

Deceptively Simple: Explanation of the Concept of Intellectual Investment in Foreign Investment Law, With an Emphasis on the ICSID Arbitration Procedure (Original Research)

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Extended Abstract

When it comes to investments involving Intellectual Property Law, investment arbitration tribunals need to carefully determine if such rights, such as a drug patent, qualify as investment under international foreign investment law. Such analysis necessitates a thorough examination. To clarify the concept of intellectual investment, an intertextual analysis of Intellectual Property Law and international foreign investment law is essential. This analysis also needs to consider the protective mechanisms in place for investment arbitration involving intellectual investment, addressing any potential questions and ambiguities. Researchers face numerous challenges at the intersection of Intellectual Property Law and International Investment Law. One major challenge is the initial legal assessment within the framework of domestic law, given the inherent nature of intellectual property categories. This underscores the importance of registering intellectual property. Therefore, finding a common legal ground between these two fields requires deep analysis and insight.

This research addresses several key questions: What specific characteristics of the investment definition, particularly concerning Intellectual Property Law, need to be considered? Additionally, how does the registration of such rights, or lack thereof, in the host country, like a patent, impact the protection or risk to intellectual investment? Using an analytical-qualitative approach, this study will first conduct preliminary evaluations before analyzing

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the concept of intellectual investment. The research aims to validate the concept of intellectual investment by referencing bilateral and multilateral agreements and assessing its alignment with Article 25 of the ICSID Convention, based on recent ICSID tribunal cases. Subsequently, the study will elucidate the concept of intellectual investment and its role in the realm of foreign investment arbitration.

The key findings of this research indicate that in situations where an arbitration tribunal cannot rely on the alignment of bilateral and multilateral agreements with the criteria of Article 25 of the ICSID Convention, it then considers the interdependence of investment with related Intellectual Property Law, and the impact of intellectual investment on the investment's economic objective. This leads to a broader interpretation of the concept of investment, treating Intellectual Property Law as an investment. Additionally, the *Salini* Test, which serves as an indicator of the investment concept, does not legally bind arbitration authorities. Arbitration tribunals often exercise discretion and do not always consider all criteria, depending on the case. For instance, in the *Philip Morris v. Uruguay* case, the main issue was whether Uruguay's restrictions on the use of Philip Morris trademarks on tobacco products violated the bilateral agreement standards. Uruguay argued that Philip Morris's interests did not constitute a protected investment under foreign investment law. The argument made was not that trademarks are not to be considered as investment; rather, they did not specifically meet the host State's development criterion according to the *Salini* Test.

This research contributes to the existing body of knowledge by examining the characteristics and fundamental nature of intellectual investment within the context of international foreign investment law. It also explores the core definition of intellectual investment and the approach taken by ICSID arbitration tribunals in handling this concept. By tackling these elements, the study not only enhances current understanding but also fills existing gaps in the literature, thereby enriching it.

In conclusion, this research examines the concept of investment, particularly within ICSID arbitration practice. On the one hand, it is evaluated through asset and economic categories, while on the other, technological advancements make it a complex concept. In the realm of international foreign investment law, a realistic and broader perspective reveals that an activity underlying an investment, which directly impacts its value and economic productivity, can be considered as a protected investment. Intellectual Property Law is crucial for ensuring fundamental creative activities, including foreign investments. Consequently, patents, trademarks, copyrights, and other forms of intellectual property, which require substantial financial resources for their creation, development, protection, and exploitation, are regarded as investment in international investment arbitration.

In the context of International Investment Law where protection relies on

Intellectual Property Law, these rights enhance the economic value of the investment, leading to a monopoly. As a result of considering the intellectual property within such investment, a significantly higher economic and investment values are gained. It is important to note that despite the lack of a consistent and organized approach in the practice of international investment arbitration panels, which leads to divergent opinions, future interpretations of the concept of investment under Article 25 of the ICSID Convention are likely to be broader and more diverse. Investment arbitration tribunals are expected to move away from classical concepts and align the notion of investment with technological advancements and intellectual categories, including recognizing intellectual property as investment.

Keywords

Bilateral Investment Treaty, Intellectual Property Law, ICSID, Investment Arbitration, International Foreign Investment Law

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