

Conflict and coordination between data localization and cross-border intellectual property protection

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ABSTRACT

The data localization policy reflects the country's pursuit of data sovereignty, while the cross-border intellectual property protection emphasizes the protection of the rights of intellectual property owners on a global scale. However, in the context of globalization, data localization policies have hindered cross-border data flow to a certain extent, affecting the efficiency of intellectual property protection. Based on this, this paper studies the causes and specific manifestations of the conflict between the two, analyzes the feasibility of coordination, reveals the tension between data sovereignty and intellectual property protection in the context of globalization, and explores how to promote cross-border data flow under the premise of data localization and support the globalization of intellectual property protection. Promote the improvement of international organizations, international policies and multilateral cooperation mechanisms to promote data governance and intellectual property protection on a global scale.

KEYWORDS

data localization; cross-border IP protection; TRIPS Agreement; international harmonization

1 Introduction

In recent years, under the strong concept of digital sovereignty, more and more countries have adopted data localization measures to protect their own intellectual property achievements. Data localization has led to cross-border IP protection becoming a major problem in the international context. The underlying reasons for this phenomenon can be attributed to the fact that different national interests have to be violated by relevant international agreements, such as the provisions of TRIPS. Therefore, the academic community believes that there are indeed conflicts and contradictions between data localization and cross-border intellectual property rights, but this dilemma is not completely unsolvable. The author summarizes the existing views of the academic community as follows:

1.1 The contradiction between data localization and cross-border intellectual property protection cannot be reconciled

Some scholars argue that data localization policies are highly exclusive and violate international IP protection frameworks (e.g., the TRIPS Agreement) because they restrict the cross-border flow of data, which relies on the free flow of data. Domestic scholars argue that data localization policies require data storage and processing to take place within the country, while IP protection often requires cross-border data transfers to support global rights enforcement activities, and that international IP protection frameworks (such as the TRIPS Agreement) encourage the free flow of data, while data localization policies restrict this flow, leading to legal conflicts between the two. Internationally, a similar point is made in the article "Data Localization Laws and Policy: The EU Data Protection International Transfers Restriction Through a Cloud Computing Lens": Data localization policies can hinder IP holders from exercising their rights globally, particularly in the areas of cloud computing and big data.^[1] However, the author believes that these views are too extreme, and only sees the increasingly acute conflict between data localization and cross-border intellectual property rights, and fails to realize the feasibility of intellectual property protection under the data localization policy.

1.2 Play the role of a bridge for the optimization of technical means

There is a view in the academic community that technical means can be used as a potential solution to the conflict. Data encryption technology can realize the cross-border and secure transmission of intellectual property data under the premise of data localization. The role of technology as a bridge between data localization and intellectual property protection emphasizes that technology neutrality can play an important role in cross-border data flow, but the innovation of technical means is still on the surface of the phenomenon and cannot solve the fundamental problems from the legal and policy levels.

1.3 Give full play to the regulatory role of international organizations

Some scholars advocate the use of existing international coordination mechanisms (e.g., bilateral or multilateral agreements) to resolve conflicts, emphasizing the role of international organizations (e.g., WTO, WIPO) in setting rules for cross-border data flows. The differences in national laws add to the complexity of cross-border IP protection activities, and data localization makes this international activity even more complex. However, different countries will inevitably face divergent political and economic interests based on different national conditions, so the role of the international coordination mechanism in cross-border intellectual property activities in practice is too small, and it is still worth considering whether the impact of the international coordination mechanism should be maximized by restricting data localization to a certain extent. ^{[2][3]}

In short, the existence of data localization is indeed an effective means for the state to protect the legitimate rights and interests of its own intellectual property rights within its own scope, and its existence has a certain value, but the protection of cross-border intellectual property rights in international trade is also imminent. Therefore, this article will discuss the causes of data localization and the importance of cross-border IP protection, the institutional roots of the conflict between the two, and the coordinated approach that can effectively resolve such conflict.

2 The reasonableness of data localization and the urgency of cross-border intellectual property protection

The contradiction between data localization and cross-border intellectual property is worth analyzing because both have their inevitability, otherwise they will definitely take a simple and crude way to sacrifice one party to satisfy the other. Neither can achieve harmony in international trade in a way that destroys itself, so the points of conflict between the two sides are worth analyzing and balancing. So, what is the rationale for the existence of data localization? What is the importance of cross-border intellectual property protection?

2.1 The rise of digital sovereignty awareness has led to data localization initiatives

Different countries regard data localization strategies as an important part of maintaining their national data sovereignty, and analyzing its underlying logic is an inevitable process to understand the significance of data localization. As for the definition of data localization, the definition given by the academic community is the same. Wang Rong mentioned in "Policy Cognition and Suggestions on Cross-border Data Flow: From the Perspective of Comparison and Reflection of US and European Policies" that data localization has the characteristics of "the state regulates the physical storage location of data through legal coercion" ^[4]. It is summarized as data localization is a national legislative or policy means to require data to be stored, processed or transmitted within the territory of the country to protect data sovereignty, national security and public interests. It can be seen that data localization emphasizes the state's control over data and is an effective measure to ensure that data is not misused by foreign governments or enterprises. ^[5] The protection of data localization illustrates the pursuit of data sovereignty in various countries, reflecting the country's demand for data control and management, and in the context of globalization, data sovereignty has become an important part of national competitiveness, so data localization measures are also particularly important.

2.2 The importance of cross-border intellectual property protection

As an indispensable means to protect the legitimate rights and interests of intellectual property owners, how to understand its irreplaceable role is a key issue to understand its urgency. On the one hand, in terms of promoting technological innovation and technology transfer, "Intellectual Property Protection and International Technology Transfer: A Case Study of China's High-tech Industry" points out: "We find that the degree of intellectual property protection, R&D investment in technology transfer and foreign direct investment are positively correlated with technology transfer. ^[6] In China, the Patent Law ensures the legitimacy of technology transfer, prevents technology from being illegally copied and used, incentivizes technological innovation, and provides legal safeguards for technology transfer by granting exclusive rights to inventors. The scope extends to the relevant provisions on international trade, the TRIPS Agreement provides legal safeguards for technology transfer and facilitates the international dissemination and application of technology by ensuring the rights of IP holders, and WIPO supports cross-border IP protection by developing international IP protection rules and providing dispute resolution mechanisms. The formulation of these laws and policies shows that there is legal and policy support for the protection of cross-border intellectual property rights, and its existence promotes technological innovation and legalizes technology transfer standards, so as to achieve the purpose of global technology sharing and common development. On the other hand, in terms of maintaining fair competition and regulating trade

order, cross-border intellectual property protection protects the legitimate rights and interests of innovators by preventing infringements, maintaining fair competition in the market. By ensuring the legitimate rights and interests of all parties to the trade, promoting fair trade and maintaining the international trade order, so as to promote the sustainable development of the global economy.

In short, both data localization and cross-border intellectual property trade protection have their inevitability, so the conflict between the two in practice has attracted people's attention.

3 Analyze the institutional root causes of data localization and cross-border IP conflicts in the context of the TRIPS Agreement

Combined with the analysis of the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights), it is found that data localization violates the relevant content of the TRIPS Agreement, and the legitimate rights and interests of intellectual property owners in cross-border trade cannot be protected by the policy. Specifically, it is manifested in:

3.1 There is a tension between national pursuit of digital sovereignty and global IP protection

The TRIPS Agreement requires Member States to treat foreign IP holders the same as their own holders (the principle of national treatment), however data localization policies may impose additional data storage and processing requirements on foreign companies, making it difficult for foreign IP holders to enjoy the same treatment as their own holders. Article 3 of the TRIPS Agreement stipulates that Member States must treat IP holders of other Member States with treatment not less favourable than their own nationals. However, in practice, each country may act in violation of this provision in order to protect its own intellectual property rights. According to the World Trade Review: Data Localization and National Treatment Obligations in International Investment Treaties, "Data localization harms foreign investment and provides domestic firms with a potential economic advantage over foreign firms. This leads to the argument that data localization violates the principle of national treatment in international investment treaties.^[7] It can be seen that data localization policies may violate the principle of national treatment under the TRIPS Agreement, as foreign IP rights holders may face stricter data storage and processing requirements in their home countries than their own holders. The tension between the data localization policy, which reflects the national pursuit of data sovereignty, and the TRIPS Agreement, which emphasizes the protection of intellectual property rights on a global scale, is a deep-seated institutional source of conflict.

3.2 There is a contradiction between the legislative logic of international law and domestic law

The TRIPS Agreement requires Member States to provide the same treatment to IP holders from different countries (the most-favoured-nation principle). However, data localization policies may impose different restrictions on the flow of data for companies in different countries, leading to violations of the MFN principle. Article 4 of the TRIPS Agreement stipulates that Member States must treat IP holders in other Member States no less favourable than any third country. However, data localization policies may impose different restrictions on the flow of data for companies in different countries, making it difficult for IP holders from different countries to enjoy the same treatment. The conflict between the TRIPS Agreement, which is the framework of international law, and the data localization policy, which is usually regulated by national law, reflects the coordination between international law and domestic law in the field of data governance and intellectual property protection.

In conclusion, the institutional roots of data localization and cross-border intellectual property conflicts lie in the contradiction between the country's pursuit of data sovereignty and the global intellectual property protection emphasized in international trade agreements, and the difficulty in coordinating international law and domestic law.

4 From the legal perspective, give feasible measures to reconcile the conflict between data localization and intellectual property protection

Combined with the above, data localization has largely maintained the domination of domestic data sovereignty, and the protection of cross-border intellectual property rights is the only way to implement international trade treaties and promote the smooth flow of global trade.

4.1 Promote the establishment of bilateral agreements on data flows and intellectual property protection

Based on the feasibility of achieving international IP protection under the domestic data localization policy, it is possible to promote the construction of bilateral agreements on data flow and IP protection. Bilateral agreements, exceptions to data flows, and the relationship between data localization and IP protection have been extensively discussed in studies by the international academic community and relevant international organizations, but few have suggested that the conflict between the two should be resolved through the development of exceptions to bilateral agreements. In bilateral agreements, exceptions to data localization policies are clarified to allow cross-border flows of data related to IP protection. For example, data such as evidence of patent infringement and evidence of trade secret leakage may be exempt from the data localization policy. Through bilateral agreements, we can flexibly respond to the data localization policies of different countries and avoid the complexity of multilateral agreements.

4.2 Standardize technical standards for data flow and intellectual property protection

With regard to the above-mentioned upgraded technical means, although they can be used as a potential solution to solve the conflict between data localization and cross-border intellectual property protection, they cannot solve the fundamental problems from the institutional level, the author proposes a feasible solution based on legal considerations, that is, to standardize the technical standards for data flow and intellectual property protection. The International Organization for Standardization (ISO) and WIPO jointly develop technical standards for data flow and IP protection to ensure the security of cross-border data flows and the effectiveness of IP protection. For example, technical standards for data sharing platforms have been formulated to support cross-border sharing of intellectual property data under the premise of data localization. Through the joint promotion of ISO and WIPO, the development of globally harmonized technical standards and the provision of specific operational guidelines to ensure the coordinated development of data flows and IP protection.

4.3 Establishment of the International Coalition for Data Flows and Intellectual Property Protection

The conflict between data localization and intellectual property protection is a complex global problem, and domestic scholars mostly propose solutions from the perspectives of domestic policy optimization and application of technical means, but there is still a lot of room for innovation in the improvement of international coordination mechanisms. The author believes that the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and the United Nations Commission on International Trade Law (UNCITRAL) could jointly initiate the establishment of the International Alliance on Data Flow and Intellectual Property Protection, aiming to formulate global standards for data flow and intellectual property protection through multilateral cooperation, and to coordinate the conflict between national data localization policies and intellectual property protection. At present, few scholars in the existing literature in China talk about the conflict resolution mechanism between data localization and intellectual property protection from the setting of the League of Nations, although there are many scholars in the world who point out that the global coordination of data localization policy requires the participation of international organizations, for example, "Data Nationalism" mentions that "the global coordination of data localization policy requires the participation of international organizations, especially the cooperation between WIPO and WTO."^[8] However, there is little argument that these three international organizations should cooperate to form a new League of Nations. Within the framework of the New League of Nations, a legally binding international convention was developed to clarify the relationship between data flows and the protection of intellectual property rights. For example, the content of the convention may include exceptions to data localization (e. g., data related to intellectual property protection can be transferred across borders), data security standards, minimum standards for intellectual property protection, etc. It can also set up a special dispute settlement body to deal with cross-border disputes over data localization and intellectual property protection, and the institution can draw on the WTO dispute settlement mechanism and adopt a combination of arbitration and mediation to ensure the efficiency and fairness of dispute resolution. This new type of international alliance, jointly promoted by WIPO, WTO and UNCITRAL, will form a multilateral cooperation mechanism on a global scale, and make up for the limitations of existing international organizations through the development of legally binding international conventions to ensure the coordination of data flows and intellectual property protection among countries.

5 Conclusion

In the era of big data, the protection of data sovereignty is imminent, and the importance of data localization is self-evident. However, this measure is not conducive to the protection of the rights of intellectual property holders in cross-border trade to a certain extent, and it is necessary to balance the rights and interests of various entities to study the

conflict between data localization and cross-border intellectual property protection, and to improve the coordination method, this paper examines the root causes and specific manifestations of the conflict between data localization policy and intellectual property protection, evaluates the feasibility of the existing coordination mechanism, and analyzes the inherent contradiction between data sovereignty and intellectual property system in the era of globalization. On this basis, the author is committed to building an innovative path to realize the orderly flow of cross-border data under the framework of data localization, while ensuring the integrity of the global intellectual property protection system. The ultimate goal is to promote the establishment of a new paradigm of global governance that takes into account data security and intellectual property protection by improving the international governance architecture and optimizing multilateral cooperation mechanisms.

References

- [1] W. Kuan Hon «Data Localization Laws and Policy: The EU Data Protection International Transfers Restriction Through a Cloud Computing Lens» [M]. Edward Elgar Publishing.2017.1-488.
- [2] Gasser & Schulz «Governance of Online Intermediaries: Observations from a Series of National Case Studies» [J]. Berkman Center Research Publication. No. 2015-5. 2015.<http://nrs.harvard.edu/urn-3:HUL.InstRepos:16140636>.
- [3] Chirstopher Kuner & Daniel Cooper.«Data Protection Law and International Dispute Resolution»[M]. Leiden/Boston.2017(382).1-174.
- [4] Wang Rong, "Policy Cognition and Suggestions on Cross-border Data Flow: From the Perspective of Comparison and Reflection of US and European Policies"[J].Information Security and Communication Secrets, 2018(03).41-53.
- [5] Joshua P.Meltzer «Governing Digital Trade»[J]. World Trade Review.2019. (18).23-28.
- [6] Liliana Mitkova & Yu Xiaohan, "Intellectual Property Protection and International Technology Transfer: Taking China's High-tech Industry as an Example"[N].Journal of Hunan Business College.2017,24(03):.5-11.
- [7] Qianwen Zhang & Andrew Mitchell, World Trade Review: Data Localization and National Treatment Obligations in International Investment Treaties [J]. World TradenReview .2022(21).391-410.
- [8] Anupam Chander, A., & Uyên P. Lê, (2015) «Data Nationalism»[J]. Emory Law Journal .2015(64).3.