its brands, designs, innovations, etc.) will increase as well. In fact, the IP may even help the business expand by fending off rivals and securing its position in the market. Even though it is expensive, legal protection can actually increase your business's profitability. For example, according to Forbes, the brand value of APPLE is nearly 150 billion euros and has been increasing significantly in the last 10 years [8]. It is not excluded that the value of the above-mentioned trademark is increasing day by day, and with time, the intellectual property strategy correctly created by the administration of APPLE company has developed and returned without any loss.

Companies in technologically advanced countries are increasingly focusing their asset structures on intellectual property rights. Trade secrets, trade names, technical processes, and other intellectual property rights may be included in the capital structure of a subsidiary when companies from technologically advanced nations distribute their production and Research and Development (R&D) facilities abroad. For these reasons, investment agreements define investment assets as including, but not limited to, intangibles, intellectual property rights, licenses, claims, and returns. The inclusion of IP

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rights in the definition of investments establishes a connection between investment agreements, which are typically bilateral, and IP instruments, which are typically multilateral.

During the MAI negotiations, there was a lot of discussion about whether IP rights should be included in the definition of investment. Some states proposed excluding intellectual property (IP) from the definition of investment [6].

Further negotiations did not result in a resolution to the problem. However, just because IP rights aren't specifically mentioned in the definition of investment doesn't mean it doesn't still count as investment. This is so because the intellectual property rights that protect the foreign company's technologies can be included in investment assets as claims, interests, and other intangibles. Determining the scope of rights and obligations resulting from investment agreements necessitates a thorough investigation as well as legal and economic analysis of the interface between IP and investment agreements. One point deserves special attention when considering the relationship between intellectual property and investment treaties. So, for intellectual property to be considered as an investment, it must be reflected in the contract. This can be reflected in several forms. Intellectual property can be characterized as an investment both directly and indirectly. Developed and industrialized nations frequently directly classify intellectual property as an investment. Based on experience, the 2012 United States Bilateral Investment Treaty recognized intellectual property as an investment-"‘every kind of asset that an investor owns or controls … Forms than an investment may take include: … (f)intellectual property rights”[7]. The Agreement between the Republic of Turkey and Australia on the Reciprocal Promotion and Protection of Investments uses a similar but slightly different formulation and omits "geographical indications" and layout designs of integrated circuits but includes know-how and goodwill.

However, it is possible to imply that intellectual property is an investment. For instance, "real estate or other property, tangible or intangible...," is included under the definition of investment in the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership. Here, intellectual property can automatically be characterized as an investment by being included in the category of "intangible assets".

It is important to note that the protection of intellectual property rights as an investment usually occurs by the agreement of the parties creating that investment agreement. In order to ensure the effective and efficient operation of the international investment agreement, the domestic legislation of the countries must be taken into account. Otherwise, the contract cannot achieve its purpose, the necessary legal protection cannot be provided to the investment specified in the scope of the contract, and all of these can lead to legal disputes. If we look at the practice, the most famous case related to this issue is “Lilly” vs. Canada [3]. Lilly is an American pharmaceutical company that applied to the relevant authority to obtain patent protection for two products in Canada under the North American Free Trade Agreement and received a refusal. Because the "utility" requirement under Canadian law was not met by “Lilly”'s pharmaceutical products. However, “Lilly” filed a lawsuit in the Federal Court of Canada, stating that this decision was a violation of Article 17 of the NAFTA Agreement. In justifying its claim, this company referred to the TRIPS agreement, the text of the NAFTA agreement and the legislation of the United States and Mexico. From the text of the case given above, it is also clear that when concluding an international investment

agreement, domestic legislation must be taken as a basis, and in this regard, domestic legislation should be evaluated as an important reference point, not as an auxiliary source. When acquired in accordance with domestic law, intellectual property rights acquire investment characteristics and financial value. A tribunal concluded in this regard that the reference to the host country's laws and regulations refers to the validity of the investment rather than its definition-, " it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."

The Chile-Australia BIT (1996), on the other hand, qualifies the determination of the scope of rights over investment assets in accordance with domestic law: "The term "investment" shall mean every kind of asset, including property and rights of any kind acquired or effected in accordance with the laws of the receiving state … The meaning and scope of the assets above mentioned shall be determined by the laws and regulations of the Party in whose territory the investment was made."[2]

Similar to this, the 1990 Belgium-Luxembourg-Argentina Bilateral Investment Treaty (BIT) defines investment as: "The Content and scope of the rights corresponding to the various categories of assets will be determined by the law and regulations of the Contracting Party in whose territory the investment is located."[1]

Since intellectual property rights are inherently territorial in nature, it is especially important that the appropriate feature of investment and its relationship with domestic law be taken into consideration. The acquisition and recognition of their right to protection in one territory does not equate to the same acquisition and recognition in any other territory. In addition, as recognized by multilateral agreements, the states that grant IP rights make different decisions regarding the extent and scope of the rights, as well as the limitations and exceptions that are applicable to the rights. The specific categories and technologies, in addition to the applications of the criteria for the grant of the intellectual property, are subject to variation from nation to nation. In this regard, certain investment agreements, such as several of the Indian Bilateral Investment Treaties (BITs), clearly limit the intellectual property that can be used to form an investment to the extent that is acceptable in accordance with the applicable laws of the respective countries. Some other investment agreements take things a step further by mandating that intellectual property rights be subjected to a formal process of capital registration in order for those rights to be considered an investment asset:

"Member Countries, …., may consider as capital contributions, such intangible technological contributions like trademarks, industrial models, technical assistance and patented or non-patented know-how, that take the form of physical goods and technical documents and instructions."[4]

Almost all of the various objects that are part of intellectual property rights are included in the protection of investment treaties. In particular, the protection of patent rights is of great importance in investment contracts. If we review the text of modern investment agreements, we can find provisions related to the conditions of granting a patent, patent invalidation, cancellation and compulsory licensing. The parties to the investment agreement can define a system of legal protection that is compatible with the provision of applying the minimum standards established by TRIPS in this area. However, there are also areas of intellectual property that, even if they are included in the scope of the investment agreement, it is very difficult to ensure their effective protection as an investment. Copyrights and well-known trademarks are among such in-

tellectual property objects. The term "investment" and the function of domestic law in determining the legality, extent, and nature of the rights to investment assets are not always explicitly defined in investment agreements. Even if domestic law is included as a requirement for investment assets to be valid, the expansive definition of investment may offer greater asset protection than what is permitted by domestic law. Investment arbitration tribunals place a strong emphasis on how public international law interprets treaties, which means that legal terms in investment agreements that are thought to have their own independent meanings that are appropriate to the contents of a given treaty may not always have the same meanings as equivalent terms in the domestic law of the contracting parties. In cases where such protection is unavailable or less advantageous under the domestic laws of the host country, investors may argue that the protection of their intellectual property rights is available to the extent specified in investment agreements. As a result, there is a gray area where domestic law does not recognize the intellectual property rights that are acknowledged under investment agreements.

The majority of investment agreements include a list of intellectual property rights, which may include assets that are in the public domain under domestic law. Some investment agreements, for example, have become more explicit in their definition of investment by specifying geographic indications, plant varieties, data, and encrypted programs. Some investment treaties clearly deviate from domestic intellectual property laws. The Ethiopia-Israel Bilateral Investment Treaty (BIT) of 2003, for example, defines geographic indications and plant-breeders rights as investment assets [9], despite the fact that Ethiopia, which is not a member of the WTO or the International Union for the Protection of New Varieties of Plants (UPOV), did not protect geographic indications and plant-breeders' rights in its domestic law at the time the investment agreement was signed. The protection of the above-mentioned intellectual property rights as an investment in recent times is one of the successes of the TRIPS agreement adopted by the World Trade Organization. Thus, the adoption of mandatory provisions of TRIPS in this field and the implementation of these provisions by WTO member states had a great impact on international investment relations and intellectual property rights became an important component of investment agreements.

In conclusion, IP rights that have been legally acquired in accordance with host country law may be considered an investment asset. Their scope, content, and form will be determined by domestic law of the host nation. However, the host country will still be required to protect such rights as investment assets where investment agreements specifically list a given right as an investment asset even nations, though it is not covered by domestic law [8]. Since adding new sources of IP rights for foreign investors does not specifically benefit developing it is crucial to always be clear about the extent of investors' property rights and the function of domestic law. Additionally, it is essential to refrain from listing any rights that are not safeguarded by national legislation or agreements to which the state is a signatory. It is important to note that the value and importance of intellectual property are increasing due to the rapid development of technology and industry, and this positive alterations will also be reflected in investment agreements.

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