



Revisiting the Investment Opportunities in Intellectual Property

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The present study shall assess the various modes and kinds of investments in the recent past and how the investment in intangibles has witnessed growth in the recent decade. This doctrinal study found that Intellectual Property Rights (IPR) as an investment has been in use since the late 1900s in various international agreements, apart from the traditional methods of investment in IPR such as, licensing, assignment, and securitization. Though, some countries do not have legislations to deal with the traditional methods of investment, International Investment Agreements (IIAs) have been a driving force for the investments in IPR. Since the advent of such an agreement, countries have always mentioned IP protection as an essential clause. However, the differing laws of the countries paved the way for varied definitions and kinds of IP protection. It has been found from the existing literature that at the present, most IIAs have emphasized investor protection priority over IP protection which also forms an essential part of the agreement. This requires that there be adequate laws to supplement the agreements at both the domestic and international levels. The IP forming the heart of the agreement should be given priority in terms of protection coupled with adequate redressal mechanisms.

Keywords: Investment, International Investment Agreements, License, Assignment, Franchise, Intangible Investment, International Centre for Settlement of Investment Disputes

Investment is an important aspect for the growth of an economy. At an individual level, we invest the money into a profitable venture to reap the benefits from our savings. Traditionally these investments were made in tangible assets such as gold, land, vehicles, minerals, coal, petroleum, infrastructure, etc. Even though investments in motor vehicles are subject to depreciation, it was considered a luxury at a certain point in time and a lucrative form of investment. In the last few decades, investment opportunities witnessed a revolutionary change. Investments were no longer restricted to within a territory or nation even cross-border investments have become possible. Alongside investments in intangible assets such as shares, other forms of securities and intellectual property have witnessed a surge in the last few decades. All these turned the table around and gave a boost not just to the economies but the investors as well. Research and development being another avenue seeking wide opportunities were welcomed by countries across the world. One important aspect of this research and development segment is intellectual property.

Some important treaties and agreements such as the Stockholm Declaration, Berne Convention, Paris Convention, Madrid Agreement, WIPO, TRIPS, etc., led to the promulgation of local laws in countries and an incentive for people to enter the field of IPR. This sector witnessed a boon because technology and investments in this segment soon became a lucrative option.

For instance, if we take the most recent and relevant example of Covid-19 vaccines, despite the ongoing debates with respect to its patentability, we shall assume them as a potential patent. Some of the private players entered the field realizing the huge returns the investments will reap in the future. All of the expenses put into the research and development of the vaccines were easily recovered by the manufacturers. Even though money was pumped into this sector even by the Government of India, this wasn't in the form of an investment but an economic incentive/subsidy to boost the production of the vaccines.

Internationalization of these intellectual property rights gave way to proprietors registering themselves in countries apart from their nation of origin. Then came the concept of monetization of intellectual

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property by the way of securitization (license, assignment, franchise, etc) and collateralisation. All of these were nothing less than a form of investment into intellectual property. While the proprietor seeks opportunities to reap money from this investment in the intellectual property, the licensee/assignees see this as an opportunity to reap profits from the existing intellectual property. All these are just some of the many ways of investment into intellectual property which are referred to as license or assignment in common parlance and not modes of investment.

Investments in intellectual property are new age trend and these are largely governed by contractual terms. The modern age contracts have defined investments to include intellectual properties. Developed countries such as the USA, Singapore, UK, Japan, etc., have entered into agreements wherein investments are made in intellectual properties such as patents and trade secrets. Such agreements are largely entered by the developed countries because they primarily rely on technology sharing and have a strong legal backing for intellectual properties in their respective countries.

However, there is no formal law or any international law in place governing such agreements. There is a need to reflect upon the provisions which should form a part of the agreement to protect the rights of both the proprietor and investor apart from the intellectual property itself. In the present study, the authors shall be discussing some such tests in which it has been stated when an intellectual property takes a form of investment and how these agreements need to be framed.

The objective of the study however shall focus on the use of intellectual property (intangible investment) as a form of investment in the present era. This study has analyzed the use of a traditional intellectual property as a form of investment as an alternative to modern techniques. The present doctrinal study shall delve into aspects of investment opportunities in IP, how feasible is intellectual property as a form of investment and what are the various laws concerning the subject matter.

IPRs in International Investment Agreements

With various international treaties signed by the developed countries, like, Japan, EU, USA, intellectual property rights are increasingly finding their place in investment agreements. These treaties go beyond the WTO and TRIPS Agreement and deal

with the matter almost exhaustively. These agreements define the term investment not just in monetary terms but also in including intellectual properties such as, patents and other technologies. This makes it imperative to protect the investors investing in IPR.¹

IPRs as protected Investments: How open are the gates?

The conventional intellectual property treaties, laws, and agreements have protected a third-party intervention in rights. Thereby, giving the proprietor some absolute rights in this regard, however, in the case of investors of these intellectual property rights differ. However, only horizontal rights concerning intellectual property find their place in the agreements and that's why ideally such IPR investment agreements should be framed.²

The topic being new to various legal regimes, the research study gives a kick start to the understanding in this context. It discusses the various models and how a shift is made from the protection of proprietors of IPR to the protection of investors in investment agreements.

Protection of IPRs through Bilateral Investment Treaties: Is there a TRIPS-Plus Dimension?

Various important concepts of intellectual property rights such as, national treatment, most favoured nation treatment, fair and equitable treatment, etc., eventually need to find their place in investment agreements. TRIPS being one of the sole guiding authorities in respect of trade and intellectual property have not covered certain aspects of investment agreements and there can be an approach that goes beyond these guidelines.³ The rights of an investor and proprietor of an IPR also needs to be balanced especially in an international setting.

Role of National and International IP Laws and Policy in Reconceptualising the Definition of Investment

The intellectual property in investment agreements should be subjected to local laws and not dispute resolution. The arguments with three cases wherein the arbitration used the local laws and international investment agreement the research study describes the Salini Test, which is imperative for the present study.⁴ An important question has been raised as to how national laws must be developed enough to protect both the investor and proprietor of IPR, in case of

dispute settlement, which makes it crucial for the present study.

IP Provisions in International Investment Agreements

The present document is the culmination of the United Nations Conference on Trade and Development monitoring of International Investment Agreements (IIA). The bilateral investment treaties (BITs) and preferential trade and investment agreements (PTIAs) have always included provisions for IPR protection. The term investment in the BITs since the late 1900s has included IPR and cited numerous examples from treaties worldwide. The PTIAs have gone beyond the basic provisions of the TRIPS Agreement for IPR protection, almost 51% of treaties (out of the 151 treaties analyzed by the UNCTAD).⁵

Defining Investment and its Various Forms

Investment is defined as “*The act of putting money, effort, time, etc., to make a profit or get an advantage, or money, time, effort, etc used to do this.*”⁶ Alternatively, it may be defined as “*commitments of current financial resources to achieve higher gains in the future.*”⁷

Meaning thereby it is an attempt to increase my saving/investment of Rs.100 today to a bigger amount in the future. The returns we get in investment are proportionate to the risk and time associated with the venture i.e., a fixed deposit would reap fewer returns than the stock market. For simple reasons, an element of risk is associated with the stock market. Investments are classified as ‘real and financial investments’ (Fig. 1) and ‘money and capital market’ (Fig. 2).

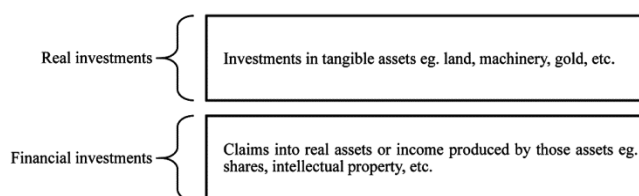


Fig. 1 — Real and financial investments

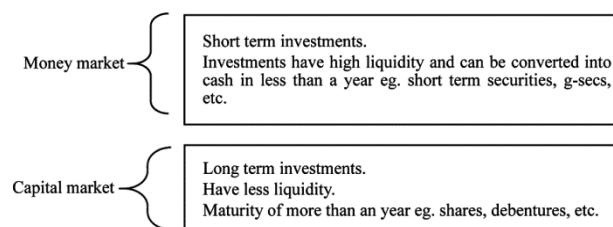


Fig. 2 — Money and capital market

Test for Determining an Investment

Apart from the open-ended definitions discussed previously it is essential from the perspective of adjudication or dispute resolution that a proper criterion be set to exhaustively understand the meaning of a term. The International Centre for Settlement of Investment Disputes (ICSID) had laid down one such test to define an investment. The ICSID under Article 25(1) of the ICSID Convention was entrusted with the jurisdiction to settle matters arising out of any legal dispute in investment. The term investment was never defined before the Salini Test was laid in the case of *Salini Costruttori S.P.A. and Italstrade S.P.A. v the Kingdom of Morocco*.⁸ There were four essentials to be fulfilled to become an investment:

- (i) Contribution of money/assets
- (ii) Risk
- (iii) Duration
- (iv) Contribution to the host State’s economy

Over a while, the test was twitched to suit the needs, opting for a more inclusive and a wider definition of investment under Article 25(1) of the ICSID Convention. *Philip Morris Brands Sàrl, Philip Morris Products S.A. And Abal Hermanos S.A. v The Oriental Republic of Uruguay*⁹ was one such case that held that the Salini test doesn't lay down a mandatory criterion. Hence, a flexible approach should be opted for, thereby, doing away with the fourth requirement of contribution to the state's economy.

Risks Associated with Investments

While investment is a reaping return in a given duration of time, the returns are directly proportioned to the risk associated with these investments. The returns are calculated using the formula:

$$\frac{[\text{Final value of the investment} - \text{Initial value of Investment} + \text{cash returns}]}{\text{Initial value of Investment}}$$

These returns are by and large correlated with the risks and period of investment. The greater the liquidity, the lesser the returns; and the greater the risk, more the returns. The risks associated with investment markets can be classified as systematic, unsystematic, and other risks (Fig. 3 & Table 1).

Thereby, each investment venture has its portfolio and risks associated with them. Each investor has to be wise enough to pick a suitable venture as per their needs and the time for which they wish to keep the funds invested.

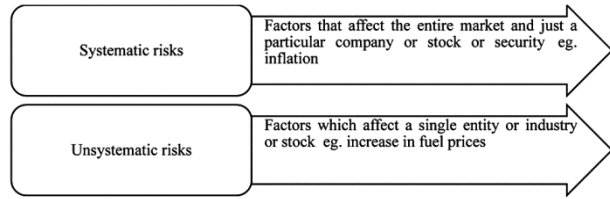


Fig. 3 — Systematic and unsystematic risks

Table 1 — Types of risks ⁷	
Business risks	Industry-specific risks eg. an increase in fuel prices would affect the entire manufacturing sector.
Economic risks	Fluctuations in macro-economic factors eg. budget deficits, inflations, unemployment rates, etc.
Liquidity risks	More liquidity lessens the risk. While risk and returns are inversely proportional to each other.
Interest rate risks	Fluctuations in the interest rates eg. an increase in the repo rate would make borrowing difficult for the general public.
Exchange rate risks	Fluctuations in currency rates eg. an increase in Dollar (\$) price makes fuel prices skyrocket.
Firm-specific risks	Internal decisions of the firm/entity eg. taking over another entity may either be profitable or loss-making.

Theories Associated with Foreign Direct Investment and IP

Theories of FDI¹⁰

Production Cycle Theory

The theory propounded by Vernon is of the view, that there are four stages in a production cycle; innovation, growth, maturity, and decline. While goods are made for the consumption of the locals and the excess is exported. It is during the first two stages of the cycle that foreign investment is sought.

Theory of Exchange Rates

This theory discusses the impact of exchange rate and currency rates and their impact on the FDI. With the increase in the rates of USD, the levels of FDI fell.

Internalization Theory

Hymer identified two major determinants of FDI; removal of competition and the other was advantages that some firms possess in a particular activity. To attract FDI the companies were to highlight the specific advantages, thus, emphasizing their internal activities and structure.

The Eclectic Paradigm of Dunning

A three-factor determination was developed under this theory: OLI (Ownership advantages, Location,

and Internalization). While ownership refers to the intangible assets possessed and owned by the company, location refers to the advantageous location of each company, and internalization deals with the engagement with different foreign goods and products.

Theories of IP

Utilitarian Theory

The utilitarian theory was proposed by Jeremy Bentham, which propounds for the "greatest good of the greatest number".¹¹ While the theory suffers from certain criticisms when read with IP. Three other theories support this theory:

Incentive Theory

This approach proposes that each entitlement of IP given to the proprietor incentivizes others to come up with more innovations. The theory focuses on how social welfare increases with the increase in such inventions even though the costs associated with these inventions remain to be high.

Optimizing Patterns of Productivity

This approach talks about the distribution of the IP amongst the public. It emphasizes the fact that if the same is given free of cost, the IP is likely to lose its value. However, if a monetary benefit comes alongside the distribution, it makes the use legitimate. Sale, licensing, compulsory licensing and fair use fall within the purview of this concept.

Rivalrous Invention

This theory emphasizes the fact that there can be rival inventions that may come up. While studies have come up in this regard, no concrete solution has been proposed so far.

Labour Theory/Locke's Theory

John Locke's theory emphasizes the fact that a person owns a natural right over the goods wherein he invests his labour and efforts, irrespective of whether it is mental or physical. To put this in other words, an invention or creation of a person must be owned by that very person as it is the outcome of his sweat and labour. However, there stands to an exemption in this regard, the employ-employee relation. Here, even though the efforts are those of the employee, it is the employer who happens to be the owner of the said creation.

Ethics and Reward Theory

This theory supports the view that the fruits of the labour must go to the owner of the IP. The owners are

dispensed with certain rights which go a step ahead in protecting them and include the right to use as per their will, right to dispose of, etc. At the same time, there must be some good that the creation must do to society in order words it must be of utility/social utility.

Personhood Theory

Just like a child is a reflection of their parents, every creation is a resemblance to an individual’s personality. This theory discusses the rights of the owner which go beyond the financial aspects to protect the personality traits in the invention.

Intellectual Property as a Form of Investment

A Shift in the Approach

Over the past decades, there has been a significant shift from investments in tangibles to intangibles. Intangibles include patents, research, and development, technology know-how, product quality, brand names, and intellectual capital.¹² This is because of the increasing realization of the fact that the growth and return on investments in the intangibles are manifold as compared to tangibles (Fig. 4).

There was an increase varying anywhere between 2 to 8 times in the investments into the intangibles. Most of the developing countries have made this swift move to the intangibles market (Fig. 5).

The shift was witnessed especially during the Covid-19 pandemic which required the use of technology. Over time, investment in intangibles has now become a determinant of productivity and growth.¹³ India has also taken a lead in this regard and happens to be ranked third globally after USA and Switzerland in intangible investments.¹⁴ Yet, we have a few countries such as the Maldives which are yet to make their way through this change.¹⁵

There is a specific mention of intellectual property in the definition of intangible investments. This becomes imperative because with the changes in an

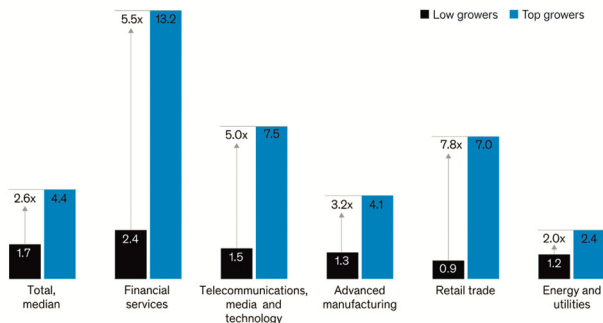


Fig. 4 — Investment in intangibles and revenues¹³

economy we need to technologically advance and come up with a greater number of intellectual properties let that be in the form of patents, trademarks, trade secrets, plant varieties, etc. A major question that comes here is why we need investments in intellectual property and in what forms? Research and development has been a field that requires a constant flow of money to keep up with technological advances. Almost all intellectual properties require funds to become operational, especially patents, plant varieties, trademarks, etc. The proprietor of the intellectual property undertakes such investment ventures to reap profits from his investments and to put the IP to use in the market. One of the major sources of funding for intellectual property has been the way of crowd funding, securitization (licensing and assignment), franchise, and collateralisation.

Crowd Funding

It is defined as the method of raising money by accepting contributions from people across the globe or a nation. Inventors put this method to use especially in start-ups. The inventor ideally obtains the relevant intellectual property authorization before they put their idea on the market. As it becomes difficult to protect one’s invention in the public domain, confidentiality agreements are signed by prospective investors.¹⁶ It is also recommended to open crowd funding to only those people of the nation where the IP is registered.¹⁶

Securitization

There are two methods of securitization which are opted globally; licensing and assignment.¹⁷ Assignment refers to the transfer of title in the intellectual property meaning thereby that the assignor no longer has any proprietary rights over the intellectual property for the period of assignment. While in the case of a license, the licensee is given

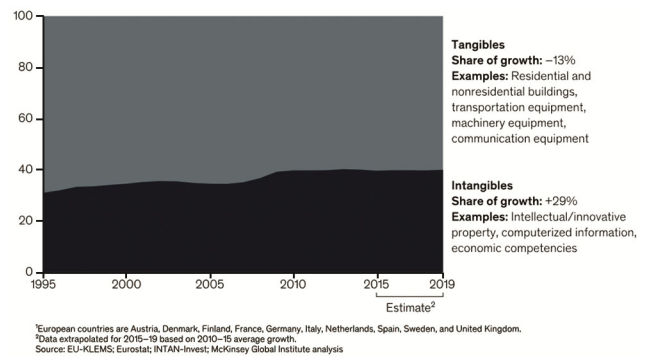


Fig. 5 — Intangibles investment growth in the USA and Europe¹³

some rights of proprietorship which can be practiced at the same point of time by multiple licensees and the licensor is in no way devoid of practicing those rights. However, in both of the aforesaid cases, monetary benefits are affixed for both the parties (licensee and licensor, assignor and assignee).

Franchise

Franchising is a form of business expansion involving the exploitation of an intellectual property asset, where the franchisor exercises a great deal of control and offers assistance in the business.¹⁸ There are two types of franchise; product and business franchise. While in the former, the product is replicated in the latter the entire business format is replicated. Some common examples of food franchises being that of Haldiram, KFC, McD, etc. This way the proprietor can exploit the IP and expand its reach in the market.

Collateralisation

IPs are one of the upcoming forms of collateral offered by firms, IP owners, etc. Even though the process involved is a little complex, in simple words the investor invests the money in a given IP with the help of a special purpose vehicle and in return, they get their share of returns after a given period.¹⁷ These returns are reaped by the way of the royalty or any incomes or profits associated with the IP. Meanwhile, these investments help the proprietor to expand the presence of the IP in the market or undertake a suitable venture.

While all these are some very conventional methods of investment in IP, to date, not all countries have definite laws covering all these aspects. For instance, India doesn't talk about crowd funding, franchise, and collateralization in its IP laws. Only a passing reference is made in the SARFAESI Act and the Patent Act which lack a certain degree of clarity. Thus, investment law is one subject that hasn't been formally structured into a single law, especially investment IP to date remains untouched.

International Investment Agreements

Investment in IP has witnessed a stark rise in the past decade, it has been seen to have a prominent mention in various international investment agreements (IIA). Even though their prominence is felt in the present era, they were in use since 1903, wherein USA and China had entered into a

Friendship Commerce and Navigation (FNC) Agreement wherein a property included IPRs and due protection was extended to them.¹⁸ There have also been debates as to how the bilateral investment treaty (BIT) models of India and the USA differ for IPR protection, yet negotiated BITs have been entered between the two nations.¹⁹ These agreements are an intersection of the two laws; IPR and investment. They are required to balance not just the rights of the investors but also the IPR. TRIPS agreement has been the guiding authority in this regard apart from the various bilateral and multilateral agreements entered between nations.

Definition of Investment in IIAs

To understand the functioning of the IIAs, it is imperative to understand how they define IPR to be an investment.¹⁸

Referral Model

This model places reliance on the domestic laws of the nation. No reliance is placed on international laws and domestic law becomes the sole guiding authority.

Reliance Model

This model as is suggestive by the name itself places reliance on the domestic law but the sole authority remains to be the international law or the definition in the agreement. For example, if the agreement defines what the term investment means and it includes IPR, reliance on domestic law will be placed only to the extent of the definition of IPR and investment. Even if the term investment in domestic law doesn't include IPR, it becomes an irrelevant consideration.

Delegation

In the delegation model reliance is placed on the meaning of the term investment under Article 25(1) of the ICSID Convention. This model leads to consistency in the definition.

Protection of IP Rights in IIAs

Although, most IIAs are autonomous in nature meaning thereby that they stick to the provisions of the agreement and enforce only the obligations stated in the agreement.¹⁹ This is also referred to as the horizontal obligations approach. Here, only those IPR principles are implemented explicitly which mentioned in the agreement as opposed to the vertical obligations wherein all the international principles on IPRs are inculcated and given due importance. Protection of IP rights has been of concern in most

IAs as it grants due protection to the investors but not to the IP and its owner(s). This was where the TRIPS Agreement steps in to protect the rights and enforce of the most favoured nation, national treatment, and some other important concepts of IPR. Reports have even claimed that cases brought by private investors for IPR protection in BIT and other agreements have to date not been adjudicated.¹⁹

With the advent and increased focus on research and development, intellectual property gained prominence. It was proposed not just as the most suitable form to protect one's creation but also a way to mint money. In accordance with the Ethics and Rewards Theory, the owner of the IP must enjoy the fruits of their labour. Different countries have their own set of laws governing the protection of intellectual property however, it is observed that legislations relating to the investment opportunities in IP is found to be missing. For instance, in India, the Patent Act provides that only those people investors who have significantly invested in the patent shall be obliged to give royalty to the owner.²⁰ Yet, there is no single law discussing at length about the plausible investment opportunities in the field. It is imperative that each nation has its own set of laws framed at part with the international guidelines and laws. This will facilitate and ease the formation of IAs and BITs. Moreover, intellectual property rights must be given as much importance as protection of the investor and their rights. Intellectual property is an upcoming area where a lot of investments are sought from across the globe and it becomes even more important to have laws in the present context.

It is highly recommended that alternate dispute mechanisms must be opted in case of any disputes relating to IP investment. This way there is no significant loss suffered by either the investor not the owner of IP in terms of money, time and goodwill.

Conclusion

Intangible form of investments has been a creation of the recent decade however, investment in IP has been put to use since the late 1900s. Almost all the BITs and PTIAs have mentioned IP protection, even though the national laws of the countries may not have developed in this regard. While the UNCTAD in the year 2007 had come up with the report that IP protection in the various BITs and PTIAs has surpassed the provisions in the TRIPS agreement, all the other literature reviews of the year 2015 and onwards state that IP protection is the least priority of

the IAs. The priority remains to be the protection of the investors.

Hence, there is a need to have strong domestic laws to protect the IP rights in investment apart from the investors. Also, international laws or model laws can be developed further to exhaustively deal with the subject matter. Especially, when we have seen how imperative these investments have been for the developed and developing countries of the USA, Singapore, and India.

Apart from the IAs, the laws dealing with monetization, crowd funding, and franchisee should be developed further especially in developing countries to promote the use of IPR by the way of offering funds to them in these varied manners. Intangibles being the future of investment, there must be initiatives taken by the countries, international organizations, and the local regulatory bodies in a nation. There remains to be immense scope in this area and strong laws can supplement the functioning of the economy.

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