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PAVING PATHWAYS FOR PROGRESS: **HARMONIZING PATENTS AND TRADE** **FOR WORLDWIDE INNOVATION EQUITY**

AUTHORED BY - KAPIL SINGH

Trade related aspects of intellectual property rights (herein after to be known as TRIPS) come into force on 1 January 1995, after coming into force the TRIPS creates the perennial tug war between the developed and developing countries, especially in the sector of pharmaceutical. To achieve industrialized harmonization of intellectual property regimes, it is imperative to ensure that they conform to the minimum standard of goals which are set in the agreement. Developing countries often perceive the agreement as lacking specificity and clarity, emphasizing the importance of encouraging a flexible approach to its interpretation.

Patent rights is considered to be the one of the strongest rights which gives the patent holder the exclusive rights for manufacturing, selling, distributing and using of the said invention for the limited period of time. Local working of patent is considered to be the unique features for the development in the industrial growth of the country. The patent holder is required to produce the patented product or perform the patented process inside the nation where the patent was granted. Paris convention provides the ground on the failure to work or insufficient for utilizing the invention by granting them compulsory license for the working of the patents within the country. But after coming of the TRIPS agreement this become one of the highly controversy issue as what extent Article 27 (1) of the TRIPS agreement repeals all the pre-existing rights of the member which they continue to treat for the non-working of the patent which is mentioned under the article 5A(2) of the Paris convention.¹

The issue of local working requirements under Article 27.1 of the TRIPS Agreement has sparked debate between developed and developing countries. Developed countries argue that the sub-clause intends to exclude the working obligation from the scope of the TRIPS Agreement. However on the other hand it was argued by the Developing Countries, that Article 31 of the

¹Daya Shankar, Access to medicines: Paragraph 6 of the Doha Declaration on Public Health, and Developing Countries in international trade negotiation. 2006, 2 IJLT(2006)8

TRIPS Agreement does not prevent the granting of compulsory licenses in cases of inadequate or insufficient working. Article 31 of the TRIPS agreement also provides the medicines to every people in the case of national health crises.²

3.1. TRIPS and its Compatibility with GATT.

GATT, which was created in 1947, is primarily concerned with trade in goods and the reduction of trade obstacles. TRIPS, on the other hand, concerns intellectual property rights and their influence on trade. Despite its disparities in subject matter, TRIPS is regarded as an essential component of the WTO's legal structure, alongside GATT.³

One of the foremost issue that arises as why the Intellectual property rights was concluded under the framework of trade. The world trade organization and general agreement of trade and tariff are the agreements which are dealing with the matter related to the international trade. The major goal was to create circumstances for free trade, in which market forces decide trade conditions, and to reduce the impact of artificial, state-sponsored trade restrictions.

The World Trade Organization's intellectual property rights agreement is not only seems to be incongruous, but also contradictory. IPR confers the monopoly rights, which prevent other from engaging in the trade of the same product which they had acquired the rights . This seems to be in conflict with the objectives of the GATT as their main aim was to have the free trade agreement. The incorporation of the TRIPS agreement within the GATT framework may be viewed as a divergence from the general objectives of minimizing state intervention in trade. While the majority of GATT rules strive to reduce such intervention and establish ideal trade conditions, the TRIPS agreement requires the state intervention for ensuring that any trade advantage taken by the person are not negated by any unauthorized use of the technology of their competitors.⁴

Intellectual property protection was included within the GATT as the developing countries could use their trading power for negotiate their scope, nature and extent of the intellectual property systems. The final GATT draft was submitted and accepted in its entirety, all the negotiation on the intellectual property which were linked to the international trade negotiation. The access to

²Daya Shankar, Access to medicines: Paragraph 6 of the Doha Declaration on Public Health, and Developing Countries in international trade negotiation. 2006, 2 IJLT(2006)8

³ Gautam Saha and Abhishek Malhotra , Biological Diversity of India as a resource: A sui Generis system for protection of plant varieties, 11student Adv(1999)18.

⁴ Ibid.`

developed countries by the developing countries made the contingent upon providing adequate IPR protection. Secondly the GATT and the TRIPS Agreement has the strong dispute settlement mechanism .As a result, members who fail to meet the requirements established by the intellectual property rights regime may face trade sanctions. This thing would be possible only when if the regime is outside the scope of the GATT. Further since the developing countries were not well organized for the WTO and there were no collective opposition made by such. This makes the developed nation to push through the requirement as far as possible.⁵

The compatibility of TRIPS with GATT demonstrates that intellectual property rights are now seen as a significant part of international trade. TRIPS seeks to find a balance between preserving intellectual property rights and facilitating global trade by establishing baseline criteria, promoting non-discrimination, and giving flexibility.

3.2. Barriers to entry and market access for developing country firms in developed country markets

The developing countries faces the difficulties while entering into developed countries due to number of legal or non-barriers which are imposed by the developed nation to the developing countries. The following are the barriers which are imposed by the developed nation upon the developing countries.

- **Tariff and Non-Tariff Barriers**

Imports are frequently subjected to high tariffs in developed countries in order to protect native industry. Tariffs like this can make the products more expensive for the developing-country companies from exporting their goods to the developed countries and competing there. Non-tariff barriers, such as import restrictions, licensing requirements, and technical rules, might also prevent these enterprises from entering the market.⁶

- **IPR Laws and their Issues**

Firms must preserve their intellectual property in order to safeguard their inventions and products.

⁵Ibid.

⁶2021 National Trade Estimate Report on Foreign Trade barriers by UNITED STATES TRADE REPRESENTATIVE, Available at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2021>(Last Visited on 1 June 2023).

However, IPR systems in developed countries can be complicated ones as it, requiring large more of investments in the field of IPR which includes patents, trademarks, and copyrights etc. Firms from developing countries may encounter difficulties navigating these institutions, securing their intellectual property, and enforcing their rights in developed-country market.

The following are the challenges which may face by the developing countries related to the IPR:

- a. Patent protection and patentability criteria.

The Patentability criteria in the developed countries are more complex one as compared to the developing countries. Companies might face the difficulties in fulfilling the said criteria like novelty, inventive steps and capable of industrial capacity etc. Plus the examination process of the invention is more stringent.

- b. High cost involved in Protecting Intellectual Property Rights.

Acquiring and preserving intellectual property rights can be expensive, including filing fees, legal fees, and regular maintenance payments. Firms in developing countries, which frequently have low financial resources, may find it difficult to bear these costs. This can make it difficult for them to obtain effective intellectual property protection and discourage them from entering in the developed-country

- c. Enforcing of Intellectual Property Rights

If the developing countries firm is able to get the protection in the intellectual property rights, then the enforcing of these rights in the developed countries is very complex and costly procedure. Moreover if there are any legal disputes related to patent in foreign country then the litigation cost and procedure is more complex one.

- **Lack of Market Information of Developed countries**

Companies from developing nations trying to enter the market in developed countries may encounter difficulties due to a lack of market information. Accessing this information can be expensive and challenging for companies, which can result in errors of judgment and poor investment choices.⁷

⁷Ibid.

- **Quality and standard compliance**

In order to access developed countries' market products must often meet severe quality and standards regulations. Meeting these criteria can be difficult for enterprises in developing nations, particularly if they lack with the appropriate infrastructure, resources, and technical expertise. Costs which is related to compliance will significantly, affects the enterprises competitiveness.

- **Limited Access to distribution Channel**

Firms from developing countries may face barriers to accessing established distribution networks in developed nations. Local or larger international corporations often dominate these networks, making it difficult for smaller or lesser-known firms to gain distribution channels for their products or services.⁸

Reducing barriers and enabling market access for developing-country companies in developed-country markets requires both firms and policymakers to work together. This can be accomplished through a various means such as trade agreements, capacity-building programmes, increased access to financial resources, technology transfer initiatives, and complete market entry support. These steps are crucial in encouraging equitable and inclusive trade, allowing companies from developing countries to successfully compete and thrive in developed country markets.

3.3. Trade for Sustainable Development: Unleashing the Potential for Economic, Social, and Environmental Progress

The pursuit of economic growth, social progress, and environmental protection in a manner that meets the demands of the current generation without jeopardizing future generation's ability to satisfy their own needs is referred to as sustainable development.⁹

There are the various ways in which trade helps for achieving the sustainable development which are as follows:

- **Economic Growth**

⁸Ibid.

⁹ Antony Taubman , Framing a Multilateral Trade and Innovation Agenda to Advance the sustainable Development Goals: the Intellectual Property Dimension, ,(2020) 12 TLD363

Trade may encourage economic growth by encouraging countries to exchange goods and services. It enables countries to specialize in the production of goods and services in which they have a competitive advantage, resulting in higher productivity and efficiency. This, in turn, can lead to more job possibilities, higher earnings, and higher living standards, all of which contribute to long-term economic development.

- **Poverty Reduction**

Trade has a critical role in poverty alleviation by establishing income-generating opportunities and employment. It allows producers, particularly those in poor countries, to access larger markets and benefit from economies of scale. The consequent growth in trade promotes market integration, allowing SMEs and marginalized groups to actively participate in global value chains, expand their businesses, and improve their general well-being.

- **Technology, Transfer and Innovation.**

Trade fosters the cross-border interchange of knowledge, technology, and innovation. When countries trade, they gain access to new technology, machinery, and expertise from other countries. By enabling countries to adopt cleaner and more effective industrial methods and technologies, this technology transfer can help in improving the productivity, boost competitiveness, and promote sustainable development.¹⁰

- **Environmental Protection.**

Trade can help to advance environmental sustainability by incentivizing governments to implement and enforce stringent environmental standards and regulations in order to meet the demands of international markets. Furthermore, trade promotes the spread of ecologically beneficial goods and services such as renewable energy technologies and sustainable agriculture practices. This widespread adoption promotes more sustainable resource utilization and effectively mitigates environmental consequences.¹¹

There are numerous Acts and International Agreements relating to trade and sustainable development. In India, there are many act which aims at promoting trade which are as follows

¹⁰ Ibid

¹¹ Ibid.

the Foreign Trade (Development and Regulation) Act of 1992, the Customs Act of 1962, the Indian Trade Act of 1927, and the Environment (Protection) Act of 1986. Furthermore, international accords such as the World Trade Organization (WTO) and the United Nations Sustainable Development Goals (SDGs) address the links between trade and sustainable development.¹²

3.4. Disparities of Trade between Developed and Developing Countries.

The main aim of the TRIPS Agreement was to ensure that the protection and enforcement of Intellectual Property Rights properly exist in the country. Rather than focusing primarily on the protection of private rights, the TRIPS Agreement's principal goal is to enhance the overall benefit of society. Thus according to Article 8(1) of the TRIPS agreement states that member nation has the full liberty and discretion for adopting that method which helps them in protecting the public health and interest in the society so that there is proper implementation of the TRIPS provisions.¹³ Many years India has evaded the responsibility of complying with the TRIPS Agreement until the complaint which was lodged by the USA government against the India at the Dispute Settlement Unit of the World Intellectual Property Rights Organization (WIPO) it having the lack of appropriate transitional provisions. The pharmaceutical company of developed countries alleged that they had huge losses on the account of imitation of their invention by the developing countries. The framework of the TRIPS agreement suggests that the stronger IPR system would help in boosting the foreign investment in research and development in the developing countries and thus it helps in growth of the economy. Many countries government opposed this system as they worry about the potential negative detrimental impacts on the indigenous industries due to higher price and that stronger IPR system. In spite of many opposition made by the developing countries, many of the developing countries has signed this agreement and implement the provision of patent in their laws.¹⁴

The ideology of free trade principles has frequently been criticized for its involvement in the development of giant industries by prohibiting of imports on cheaper goods from other countries and placing limits on the flow of goods through the market.. It is the common misconception that

¹² Ibid.

¹³ Mallika Iyer, Pharma Patents: The New Regime and Pricing Implication (2004) 3 Law Rev GLC 111.

¹⁴ Ibid.

the rich nations become rich through free trade. The developed countries are actively involved in the implementation of the product patent regime under the TRIP agreement, which permitted only product patented to be granted only when their own pharmaceutical sector have reached their level of self-reliance. The opening of their borders for the foreign trade can only be done when they become stronger in economics and they also suggest that every nation should do the same.¹⁵

The industrial world is going to gain immensely after the adoption of the TRIPS agreement by the developing nations. The world trade organization has favored the decision which is taken at the Doha declaration summit where they waive the requirement of the Article 31(5) (f) of the TRIPS agreement, which allowed the African countries to import the lifesaving drugs and medicines from the nation that possess the ability to grant compulsory license for the export of such medicines. This waiver was granted by the TRIPS agreement was of the short term measure. There was no longer term measures from the world trade organization for granting this welfare and benefit to the poor countries particularly in the health sector.¹⁶

3.5. Roles of Patents and Global Economy

Patent play an important role in economic growth and development of countries as it improves the living standards, better infrastructure and more employment and investment in the country. The developing countries are protecting the patent rights as it helps in faster innovation and the development of the market in the economy which helps in promoting the economic growth. There are the following ways which impact the economic growth which are as follows:

- **Patent helps in encouraging the investment in the research and development**

Private sector industries in developing nations are well-known for investing in research and development (R&D). These countries are mainly focused on the agricultural commodities, extraction of minerals, low manufacturing etc. here most of the scientist and engineers in the developing countries are employed in the public sector either through state run laboratories or university. The developing countries have been lacked with the institution and the policies that encourage patenting and commercialization of inventions. Countries like USA has the well-developed policies which help them for making more invention as compared to other nation. Recently the data which has been published by IP index 2023 which shows that USA has top in

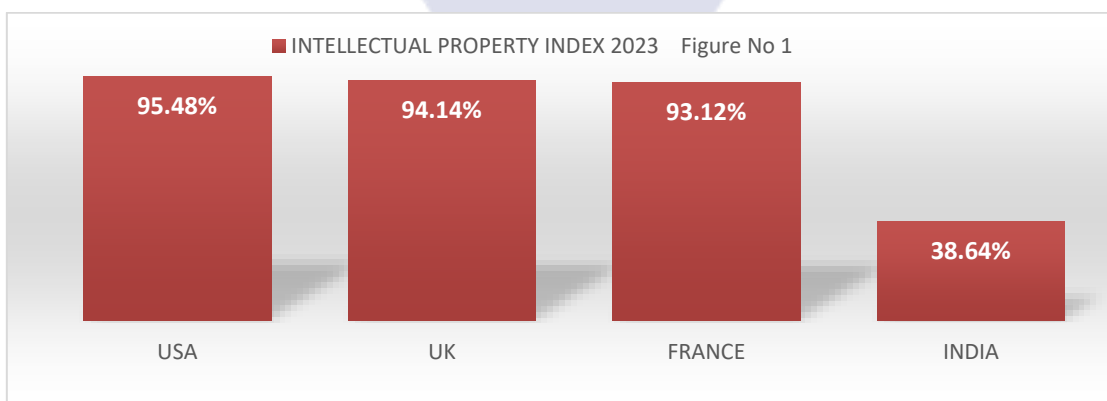
¹⁵ Ibid.

¹⁶ Ibid.

this list.¹⁷

- **Patent has the positive impact on the GDP Rate of the economy** as it helps in increasing the Economic growth in the society. According to the Indian context which has been published by the WIPO states that in 2011, the patent count was 15,914, and the GDP (in US \$) stood at \$5,501.13. In 2012, when the patent count increased to 18,250, the GDP increased to \$5,801. By 2020, the patent count increased to 37,880. Simultaneously, the GDP increased to \$8,443.36.¹⁸

As per recent intellectual property right index 2023 shows that the USA has top in the IPR Index with 95.48 IPR index Score which was followed by the United Kingdom and France whereas the India ranks is 42 which has improve from the last year IPR index. Thus the data shows there is playing one of the important roles in the Growth of the economy.



- **Patent is the Major source of Employment**

Investing in research and development (R&D) can encourage businesses to spend funding to R&D activities, thereby helping to create more jobs in the developing nation. The creation of new products and technology can result in increased employment in fields such as marketing, sales, and production. Furthermore, organizations that invest in R&D might attract investor funding and obtain a competitive advantage in the market, resulting in employment creation.¹⁹

¹⁷Role of patent in promoting innovation and economic growth: Available at: https://www.linkedin.com/pulse/role-patents-promoting-innovation-Economic?utm_source=share&utm_medium=member_android&utm_campaign=share_via (Last Visited on 30 May 2023)

¹⁸The Rise Of Patents In The Indian economy And How It Promotes Innovation In Technological Development Available at <https://www.outlookindia.com/website/story/outlook-spotlight-the-rise-of-patents-in-the-indian-economy-and-how-it-promotes-innovation-in-technological-development/404464> (Last Visited on 30 May 2023)

¹⁹Role of patent in promoting innovation and economic growth: Available at: https://www.linkedin.com/pulse/role-patents-promoting-innovation-Economic?utm_source=share&utm_medium=member_android&utm_campaign=share_via.(Last Visited on 30 May 2023)

- **Patent Encourages the competition and investment**

Consumers benefit from lower prices, larger quantities, and higher quality goods and services when enterprises compete. Patents help to limit the replication and copying of inventions and products, boosting industry rivalry and promoting ethical business practices.

- **Patent encourages the technology transfer between the developed and developing nation**

According to the data which has been published by the WIPO shows that around 3.4 million patent has been filed in the 2020-21, which shows the growing importance of the patents in the economy.²⁰

3.6. Challenges of patent law Implementation in Developing Countries

Patent rights is considered to be the one of the strongest rights which gives the patent holder the exclusive rights for manufacturing, selling, distributing and using of the said invention for the limited period of time, but there are many challenges which is faced in the developing countries for implementation of patent law due to many factors like economic, technology and institution limitation etc. There are various factors that affects the challenges which are as follows:²¹

- **Lack of Infrastructure**

In developing nations, the execution of patent law is hampered by insufficient infrastructure, which shows insufficient resources for patent inspection, registration, and enforcement. Furthermore, many countries confront barriers to obtaining databases and information technologies which are required for effective patent-related activities.

- **Limited Technology Capacity**

Understanding and implementing sophisticated technological principles related to patent assessment may be difficult for developing countries. Inadequate technical competence and

²⁰ IMPACT OF PATENT LAW ON ECONOMIC GROWTH OF INDIA : A STUDY Available at :<https://www.journalijar.com/article/31495/impact-of-patent-law-on-economic-growth-of-india--a-study/>(Last Visited on 1 June 2023)

²¹Current and Emerging Issues Relating to Patents Available at :<https://www.wipo.int/patent-law/en/developments/intro.html#:~:text=The%20system%20today%20faces%20two,impact%20of%20the%20patent%20system.> (Last Visited on 1 June 2023)

resources might make it difficult to evaluate patent applications and determine novelty, inventive step, and industrial usefulness.²²

- **Institutional Weakness**

Patent law application in developing nations can be hampered by weak or underdeveloped institutional structures, particularly in legal and judicial systems. These deficiencies generate the potential for corruption, lack of transparency, and bureaucratic inefficiencies, all of which endanger the patent system's integrity. As a result, intellectual property rights protection and enforcement are hampered, reducing the overall efficacy of patent law implementation.

- **Limited Human resources**

Developing countries may suffer a shortage of professional personnel with knowledge in intellectual property law, such as patent examiners, lawyers, and judges. Inadequate capacity-building programmes and training opportunities may hinder successful patent implementation and enforcement.²³

- **Socio-economic factors**

Poverty and a lack of capital can stifle innovation and technology transfer. Lack of financial resources may deter innovators and entrepreneurs from pursuing patent protection or investing in R&D operations.

- **Access to Medicines**

Innovation in the field of the pharmaceutical sector brings the hope of saving the life of human being. The development of the drugs was considered to be the cost-intensive process, which resulting higher price of the drugs that cannot be affordable by every people. So the grant of patent must be given to the patent holder on the basis that the price of the drugs which will make available to the people will accessible and affordable to the people. In additional Patent barriers can also limits the production of generic drugs and restrict access to life-saving treatments.²⁴

²²Ibid.

²³The Rise Of Patents In The Indian economy And How It Promotes Innovation In Technological Development Available at <https://www.outlookindia.com/website/story/outlook-spotlight-the-rise-of-patents-in-the-indian-economy-and-how-it-promotes-innovation-in-technological-development/404464> (Last Visited on 30 May 2023)

²⁴ Ibid.

- **International Pressure in developing countries**

Developed countries and multinational firms frequently put pressure on developing countries to align their patent laws with worldwide standards, which may not be in the best interests of their local industries and citizens. Balancing these constraints while encouraging domestic innovation and development can be challenging one.²⁵

To address these issues, a complete approach is required, including capacity-building initiatives, technology transfer programmes, public awareness campaigns, and policy reforms adapted by each country's according to their needs and circumstances. International cooperation and support from developed countries and organizations can also play a critical role in assisting developing countries to overcome these barriers of patent law implementation.

3.7. Fostering Cooperation: Moving Beyond Adversarial Relations Between Developed and Developing Countries

Over the past few years the relationship between the developed and developing countries remains adversarial. However, a viable solution between the conflict between the strong Intellectual property enforcement and developing country may emerge through cooperation which aimed at fostering mutual benefits. There has been little extensive research into how states might actively engage in a developing geopolitical system, with the ability to transcend the zero-sum nature of intellectual property and generate mutually beneficial outcomes. There are three ways under it will open the door of cooperation between developed and developing countries which are as follows:²⁶

1. Psychological change
2. Reallocation of resources.
3. Promoting foreign direct investments.

²⁵ Ibid.

²⁶ Sumer Dayal, Redefining Patentability: The Impact of Novartis v. Union of India on Trips, Trade and the balance of Power Between Developed and Developing Nation. 6IJPL(2013)8

- Psychological Change

Industrialized nations have frequently interacted with other countries in a condescending manner, taking a patriarchal position by emphasizing the importance of intellectual property rights and holding them accountable for any misconduct. The global experience since the GATT has proven that stringent intellectual property rights (IPR) rules do nothing to stimulate innovation but rather they primarily serve to protect the market interests of foreign owners.²⁷

India's actions have shown that TRIPS may be used to develop legitimate alternatives to Western paradigms, making persuasive arguments in the face of a shifting global trade power dynamic. Developed nations must recognize that their counterparts influential in shaping IPR regime beyond the levels that were witnessed during the Uruguay round. To navigate this changing landscape, they must embrace constructive engagement and collaborate effectively with these states.

- **Reallocation of Resources**

The reallocation of resources helps to do away the enforcement issues and helps in improving the collaboration between the patent office of the developed and developing countries. Coordination between the United States of America and European countries patent office allows facilitating the exchange of examiner of know-how and thereby safeguarding genuine innovation from unwarranted challenges. The assistance which has been provided is geared more towards the sharing of the patent information for ensuring the compliance with the established standard in their countries and helps the multinational company to follow the same rather than the goal of improving the quality of the inventiveness by establishing the new methods.²⁸

The USPTO and EPO have been accused by critics of just supporting developing nations in training patent officers and strengthening capacity building activities, with the primary goal of harmonizing methods of interpretation within a technical, rule-based framework. However, this approach has raised concerns about the possibility for patent scope to be expanded, which potentially leading to the patenting of lesser invention

²⁷Ibid.

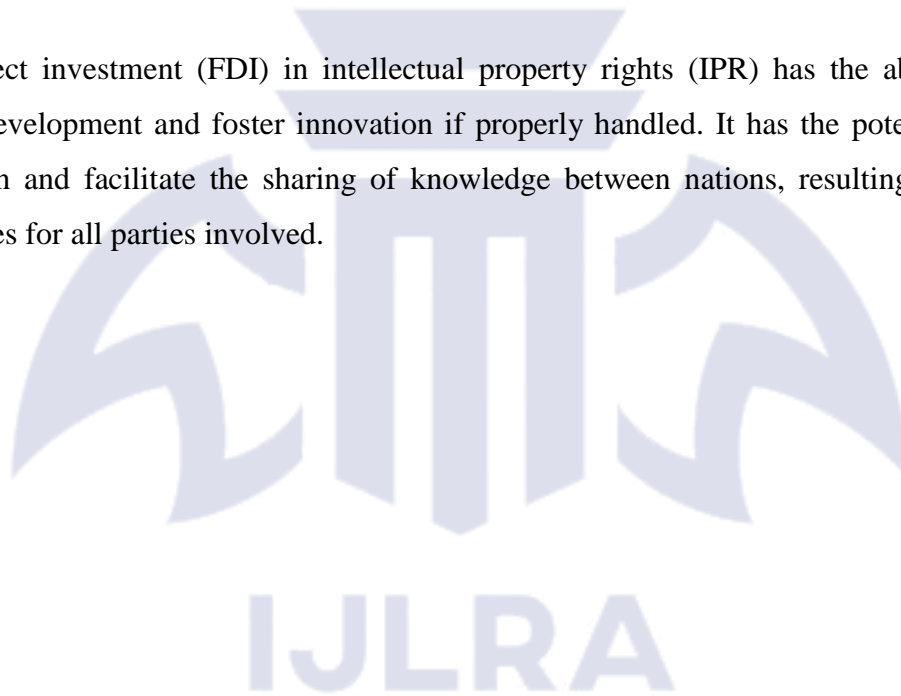
²⁸Ibid.

- **Foreign Direct Investment**

Foreign direct investment plays a crucial role in developing the research and development capabilities of the developing countries. By increasing more investment in developing countries which helps the developing countries to develop more invention of patent, which ultimately driving the economic growth of the country. ²⁹

FDI in IPR is important for global economic activity since it allows for the cross-border transfer of technology, knowledge, and innovation. It enables companies to grow their operations globally, by entering into new markets, and obtaining a competitive advantage by exploiting intellectual property assets. ³⁰

Foreign direct investment (FDI) in intellectual property rights (IPR) has the ability to drive economic development and foster innovation if properly handled. It has the potential to foster collaboration and facilitate the sharing of knowledge between nations, resulting in favorable consequences for all parties involved.



²⁹Ibid.

³⁰ Ibid.