

The Impact of Free Trade on the Development of China's Intellectual Property Strategy

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Abstract—As the international trade model of free trade prevails worldwide, China has begun to establish pilot free trade zones in some regions to promote the economic development in China. The free trade zone measure facilitates international trade but also produces a series of intellectual property disputes. Due to the incomplete intellectual property system and lack of mainstream awareness in China, the free trade zone is likely to become an area with high risk of intellectual property infringement. Judging from other developed countries' experience in protecting intellectual property in the process of free trade, implementing stricter intellectual property protection strategies is not only an inevitable requirement to promote the sustainable and healthy development of free trade, but also an inevitable trend to promote the continuous development of China's economy.

Keywords: *economic development, intellectual property, free trade, law*

I. INTRODUCTION

Under the influence of free trade, countries around the world gradually implement a more systematic intellectual property protection system. China will inevitably encounter many intellectual property infringement problems in the process of trying free trade. These problems not only hinder economic development to a certain extent but also challenge China's intellectual property protection strategy. In solving these problems, China can learn from the advanced practical experience of other developed countries, and at the same time, based on the current state of intellectual property protection in China, explore a set of intellectual property strategic systems suitable for China's national conditions, so as to better protect its intellectual property.

II. THE RELATIONSHIP BETWEEN FREE TRADE AND INTELLECTUAL PROPERTY

Free trade refers to the circulation of commodities, goods and services that are exempted from tariffs between countries. Free trade allows goods to be imported and exported more freely, and to compete freely in domestic and foreign markets. At the same time, free trade is also the main body of economic globalization. [1] Free trade theory was first proposed by the classical economist Adam Smith who believed that free trade was an important reason for the realizing rapid economic development of all civilizations.

After World War II, when developed countries accumulated enough wealth to ensure that they could benefit from free trade, they began to actively advocate free trade policies. The establishment of the World Trade Organization (WTO) accelerated the development of free trade worldwide. However, no country has implemented a free trade policy in a pure sense. Each country implements different trade policy based on its national conditions, position and benefits.

The purpose of intellectual property protection is to protect the intellectual property owner's right to their intellectual achievements. Fundamentally, it is to encourage people to actively make creation and invention to promote the development of science and technology and the progress of human civilization. [2] Since the signing of the Paris Convention, international trade protection for intellectual property has been conducted between some countries and achieved many great progresses, but its development speed and scope of protection are still very limited.

III. THE IMPORTANCE OF INTELLECTUAL PROPERTY PROTECTION IN FREE TRADE ENVIRONMENT

In recent years, with the gradual deepening of free trade, the trade of high-tech products has developed rapidly, the proportion of knowledge and technology products in China's foreign trade process has been gradually expanded, and the relationship between intellectual property and free trade has become closer. For a long time, it has always been an objective difficulty for China to effectively protect intellectual property. It is undoubtedly more difficult to promote the continuous development of intellectual property protection strategies in the context of global free trade. As an important means of stimulating innovation, intellectual property protection has become increasingly important in free trade.

Some developed countries have accused China's exporting of commodities infringed intellectual property and China's weak protection at the borders of intellectual property. For example, in the United States' "301 Report", China is often included in the list of "Priority Watch List". With the continuous development of international free trade, the competition between countries is becoming increasingly fierce. Some developed countries, led by the United States, have imposed stricter requirements on the protection of their

intellectual property while dominating the new rules for international free trade.

IV. THE IMPACT OF FREE TRADE ON CHINA'S INTELLECTUAL PROPERTY STRATEGY

It is self-evident that free trade will facilitate China's trade, which is mainly reflected in domestic and foreign investment, international trade, and finance. At the same time, the continuous advancement of free trade measures will also bring a series of intellectual property infringement risks, which places higher requirements for intellectual property protection in China and challenges China's intellectual property strategy development. However, in the context of free trade, intellectual property issues cover a wide range of professional fields. Due to the relatively immature legal system and the lack of protection awareness in China, China's pilot free trade zones are likely to become vague areas or even blank areas of intellectual property protection strategy.

A. *Infringement of OEM processing products*

OEM processing refers to a trade means that foreign trademark owner provides trademark and China as the commissioned party produces and processes specific commodities in accordance with the corresponding agreement and pastes the specific trademark on the commodity and finally gets the commodities sold to other countries than China. [3] In case that this specific trademark is the same as or similar to the trademark that has already been registered by others in China, there is still large controversies in Chinese legal and practical circles as for whether this OEM processing behavior has caused trademark infringement.

Although China is a big country of OEM processing products, from the perspective of China's judicial practice, different courts have given different judgment results. Some courts hold that in this case, the OEM processing behavior constitute a trademark infringement in accordance with clause 52 of the Trademark Law and the territorial theory of trademark rights. They believe that if the foreign commissioning party has registered the trademark in China, it can enjoy the relevant rights; but it has not registered the trademark in China, so this behavior causes trademark infringement to the same or similar trademark that has been registered in China. [4] Some courts maintained that such behavior does not constitute infringement in accordance with the confusability theory of trademark. They think that the OEM processing products has not been sold in Chinese market after being pasted with the trademark; it may not cause confusion to the trademark in China, and thus does not cause infringement to China's trademark owner.

B. *Intellectual property protection of transit products*

Due to the continuous development of free trade, some pilot free trade zones have implemented "front-line open" customs policies, implemented a new model of customs supervision, and simplified the tedious customs clearance procedures in the past. The implementation of those measures has greatly facilitated the import and export of

goods. At the same time, it also provides opportunity for some products that infringe intellectual property to pass the customs. [5] According to China's relevant regulations for protection of intellectual property, transit goods refer to goods that are transported from overseas and continuously transported overseas after passing through the land within territory of China. Hence, it can be seen that the goods transported from overseas to China's free trade zone and then re-transported overseas and not sold in China's market belong to transit goods other than imported goods.

C. *The issue of parallel import products in free trade*

The issue of parallel import goods is a specific result of international intellectual property protection, and mainly refers to the issue that for a kind of goods enjoying intellectual property protection in two or more countries, when it is sold in a country legally, whether it can be sold in another country granting it intellectual property without permission of the intellectual property owner. From this, it can be seen that the problem of parallel import products in free trade is ultimately the regional issue of intellectual property. In the legal sense, this dispute can be expressed as the issue of conflict between the exhaustion of rights and the regional nature of intellectual property.

In the context of international free trade, the issue of parallel import products often implies huge commercial benefit. It is precisely because of the issue of trade interests so that many international treaties do not have a unified rule for parallel import goods. [6] China's Patent Law (2008) shows that parallel import of goods has been allowed, but there are no relevant specific provisions in other legal provisions. In actual judgments, due to the specific circumstances of individual cases, the court often gives very different verdict.

V. CHINA'S STRATEGIC MEASURES FOR PROTECTING INTELLECTUAL PROPERTY UNDER FREE TRADE

A. *Improving China's legal system on intellectual property protection under free trade*

When formulating relevant laws and policies, it is necessary to conduct an in-depth investigation on China's current free trade environment, and fully and effectively protect the interests of free trade and intellectual property on the basis of China's basic national conditions. At the same time, it can also refer to the advanced legislative achievements of developed countries such as the United States and the United Kingdom and formulate a set of legal systems that are in line with China's national conditions and can promote intellectual property protection in the international context of free trade.

B. *Establishing a diversified international trade intellectual property dispute resolution mechanism*

In terms of intellectual property protection strategies, it is not enough for the free trade pilot zone to solely rely on relevant laws and regulations to solve intellectual property disputes. What's more important is that the free trade zone should actively explore diversified intellectual property

dispute resolution mechanism to solve intellectual property infringement issues more effectively and quickly on the basis of national administrative and judicial protection. [7] With reference to Chinese and foreign experience in dispute settlement, the diversified dispute resolution mechanism mainly includes different forms and different channels of dispute settlement systems such as negotiation, reconciliation, litigation, and arbitration.

In the current prevailing environment of international free trade, China's implementation of diversified intellectual property dispute resolution system in the free trade pilot zone is in line with China's basic national conditions and can more effectively resolve disputes. First of all, different from general legal cases, intellectual property cases often involve a lot of professional technical knowledge beyond the law, while most judges generally do not know much about knowledge in professional and technical fields so that they may be affected in making judgment on intellectual property cases due to the lack of professional knowledge. [8] On the other hand, advocating a diversified dispute resolution mechanism can not only greatly save the limited judicial resources in the free trade pilot zone, but also make it available to select a more reasonable solution for cases with different circumstances in a targeted way, and better protect the legal rights of the intellectual property owner.

C. Strengthening intellectual property customs supervision in pilot free trade zones

In order to strengthen the customs supervision on intellectual property in free trade zone, the first is to clarify the rights of the customs, namely the customs have the right to supervise the import and export goods. In free trade zone, goods enjoy the special right of "customs territory" in the process of entering and leaving customs. Foreign goods enjoy a series of exemption policies in this environment. Therefore, the customs in free trade zone may adopt relatively simple procedures for entering and leaving customs. However, this does not mean that customs has lost its supervision right over import and export goods. Therefore, China should increase the supervision and enforcement power of the customs in free trade zone, and protect the intellectual property of China from being violated in the process of free trade through practicing the enforcement power of customs.

D. Establishing a system of customs linkage system with trading countries

In pilot free trade zone, most intellectual property infringement activities are occurred on OEM processing products that are re-branded and re-packaged foreign goods. This kind of OEM processing has changed the origin of the products and made customs have vague judgment on whether it caused intellectual property infringement, so infringing products are often difficult to be detected by customs. [9] Due to the lack of a unified and efficient international cooperation platform among trading nations, much intellectual property information has not been tracked and verified in time. Precisely for this reason, with the continuous deepening of free trade nowadays, it is more

necessary to establish an intellectual property information sharing platform with trading nations. Especially, when China engages in free trade with some countries with a high risk of intellectual property infringement, the sharing of intellectual property data between countries becomes even more important. This way can not only help customs timely grasp the accurate information of the import and export goods, improve the entering and leaving efficiency of goods, but also facilitate customs making special supervision on good with large mobility.

E. Improving the mechanism of intellectual property law enforcement protection and judicial protection

From the perspective of the protection of intellectual property law enforcement, the boundary between intellectual property management and law enforcement in China is relatively vague, and a professional model in which management and law enforcement are complementary to each other has not yet been formed. In addition, China's intellectual property departments are relatively scattered, and each department independently assumes the two types of protection duties on administration and law enforcement, which hinders effective intellectual property protection to a certain extent.

From the perspective of judicial protection of intellectual property rights, in the free trade zone, the substantial increase in number of intellectual property infringements has led to large quantity of relevant intellectual property disputes. At this time, it becomes particularly important to protect China's intellectual property from being violated by foreign country from judicial perspective. [10] First of all, because intellectual property cases are different from ordinary legal cases, they have strong professionalism and comprehensiveness. In order to avoid getting different judgment results in different courts for the same case, and improve the accuracy and efficiency of judgments, it is necessary to adopt a "three trials in one" trial model to treat intellectual property case in order to find out the truth of the case.

VI. CONCLUSION

In recent years, the trend of global trade is increasingly moving toward free trade, and global trade competition is becoming increasingly fierce. In the face of the double pressure from both China and foreign countries, China must continue to deepen its economic system reform and constantly develop the domestic economy, speed up the transformation of government's functions and prevent China from being marginalized by the new rules for international trade as formulated by the developed countries led by the United States in the international free trade environment. Frequent international trade in free trade zone makes intellectual property disputes more concentrated. The settlement of those disputes will constantly promote the development of China's intellectual property strategy. Therefore, the efforts of professionals from all walks of life are required to jointly explore an appropriate way for free trade to protect intellectual property and promote the economic development of free trade zone and even China

and the progress of the intellectual property protection system.

REFERENCES

- [1] Wu Handong. Innovation, Driving and Development of Intellectual Property in the New Normal of Economy [J]. *Law Science*, 2016 (7): 32. (in Chinese)
- [2] Ye Xin, Cheng Hui, Zhang Dan. Thinking of the Construction of China's Pilot Free Trade Zone [J]. *Intertrade*, 2015 (11): 13. (in Chinese)
- [3] Yao Xinchao, Zhang Xiaolin. Trademark infringement disputes and coping countermeasures in OEM processing trade [J]. *Intertrade*, 2012 (11): 9. (in Chinese)
- [4] Du Ying. Conception of Intellectual Property Protection for China (Shanghai) Pilot Free Trade Zone [J]. *Law Science*, 2014 (1): 42. (in Chinese)
- [5] Ma Yide. Development Driven by Innovation and IPR Evolution [J]. *Modern Law Science*, 2014 (3): 48. (in Chinese)
- [6] Cui Wangwei. On the Legal Protection of Intellectual Property in Shanghai Pilot Free Trade Zone [J]. *Modern Economic Research*, 2014 (3): 67. (in Chinese)
- [7] Zheng Guohui. Some Legal Issues on Intellectual Property in China (Shanghai) Free Trade Zone [J]. *Journal of Shanghai University of Political Science Law(The Rule of Law Forum)*, 2014 (4): 52. (in Chinese)
- [8] Zhu Qiuyuan. Comparative Study on Regulations for Intellectual Property Frontier Infringement in Special Areas: A Refutation of the Misunderstanding of "Special Supervision Areas Are in Customs Territory" [J]. *Journal of Shanghai Customs College*, 2012 (4): 62. (in Chinese)
- [9] Shi Liangping, Zhou Yang. On the reform of the customs supervision system for China (Shanghai) Pilot Free Trade Zone [J]. *Journal of Shanghai Customs College*, 2013 (4): 1. (in Chinese)
- [10] Wu Handong, Suo Futao. Concepts and Policies of Judicial Protection for Intellectual Property in China [J]. *Contemporary Law Review*, 2013 (06). (in Chinese)