

Transformation of the norms of the Agreement on Trade-Related Aspects of Intellectual Property Rights in the Republic of Tajikistan

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Abstract—The article analyzes the legal system of the Republic of Tajikistan, the norms and requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as well as the norms and provisions of agreements to which TRIPS refers, in particular the Paris Convention for the Protection of Industrial Property (Paris, March 20, 1883 (as of July 14, 1967)), The Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886 (Paris Act, World Intellectual Property Organization (WIPO), July 24, 1971)), The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 26 October 1961). Together with the concept of “legal system”, such categories as “transformation”, “implementation”, “unification” and “harmonization” are considered. Particular attention is paid to the need to assess and apply international legal norms in the national legal system, arguing that such a need is reasoned by the expansion of international relations, the development of global market and market relations.

Keywords—*legal system; legal life; transformation; implementation; harmonization*

I. INTRODUCTION

Nowadays, in the Republic of Tajikistan in order to create a market economy, special attention is paid to issues of legal regulation of relations related to intellectual property issues, which is implemented through national and international legal norms. International legal regulation in this area is carried out through the conclusion of bilateral and multilateral agreements between states on the basis of their mutually beneficial cooperation, the main purpose of which is to protect the intellectual property rights of national individuals and legal entities on the territory of other states. The result of such cooperation was the development of an international legal mechanism for the protection of the rights of holders from various offenses resulted from intellectual activity.

In particular, the adoption of TRIPS within the framework of the World Trade Organization presents a special example of fruitful cooperation among countries in the sphere of protection of intellectual property rights.

The study and analysis of TRIPS, as well as the implementation of its norms are of great importance not only from a theoretical point of view, but also from a practical one, since it will determine the most effective sector for the development of law enforcement in this area, and will also contribute to the development of proposals and recommendations in order to improve legislation Republic of Tajikistan in the field of regulation of intellectual property rights.

A. Purpose of the Study

The object of the article is the provisions and norms of TRIPS and the legislation of the Republic of Tajikistan in the sphere of intellectual property rights.

The subject of the article is presented by the main requirements of TRIPS and their compliance with the norms of the current legislation of the Republic of Tajikistan, as well as the implementation of TRIPS requirements into Tajik legislation.

The purpose of this work is to study issues related to the transformation of TRIPS norms in the legal system of the Republic of Tajikistan.

In order to achieve the above mentioned purpose it is necessary to solve the following tasks:

- To define the concept of the legal system of the Republic of Tajikistan;
- To analyze the categories “harmonization” and “unification”;
- To identify issues arising from the transformation of TRIPS norms in the legal system of the Republic of Tajikistan.

B. Literature review

Every state has its own national legal system. The specifics of the national legal system of every state are constituted by the development of a country, the special social relations that arise in this country, etc. Regardless of this, every state has its

own national legal system, and the development of a state can be assessed by its legal system. In the legal literature, the issue of understanding the legal system is the subject of active debate, particularly in the works of S.S. Alekseev, L.B. Tiunova, V.M. Syrykh, V.M. Baranov, V.K. Babaev, S.V. Polenina, V.P. Kazimirchuk etc.

In our opinion in the context of the study of the concept of the legal system, the opinion of most researchers characterizing the legal system as an aggregate legal category, reproducing a holistic legal reality, a unified system of organization of society from a legal point of view is worthy attention [1].

In this context, the position of M.A. Bolsunov, who singles out such a property as the main aim or purpose of a legal system, such as the description of the features of legal phenomena operating in a particular state or administrative-territorial entity, as well as their relation with the law - the main component of this system that has normative consolidation [2, pp. 57, 60]. Indeed, the legal system is a complex category that recreates the real legal picture of a country, characterizes the specifics of the flow of state-legal phenomena and processes (for example, the level of legal culture of society, the degree of legal awareness of the people, particular law-enforcement and law-making process, etc.). It is necessary to note that the core of the legal system is constituted by formalized legal norms, due to which various legal phenomena exist and operate.

The great importance of the category "legal system" manifests itself in disclosing the features of the "legal life" of a particular country. That is why it is widely applicable in the field of comparative law in analyzing the development of legal norms and individual legal phenomena.

It is necessary to pay attention to the fact that although the term "legal system" is actively used in the legal sciences, however, there is no consensus regarding its concept and content until present moment. Among all the existing positions of scientists in the theory of law regarding the definition of the concept of the legal system, there are three main approaches. Thus, supporters of the first approach view the content of this legal phenomenon through the prism of the diversity of forms of consolidation of legal norms and sources of law, as well as their interaction with each other. For example, according to Y. A. Tikhomirov, the legal system is a basic legal concept, which covers all legal acts and their connections at the national-state level [3]. The author further notes the structural nature of the legal system, which includes four groups of elements, namely legal thinking, lawmaking and the legal array [4].

A similar position was expressed by S.N. Egorov, who considered the legal system of a country as a set of norms enshrined in the regulatory legal acts adopted by state bodies, which are located according to a certain hierarchical system [5].

II. RESULTS AND DISCUSSION

According to the authors, such an approach, although it serves to describe the legal system as an integral phenomenon,

nevertheless, does not form a complete picture of the essence of this category. It is necessary to note that the legal system, being a complex phenomenon, has the ability to describe not only the external side of law, but also its content. In other words, nowadays, in the framework of comparative legal analysis, both the specificity of the external expression of law¹ and its internal structure are studied. For example, an essential feature of the legal system of England is the presence of common law and the right of justice, which together reflect the features of the functioning of the legal norms of this legal system. However, it is necessary to note that during the determination of the essence of the legal system, it is also necessary to take into account the analysis of the specific features of individual legal institutions that are relevant to the legal system of a particular country. Therefore, the analysis of the legal system through the prism of the external manifestation of law does not seem reasonable without taking into account the analysis of the internal content of the legal norms and legal institutions operating in the legal system of a particular country.

Defining the concept of a legal system, the proponents of the second approach attempt to uncover the essence of this phenomenon in a context with positive law and other closely related components functional elements of legal reality. In particular, S.S. Alekseev, being a supporter of this position, singles out legal practice and legal ideology as such elements. The author considers these elements from the point of view of manifestations of law, by means of which one can reveal the essence and specifics of the legal system as a regulator of norms. Consequently, as the author believes, the legal system is a reflection of all positive law, which must be considered in unity with other "functional elements of legal reality - legal ideology and judicial (legal) practice" [6].

It is this approach to the analysis of the essence of the category of "legal system" which can be considered quite fair, because it allows assessing the diversity of this phenomenon to full extent, taking into account the features of the relations of all its constituent components, while not limited to individual problems of the external expression of legal norms.

According to the authors, the point of view is also justified, according to which legal ideology is recognized as one of the elements of the legal system. It is clear that the holistic development of law is connected, first of all, with those principles and basic beginnings laid down as a legal ideology. Therefore, without a cumulative analysis of these elements, it is impossible to get a complete picture of the real legal system.

And finally, the third approach to the definition of a legal system is reflected in the fact that its supporters view this term as a comprehensive category that reflects all the legal reality existing in society, as well as various legal institutions and phenomena that exist in it. The supporter of this direction, in particular, is N.I. Matuzov, whose works reflect the main ideas of this approach. Thus, the author believes that "the legal system includes the entire legal apparatus, all legal activities

¹ That is, the presence or absence in the legal system of certain sources of law, the peculiarity of the correlation of laws and sub-legal normative legal acts, etc.

implemented in various forms". S.V. Polenina, sharing the point of view of N.I. Matuzov, argues that the term "legal system" forms a complex of legal phenomena, including the legal culture of legal consciousness, law enforcement, law enforcement, etc. [7;8].

The main idea of the supporters of the third approach is the rejection of the trait of homogeneity among the elements of the legal system. In other words, they believe that all the elements that make up the legal system are different, heterogeneous phenomena. They differ depending on the legal nature, the characteristic of independence, the content and degree of impact on social relations. It is emphasized that it is impossible to indicate a specific list of elements of the legal system, since it is not exhaustive because the legal system, in fact, is complex, multi-layered, multi-level, hierarchical and dynamic institution, the structure of which has its own systems and subsystems, nodes and blocks, etc. [9, pp. 179, 188].

Thus, the essence of the discrepancies in the ideas about the subject and scope of the concept of the legal system is that the views of individual authors on the list of elements of the legal system are different. Within this process, in many cases there is a subjective-arbitrary approach to the definition of the components of the legal system, the desire to include the maximum possible number of heterogeneous elements in its composition prevails over the intention to blacken its boundaries and content on the basis of fairly clear and functionally reasoned criteria. According to the authors the consequence of this is presented by the development of a rather broad and not sufficiently defined formulation of the concept of "legal system", which, on the one hand, loses its scientific and practical value, and on the other hand, contributes to the identification of the definition "legal system" with such categories as "legal reality" and "legal reality".

Traditionally, the scientific environment widely uses the term "national legal system", which, firstly, means "concrete historical complex of law (legislation), legal practice and the dominant legal ideology of a particular country (state)" or, secondly, the totality of a certain law (legislation), judicial practice and the governing legal culture of a particular country [10; 11, pp.14,102].

Thus, from the above mentioned aspects, it is necessary to note that the legal system of the Republic of Tajikistan is its positive right, considered in unity with other functional elements of legal reality – legal ideology and judicial (legal) practice.

In connection with the expansion of international relations and the development of the global market and market relations, there is a need to assess and apply international legal norms in the national legal system. However, it is necessary to note that acts or norms of international law, as a rule, have no direct action, except certain cases. They must be transformed into domestic, national legal norms. Here, the judgment of J. Hinzburg that it is the green light at the traffic light of national law that helps the international law to overcome the line between two jurisdictional spheres seems correct. [12] Sharing this position E.T. Usenko writes: "Just as a national norm cannot have actions in the international sphere without turning

it into an international legal norm by recognizing it from other states, similarly the international legal norm cannot be effective in the national sphere without transformation into the norm of national law" [13].

Thus, the Republic of Tajikistan as an equal member of the WTO is obliged to provide its individuals and legal entities with the opportunity to exercise and protect their rights in accordance with international acts, based on their direct action, or to transform certain provisions into national Tajik legislation. The word "transformation" comes from the Latin word "transformation". A similar translation can be found in various dictionaries [14].

It is impossible not to note the role of implementation. Many opinions were expressed in the legal literature regarding its relations with transformation [15; 16]. We will not consider them in detail; we will analyze, as far as possible, these positions. We also note that transformation gives legal force to international acts in the national law of a state, in other words, to be introduced into the legal system of these countries by issuing to the corresponding legal act. Depending on the type of such an act, the transformation can be divided into the following two types: general and special.

With a general transformation, a common constitutional norm (part No. 3 of article No.10 of the Constitution of the Republic of Tajikistan) [17] is formed to resolve the issue of the penetration of international law into national law. It present the legal basis for a closer interaction of the two legal systems and at the same time to exert influence rights to national law. Such a general rule gives international law the force of national action. A special kind of transformation is that a particular country gives specific norms of international law the power of national action by textual reproduction in the national law or the inclusion of provisions in it (part No. 1, article No. 7 of the Civil Code of the Republic of Tajikistan) [18] adapted to national law, or by legislative expression of consent to their application in another way [19].

The concept of implementation, in its turn, is a process of practical exploitation of international legal norms, which is expressed in the implementation mechanism (standard-setting activity, activity on creation of implementation standards, organizational-executive activity).

All the countries of the world, including the Republic of Tajikistan, participating in international treaties in the field of intellectual property rights, are obliged to bring their legislation in compliance with the norms of these international treaties [20], i.e. based on the generally accepted principles of international law. This obligation is reasoned by the membership in international agreements, "in order to meet the needs of a developing national economy ..." [21]. It is necessary to note the justified point of view of O.A. Kuznetsova regarding the priority of generally accepted principles and norms of international law. She believes that the latter is "a kind of common denominator", according to which the countries form their national law.

In case of the contradiction of national norm to this denominator should be excluded from national law both by law-making (through the adoption of appropriate changes in

national law) and law-enforcement (through resolving conflicts in favor of generally accepted principles and norms of international law) [22; 23]. Indeed, the denial of the advantage of applying this denominator gives grounds for individual countries to adopt internal norms that contradict it, which undermines the essence and significance of the legal regulators outlined. Thus, they will turn to a formal declaration that does not have practical legal value.

It is possible to pose another important question, which sounds as follows: is it possible that the public relations in the RT is directly regulated by the norms of international treaties, and there would be no changes in the form and content of such norms to the norms of national law, and their inclusion in the totality of legal norms that form the national law of the Republic of Tajikistan? Answering this question, we join the opinion of B.I. Nefedova and we note that in the RT international legal norms are able to act as direct regulators of public relations only if these norms meet the following requirements:

- They are sufficiently detailed;
- They either correlate with the national norm as a special norm with a general one (they do not define the basis for the legal regulation of these public relations), or they regulate the relations and cannot be settled by the norms of national law unilaterally, without an agreement [24].

Let us consider some agreements in the sphere of intellectual property rights. Thus, in accordance with the provisions of the Paris Convention, member countries of this Convention are obliged to create a Union for the Protection of Industrial Property. The Paris Convention also provides a national regime for citizens. The essence of this regime is that a citizen of every country of the Paris Union has in any country of the Union the same benefits that are currently granted or will be later granted by the relevant laws to its own citizens, without prejudice to the rights specifically provided by this Convention (paragraph No. 1 Article No. 2 of the Convention).

In the specified provision, we see the focus of the Paris Convention countries on the transfer of the provisions of the Convention into national law. This can be realized through the implementation, in other words, it is necessary to implement the norms of the Paris Convention, which determined such prerequisites.

Fundamental provisions are provided in the Universal Copyright Convention. Thus, in accordance with its article No. 1, every country that has acceded to this convention is obliged to take all appropriate and effective measures to ensure the protection of the rights of authors and other persons holding copyright to works of a scientific, literary and artistic nature, works of sculpture, painting as well as musical, written dramatic and cinematic works.

This convention regulates the relations with other agreements and conventions, as well as with bilateral and multilateral agreements on copyright between two or more contracting countries. In case of any inconsistency between

the provisions of one of these conventions or agreements and the provisions of the Universal Copyright Convention, in accordance with Article No. XIX of the last, the precedence specified in the Convention will prevail.

Here, as in the Paris Convention, there are prerequisites for implementation. However it is necessary to note one point which lies in the relations of the Universal Copyright Convention with other agreements and conventions, reminding the problem of the relations between national laws and international treaties, as stated in part 3 of Article No. 10 of the Constitution of the Tajik Republic, Part 2, Article No. 7 of the Civil Code of the Republic of Tajikistan and in other legal acts of the country.

The Berne Convention establishes that in addition to the provisions of this Convention, the remedies ensuring the rights of an author are governed by the laws of the country from which protection is requested (Article No. 6 (3)). As we see, here, it is possible to note the presence of interaction of an international legal act and the national law of every state.

The Convention on the Establishment of WIPO contains many provisions relating to copyright, industrial property and their protection. The purpose of this Convention is to promote and facilitate the protection and enforcement of intellectual property rights throughout the world, which is achieved through international cooperation of countries and in some cases through interaction with international organizations of various spheres of activity. To achieve this purpose, the development of various measures in order to improve the protection of intellectual property rights in the world and the harmonization of national legislations in this area has a great impact (Article No. 4 (i)).

As it can be seen, the Convention uses the term “harmonization”, which is often used in relation to the term “unification”. Without revealing details, the authors note the opinion of F.S. Sulaimonov regarding the distinction of the above-mentioned terms, with which they agree: “The difference in harmonization and unification lies in the mechanism for introducing the legal norms of one country into the legal system of another country through international legal acts”. Thus, unification arises on the basis of the will of a country and other subjects of international law, as a result of which international legal acts are unified, and harmonization has a spontaneous character, and means the process of bringing together the rights of different countries, eliminating the differences existing in them.

III. CONCLUSION

Thus, the norm of part No. 3 of Article No. 10 of the Constitution of the Republic of Tajikistan is a general transformation of international norms in the legal system of the Republic of Tajikistan, namely: it enshrines the fundamental idea that all international legal acts recognized by the Republic of Tajikistan are part of the national legal system. Along with this, this norm establishes the priority nature of the application of the norms of international law in case when particular laws of a country do not comply with or contradict recognized international legal acts. This constitutional provision is reflected in the Article No. 4 of the Law of the RT

“On international treaties of the Republic of Tajikistan” [25], the Article No. 7 of the Civil Code of the Republic of Tajikistan and the Resolution of the Plenum of the Supreme Court of the Republic of Tajikistan No. 9 dated November 18, 2013 “On the application by the courts of international legal acts recognized by Tajikistan” [26].

The content of the articles introduce the norms of international treaties into the national law of the Republic of Tajikistan in the form of *leges personales*, with or without subsequent implementation. It is understood that the norms of an international treaty are automatically applied to *proprio vigore* internal relations [27].

Thus, international legal acts that contain the norms of intellectual property law, in particular the rules of TRIPS, on the basis of Part No. 3 of Article No. 10 of the Constitution of the Republic of Tajikistan are part of the legal system of the Republic of Tajikistan. Moreover, it is necessary to note that the conventions to which TRIPS refer also generate obligations for the States Parties to this agreement, i.e. this agreement requires compliance with the provisions of these conventions. Therefore, they are also recognized as a part of the legal system of the Republic of Tajikistan. In accordance with the provisions of the Part No. 3 of the article No. 10 of the Constitution of the Republic of Tajikistan, the article No. 4 of the Law of the Republic of Tajikistan “On international treaties of the Republic of Tajikistan”, the article No. 7 of the Civil Code of the Republic of Tajikistan and the Resolution of the Plenum of the Supreme Court of the Republic of Tajikistan No. 9 dated November 18, 2013 “On the application by the courts of international legal acts recognized by Tajikistan”, international norms are applied in case of a conflict national law or when in national law there are gaps regarding the legal regulation of a certain social relations, at a time when such relations can be resolved by sufficiently detailed norms of international law.

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