

The Role of WIPO and WTO in International Intellectual Property Disputes

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Abstract: Concerning about the international intellectual property protection and dispute resolutions, it is cannot be denied that WIPO and TRIPS regime of the World Trade Organization have an important role in the whole issue. However, recent years some of the problems of international trade frictions have exposed challenges for these two international organizations. This paper aims to review the history and development of the two international organizations, and analyze their organizational nature and responsibilities. While discuss the new challenges, this paper analysis the role that the two international organizations can play in the current international protection of intellectual property rights. And explore the possibility that in the future, WIPO will gradually integrate into regional dispute settlement; WTO would might give a full play to the characteristics of trade agreements and the possible adjustment direction.

1. Introduction

In contemporary era, the World Intellectual Property Organization (WIPO) and the TRIPS regime of the World Trade Organization (WTO) are considered as the two main pillars of the international intellectual property protection system. In addition, the influence of WIPO and WTO in the settlement of intellectual property disputes still continues to play a role, and with the trade friction and international trade, it has attracted people's attention. WIPO, established in 1970, has long been considered as the specialized agency to protect intellectual property on an international scale. Concurrent with the adoption of the Uruguay Round (1986-1994) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the WTO has also included intellectual property protection in its competency.

However, some signs show that WIPO and WTO are facing new challenges of intellectual property dispute settlement. For example, the newly signed international treaties initiated by WIPO have relatively limited membership, which makes it difficult for the dispute settlement mechanism centered on the International Court of Justice of the United Nations to play an ideal role; for another example, the TRIPS agreement of WTO has also been distrusted by some countries, and it does not choose to apply in the face of international intellectual property disputes.

In this regard, this paper hopes to sort out the background and organizational nature of WIPO and WTO, analyze the existing dispute settlement mechanism and challenges, and finally explore the possible role of the two organizations in the future.

2. Historical Background and the Nature of WIPO&WTO

2.1. An Analysis of the Historical Background and the Nature of WIPO

The World Intellectual Property Organization (WIPO) was established in 1970. According to Article 3 of Convention Establishing the World Intellectual Property Organization, its purpose is to promote the protection of intellectual property around the world through cooperation among countries and with other international organizations, and to ensure the administrative cooperation among the alliances established by various intellectual property treaties.

In terms of origin, WIPO is the substitute product of Paris alliance and Berne alliance. Before WIPO, the International Office of intellectual property established by the Paris Union and Berne Union was under the agency jurisdiction of the Swiss federal government. After the establishment of WIPO, the function of the International Bureau of intellectual property was replaced by WIPO.

In 1974, WIPO became a specialized agency of the United Nations, which means that its functions and powers in the field of international protection of intellectual property rights will be recognized by the United Nations. It is worth noting that WIPO is still an international intergovernmental organization with independent legal status in the world. Although all members of the United Nations are eligible to become members of WIPO, it is not mandatory. In addition, WIPO has its own rules, organizations, procedures and resolutions. The decisions made by WIPO do not need to be approved by the United Nations.

Citing Article 57 of the Charter of the United Nations, the specialized agencies of the United Nations are "those who have broad international responsibilities in the economic, social, cultural, educational, health and other relevant departments". From this point of view, WIPO is also an international organization that the United Nations has a major international responsibility in the field of intellectual property rights, and is to meet the new needs of the United Nations in the field of international protection of intellectual property rights.

2.2. An Analysis of the Historical Background and the Nature of WTO

TRIPS is a multilateral trade agreement under the jurisdiction of WTO. The purpose of this multilateral trade agreement is "to reduce distortions and obstacles to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures for the implementation of intellectual property rights do not themselves become obstacles to legitimate trade".

TRIPS agreement was born in 1994, also during the "Uruguay round" negotiations. And the agreement itself is one of the achievements of "Uruguay round" negotiations. In view of the fact that after the "Uruguay round" negotiations, the WTO ended the temporary use of the former General Agreement on Tariffs and Trade, it is reasonable to say that TRIPS was also an important agreement produced at the beginning of the birth of the WTO itself, and became an international agreement that all countries in the world had to abide by in order to enter the WTO at that time.

Some scholars believe that the establishment of the World Trade Organization and the formation of TRIPS Agreement mark that the international protection of intellectual property rights has entered a new historical period of high-level protection and integrated protection [1]. This is mainly because the world trade organization takes into account the development demands of both developed and developing countries, and treats them equally.

3. Dispute Resolutions of WIPO and WTO

3.1. WIPO's Dispute Resolution Approaches

To a large extent, WIPO's dispute settlement mechanism is more like a proposal [2]. Just like many international organizations in the United Nations system, WIPO's dispute settlement mechanism has obvious soft law nature. Specifically, there are two types of dispute settlement provisions in WIPO:

3.1.1. Dispute Settlement Centered on the International Court of Justice

This kind of dispute settlement mechanism of WIPO is typical of Paris Convention. Specifically, Article 28 of the Paris Convention stipulates that disputes between two or more alliance countries over the interpretation or application of the convention can be settled through negotiation. If the negotiation fails, any country involved may submit the dispute to the International Court of justice. There are difficulties in the implementation and application of such provisions in the process of dispute settlement because: (1) the object of WIPO dispute settlement adjustment is limited to Contracting States. (2) The jurisdiction of the International Court of justice is voluntarily accepted by the parties. It means that if the parties refuse to appear in court, state immunity will make the whole dispute settlement mechanism unable to operate.

3.1.2. WIPO's Independent Dispute Settlement Mechanism

The dispute settlement mechanism of this kind of WIPO is typical of the Washington integrated circuit intellectual property treaty. This kind of dispute settlement mechanism is characterized by the settlement of disputes within the treaty rather than relying on other international organizations such as the International Court of justice. Specifically, Article 14 of the Washington integrated circuit intellectual property treaty stipulates that the parties to the dispute shall first reach a mutually satisfactory solution through consultation; if the parties fail to reach such a solution within a reasonable period of time, they may resort to other friendly means such as mediation, mediation, mediation and arbitration. This kind of dispute settlement gives the parties great autonomy. However, it also inevitably faces the dilemma of lack of supervision and the implementation completely depends on the consciousness of the parties.

3.2. WTO's Dispute Resolution Approaches

John H. Jackson once pointed out that the reason why some countries want to embed intellectual property protection into the GATT system is that they envy the GATT dispute settlement mechanism. In fact, in the international community, in the face of the respective protection policies between countries, most of the international laws are lack of coercive force, the GATT dispute settlement mechanism is undoubtedly running well.

According to Article 64 of TRIPS Agreement, the "agreement of understanding on rules and procedures for dispute settlement" is applicable to disputes arising from the agreement. According to the agreement of understanding on rules and procedures for dispute settlement, specific dispute settlement methods can be carried out in the following ways: [3]

3.2.1. Consolutions

Consolidations refer to the member who, as a Contracting Party, notifies the dispute settlement body and the TRIPS Council in writing after the occurrence of a trade-related intellectual property dispute. The requested member needs to give a reply within 10 days after receiving the notice, and negotiate

in good faith within 30 days. And finally reach a satisfactory solution. If there is no good faith negotiation, the requesting party can directly request the expert procedure.

3.2.2. Good Offices, Conciliation and Mediation

When the parties are unwilling to negotiate or the negotiation fails to reach a settlement of the dispute, the third party can assist the parties to settle the dispute. Such disputes are usually handled by a committee composed of several persons. The responsibilities of the Committee include investigating the facts, making judgments based on the facts, and providing the parties with alternative solutions. It should be pointed out that the solution proposed by the committee is not necessarily mandatory, and the parties still have the right to choose other solutions.

3.2.3. Panels

The work of the panels is one of the dispute settlement methods used by WTO in dispute settlement. In the agreement of understanding on the rules and procedures of dispute settlement, it also specifies in detail how the expert group should be established, how to investigate and hear disputes, and how to draft and publish the working report of the group.

3.2.4. Surveillance of Implementation of Recommendations and Rulings

The Understanding on Rules and Procedures Governing the Settlement of Disputes also establishes the supervision of the implementation of recommendations and awards. Based on the intentions of the parties, the intervention of DSB and the influence of the joint and several suggestions and rulings also have binding force on the parties. The specific performance of this binding force is as follows: first, to implement the proposal and award according to the voluntary of the parties; second, if it cannot be performed on time, it needs to be explained within the specified time. This shows that after the parties accept the intervention of DSB, this kind of dispute settlement is not a loose tripartite structure, but the parties need to show respect for DSB and have a certain ability to implement its resolutions, and receive the supervision of DSB in this respect. In addition, it is worth mentioning that the DSB also needs to consider the specific circumstances of the parties. In the agreement, special attention should be paid to developing countries. This is also the guarantee that DSB's dispute settlement can be implemented.

3.2.5. Temporary Measures

If the proposal or award cannot be performed normally within the specified period, temporary measures such as compensation, concession or suspension can be taken. Of course, these Interim Measures are also based on the premise of the authorization of the distribute settlement body, the approval of the parties and the setting of a time limit for the adoption of the interim measures themselves.

4. Challenges to the Existing Dispute Resolution Approaches of WIPO and WTO

4.1. Challenges to WIPO: Limited Number of Parties to New International Treaties

According to Article 4 of the Convention on the establishment of the world intellectual property organization, the functions and powers of WIPO have been listed in detail. One of the cores is to "promote the protection of intellectual property rights by all countries in the world, coordinate the legislation of all countries, and encourage all countries to conclude new international agreements for the protection of intellectual property rights". Moreover, according to the above analysis, the origin

of the effectiveness of WIPO jurisdiction is undoubtedly rooted in international agreements. More specifically, according to the basic principles of international law, international agreements are only binding on the contracting parties, which mean that for countries that have not joined the agreements under the jurisdiction of WIPO, WIPO has little power to intervene, and such countries are excluded from the dispute settlement mechanism of WIPO. This is a weakening of the effectiveness of the dispute settlement mechanism for WIPO.

Specifically, according to the latest agreement advocated by WIPO, it is relatively limited in terms of parties. For example, there are 39 parties to the Beijing Treaty on audiovisual performances adopted in 2012, and 79 parties to the Marrakesh treaty adopted in 2013 (covering 98 countries, with the European Union joining in the form of a single entity).

4.2. Challenges to WTO: Difficult to Coordinate Developed Countries and Developing Countries

4.2.1. The Countries Joining TRIPS May Not be the Original Intention of Intellectual Property Protection

This contradiction is the deep-seated problem of TRIPS Agreement. One of the important reasons why there are so many parties to TRIPS Agreement is that TRIPS Agreement is an agreement that must be abided by when China joins WTO. This also means that the original intention of many countries to join the TRIPS Agreement may be more to join the World Trade Organization and obtain preferential treatment in international trade. The protection of intellectual property rights is not the original intention of these countries.

This contradiction is particularly common in developing countries and the least developed countries. The more specific performance is that these countries often do not have perfect domestic laws and intellectual property management system. This makes the subsequent dispute settlement lack of domestic docking with the country.

4.2.2. TRIPS' Protection of Intellectual Property Rights is Challenged by Human Rights Protection

The agreement "intellectual property rights and human rights" published by the sub Commission on the promotion and protection of human rights of the United Nations reviews TRIPS Agreement and criticizes it on human rights.

These criticisms mainly focus on: first, from the perspective of text provisions, taking copyright as an example, the old Berne Convention has given equal attention and protection to the spiritual and property interests of creators, and has risen to the level of human rights. However, in TRIPS Agreement, more attention is paid to property rights, and spiritual rights are ignored to a certain extent. Secondly, in the aspect of knowledge sharing and health, TRIPS also protects patent monopoly to a certain extent, which makes developing countries generally distrust TRIPS agreement. In the recent Sino US trade friction, some Chinese scholars have pointed out that TRIPS agreement has become a means and tool of unilateralism to protect their own trade advantages [4].

4.2.3. Developed Countries Gradually Lose Confidence in TRIPS

In 2007, the United States filed a lawsuit against China's intellectual property protection and law enforcement disputes, and the WTO dispute settlement body also explained some law enforcement provisions of TRIPS Agreement for the first time, but it did not establish the law enforcement obligation requirements envisaged by the United States through dispute adjudication. On the one hand, the developed countries represented by the United States have obstructed the WTO Appellate Body

from starting the judge selection process in recent years, which has put the Appellate Body in a dangerous situation of paralysis at any time [5]; on the other hand, they have bypassed the WTO on the issue of intellectual property rights in International trade conflicts and directly adopted measures, specifically in 2018 In the trade friction between China and the United States, the United States directly started "301 investigation" according to its domestic law. The appearance of this phenomenon shows that the TRIPS agreement of WTO is also facing new challenges.

5. The Role of WIPO and WTO in Intellectual Property Disputes in the Future

When we discuss the role of WIPO and WTO in the future intellectual property dispute settlement, we need to analyze the current trend of dispute resolution. And on the basis of the current trend, the paper puts forward some suggestions on the possible development direction of the two organizations in the future.

5.1. The Trend of Regional Rather Than Global Dispute Settlement

With the development of international trade and the above mentioned, the dispute settlement between WIPO and TRIPS has not satisfied some member states. Therefore, some countries choose to sign multilateral agreements beyond TRIPS standards with other countries and these agreements are not based on WIPO, a global international organization. Such agreements often appear for the main purpose, on the one hand, according to the intellectual property protection of the Contracting States, put forward higher standards compared to TRIPS, in order to maintain and play their own intellectual property competitiveness; on the other hand, it hopes that regional agreements can better improve the level of international intellectual property law enforcement. These new international agreements may also have strong regional trade nature, but as the TRIPS agreement of WTO shows, the protection of international intellectual property rights and trade should not be treated as absolute separation. Two important and typical outcomes of such agreements are the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans Pacific Partnership Agreement (TPP). After the US exit in 2017, 11 Asia Pacific countries that launched TPP negotiations jointly issued a statement, declaring that fundamental and important consensus has been reached on the new agreement, and decided to rename the agreement as the " Comprehensive and Progressive Agreement for Trans-Pacific Partnership" (CPTPP). In addition, the association of Southeast Asian nations, once considered to be less influential, has also desperately strengthened its regional influence by launching the regional comprehensive economic partnership (RCEP) [6]. These all show to some extent the trend of international dispute settlement at the regional level.

5.2. Integrating into Regional Dispute Settlement and Becoming an Option

According to the report of the director general to the 2020 WIPO conference of Member States, since 2008, the demand for WIPO arbitration and Mediation Center for mediation, arbitration, expert adjudication and mediation services has been steadily increasing. During this period, the annual filing rate of mediation, arbitration and expert adjudication cases has nearly doubled.

The characteristic of this dispute settlement mode is that it has close contact with the local intellectual property office and the court. For example, in 2020, WIPO arbitration and mediation center was recognized by the mediation service of Shanghai pilot Free Trade Zone, and submitted more than 10 intellectual property disputes to the arbitration and mediation center through this arrangement in Shanghai pilot free trade zone. WIPO said, "this will provide Chinese and foreign litigants with a way to resolve disputes in China other than Chinese courts and local alternative dispute resolution services" [7]. Although it exists as "another choice", its significance can not be underestimated. Perhaps it is the dispute settlement mode that WIPO can further explore to go deep into regional

intellectual property disputes and provide diversified dispute settlement services for local and non-local litigants.

5.3. WTO: Pay Attention to the Inherent Nature of Trade Dispute Settlement

Although the main content of TRIPS Agreement is related to intellectual property rights, we should not forget that TRIPS is an agreement of WTO. The WTO's approach of integrating intellectual property rights into the international trade mechanism has been taken more closely [8]. Naturally, some scholars have discussed that the coupling of intellectual property rights and trade is a disturbing issue. However, what is the relationship between intellectual property rights and trade? This relationship has not been theorized in the literature [9] (in part because intellectual property rights are treated with exception under Article 20 (d) of the old GATT system). In the existing judgments, the appellate body and TRIPS sub group rarely pay attention to the relevance between the issues they deal with and trade issues.

Specifically, in China enforcement, on the issue of whether China has taken strong enough action to remove infringing goods from commercial channels, the panel uses a separate reference in Article 51 (on border measures), claiming that the obligations of member states are limited to preventing the import of infringing goods. The judgment of the case has its own reason, which is controversial and easy to bring dissatisfaction. Therefore, some scholars pointed out that the case itself should be placed in the context of international trade, pay more attention to the trade impact, and "give countries more leeway" [10]. Such an adjustment of dispute settlement may also be more suitable for the nature of WTO.

6. Conclusion

Through the analysis of the background of WIPO and WTO organization and the existing dispute settlement mechanism, this paper, from the perspective of its design and construction, combined with some practical situations, finds that TRIPS agreement between WIPO and WTO, as the main force of traditional adjustment of intellectual property disputes at the global level, is actually facing the challenge of new situation. How the two international organizations meet the challenges and play their due role in the new international protection of intellectual property may need to improve the situation in the previous stage, and even on a certain level, on the issue of dispute settlement, we need to change the thinking to some extent.

For WIPO, integrating regional dispute settlement measures and becoming a reliable alternative, may make up for the relative weakness of the dispute settlement mechanism which does not have the complete WTO, and then play its role widely. For TRIPS agreement of WTO, the reason that has been questioned is that the dispute settlement of TRIPS has neglected the starting point of adjusting international trade, which will lead to the failure of TRIPS agreement to meet the demands and expectations of some parties. It is a kind of expectant way to return to the trade discourse system properly and make the intellectual property dispute settlement and promote trade coordinate.

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