The WTO TRIPS Agreement and Conflict-of-Laws Rules in Intellectual Property Cases

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It is neither new nor surprising that international treaties affect the design and application of conflict-of-laws rules; not only international conventions on private international law but also other international treaties shape conflicts rules, with human rights treaties being the primary example. But a recent decision concerning the interpretation of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") could have profound and arguably unprecedented effects on the conflict rules that are applied in intellectual property ("IP") cases, such as cross-border cases concerning copyright infringement, trademark ownership, and patent licenses.

In July 2025, an arbitration panel decided in a WTO dispute between the European Union and China that the Chinese anti-suit injunction policy that led Chinese courts to issue anti-suit injunctions in disputes involving standard-essential patents violated the TRIPS Agreement (*China—Enforcement of Intellectual Property Rights*, WTO, Award of Arbitrators, WT/DS611/ARB25, 21 July 2025). The decision, which concerned the Chinese version of anti-suit injunctions, which are referred to as "behavior preservation orders," was rendered on appeal from a panel report from April 2025. In the absence of a functioning WTO Appellate Body, the appellate decision was rendered under the alternative Multi-Party Interim Appeal Arbitration Arrangement that was concluded pursuant to Article 25 of the WTO dispute settlement understanding.

The EU complaint to the WTO in the case was certainly not the first, or the only, attack on anti-suit injunctions that national courts have issued in patent cases in order to stop parties from litigating in parallel in foreign jurisdictions. Opponents of anti-suit injunctions have been successful, for example, in the Paris Court of Appeal and in the Munich Local Division of the Unified Patent Court; these courts

found that in the particular cases, U.S. court-issued anti-suit injunctions violated parties' rights under the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union (*IPCom GmbH & Co. Kg v. Lenovo (United States) Inc*, No 14/2020, Paris Court of Appeal, 3 March 2020; *Huawei v. Netgear*, UPC, Munich Local Division, Order of 11 December 2024, File No. ACT_65376-2024 UPC_CFI_791-2024). But while the effects of those decisions have been limited and focused on anti-suit injunctions, the arbitral panel decision in the WTO case could have much wider implications.

The arbitral panel in the WTO case found that TRIPS Agreement Article 1.1, according to which WTO "[m]embers shall give effect to the provisions of [the TRIPS] Agreement," creates a corollary obligation for WTO members "to do so without frustrating the functioning of the systems of protection and enforcement of IP rights implemented by other Members in their respective territories." Because the anti-suit injunctions policy at issue affected the patent holders' ability to enforce their rights that WTO member countries provided for in compliance with the TRIPS Agreement, the panel held that the policy violated the TRIPS Agreement. The panel acknowledged that "the TRIPS Agreement does not address issues of private international law," but concluded that "the TRIPS Agreement … requires that Members not frustrate the effective protection of trade-related IP rights in the territories of other Members." It explained that "[t]he provisions of the TRIPS Agreement would be rendered inoperative if Members were allowed to frustrate the implementation by other Members of their obligations under the TRIPS Agreement."

Although the arbitral panel decision concerns anti-suit injunctions in patent cases, its reasoning raises the question whether the panel's interpretation of the TRIPS Agreement could affect the application of other conflict-of-laws rules and affect the rules in *any* cases involving IP rights covered by the Agreement. Anti-suit injunctions are not the only means through which conflicts rules can impact the ability of a foreign country to protect the IP rights that the foreign country provides. Justiciability of foreign IP rights violations allows courts to adjudicate IP rights infringements arising under foreign countries' laws, which foreign countries could perceive as depriving their own courts of the opportunity to vindicate the countries' IP law violations and preventing the countries from fulfilling their obligation to "give effect to the provisions of [the TRIPS] Agreement." Choice-of-law rules that direct courts to apply the law of the forum

to remedies in cases of foreign IP rights infringements could also be viewed as diminishing or frustrating foreign countries' protection of their IP rights, and any denials of the recognition and enforcement of foreign judgments concerning foreign IP rights, which might, for instance, be because of their repugnancy with the public policy of the recognizing court's forum, clearly frustrate foreign countries' enforcement and protection of their IP rights.

A pessimistic reading of the decision could lead to the conclusion that the arbitral panel's interpretation forecloses the application of many principles and rules of conflict of laws that assist or could assist in the cross-border litigation of IP cases. In the past two decades, teams of conflicts & IP law scholars in the United States, Europe, and Asia have proposed sets of conflicts principles and rules that would overcome strictly territorial approaches to IP rights enforcement and promote greater flexibility in cross-border IP litigation, such as wider justiciability of foreign IP rights violations, greater numbers of courts with broader jurisdiction over IP disputes, concentrations of proceedings of related causes of action concerning IP rights in different countries, and the application of a single country's law for ubiquitous (such as online) IP rights infringements. Among the several proposals, the projects by the American Law Institute, the European Max Planck Group, and the International Law Association have been the most detailed. Much of this work could now seem to be to no avail in light of the arbitral panel's interpretation of the TRIPS Agreement.

An optimistic reading of the arbitral panel decision could offer support for the current conflicts principles and rules, and at least for some of the principles and rules proposed by the projects. Conflicts rules should support collaboration among courts in their enforcement of each other's national laws, including IP laws, and thus contribute to countries meeting their obligations under the TRIPS Agreement. For example, justiciability of foreign IP rights violations can frustrate the ability of foreign courts to adjudicate violations in their jurisdictions, but in some cases, the justiciability rule can pave the way for the only available avenue for effective enforcement of the rights, such as when a rights holder can afford to litigate only once, and a concentration of proceedings, facilitated by the rules of justiciability, of parallel violations of IP rights under multiple countries' laws provides the only realistic possibility for a rights holder to enforce his rights. Certainly, any rules that aim to maximize the recognizability and enforceability of foreign judgments in IP cases should be consistent with a requirement that a

foreign country's ability to "give effect to the provisions of [the TRIPS] Agreement" not be frustrated.

Not all conflicts rules, and not the rules in all circumstances, will live up to the corollary obligation that the arbitral panel identified in Article 1.1 of the TRIPS Agreement. Detailed analyses should study the compliance of different conflicts rules with the obligation, and also contemplate the role that the rules might play in achieving the overall goals of the TRIPS Agreement when a foreign country's IP laws and/or judgments do not comply with the Agreement. Rules such as the public policy exception and internationally mandatory rules might pose interesting questions in this regard.

The durability of the arbitral panel's interpretation is unclear; because it is a product of the Multi-Party Interim Appeal Arbitration Arrangement, the arbitral panel's decision is binding only on the parties and is not precedential for all WTO members, and future decisions within the WTO dispute settlement could produce other interpretations. For now, the interpretation by the arbitral panel suggests that courts should be looking closely at the TRIPS Agreement when addressing conflict-of-laws issues in cross-border IP cases.