

Legal protection of cross-border use of intellectual property

Protección legal del uso transfronterizo de la propiedad intelectual

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ABSTRACT

The paper analyzes the issues of legal regulation of cross-border use of intellectual property on the example of the Eurasian Economic Union. Among the key problems of cross-border use of intellectual property within the Eurasian Economic Union (EEU) is the need to create a unified system of registration of trademarks and service marks and elimination of double registration of trademarks, establishment of common approaches to the problem of admissibility of “parallel imports” within the EEU, and the creation of an effective patent system. The authors conclude that the development of legal regulation of the use of intellectual property in cross-border relations will follow the path of adoption of normative acts within the framework of regional unions of states, taking into account the specifics of their economic and social development, as well as the way of improvement of national legislation, taking into account the position of states on this issue.

Keywords: Intellectual property, cross-border use of intellectual property, Eurasian Economic Union, parallel import, trademark.

RESUMEN

El artículo analiza los problemas de regulación legal del uso transfronterizo de la propiedad intelectual en el ejemplo de la Unión Económica Euroasiática. Entre los problemas clave del uso transfronterizo de la propiedad intelectual dentro de la Unión Económica Euroasiática (EEU) está la necesidad de crear un sistema unificado de registro de marcas y marcas de servicio y la eliminación del doble registro de marcas, el establecimiento de enfoques comunes para el problema de admisibilidad de “importaciones paralelas” dentro de la EEU, y la creación de un sistema efectivo de patentes. Los autores concluyen que el desarrollo de la regulación legal del uso de la propiedad intelectual en las relaciones transfronterizas seguirá el camino de la adopción de actos normativos en el marco de las uniones regionales de estados, teniendo en cuenta los detalles de su desarrollo económico y social así como la forma de mejorar la legislación nacional, teniendo en cuenta la posición de los Estados sobre este tema.

Palabras clave: Propiedad intelectual, uso transfronterizo de la propiedad intelectual, Unión Económica Euroasiática, importación paralela, marca registrada.

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Recibido: 26/07/2019 Aceptado: 10/09/2019

INTRODUCTION

The development of legal regulation of intellectual property is important for the economy of any state. In the conditions of modern international economic relations, globalization of economy, activation of innovation processes, intellectual property becomes one of the key factors increasing competitiveness of national economies.

The modern model of legal regulation of intellectual property is based on the concept of exclusive law, which forms a powerful incentive to create new markets for intellectual property owners, where the goods are the rights of access or use of intellectual property (Ghosh, 2016). In addition, modern scientists confirm the impact of the level of legal protection of intellectual property on the development of national economies, in particular, their export opportunities (Gnangnon, Moser, 2014). Although most developed countries have assumed international obligations to ensure intellectual property rights, they are parties to the main international conventions in this area; the systems of ensuring rights in them are significantly differentiated, even within regional unions, including the Eurasian Economic Union.

Traditionally, the national law of the countries is based on the principle of territoriality as applied to the protection of intellectual property, which in its most general form means that the grounds and conditions for granting protection of intellectual property rights are determined by the laws of the state where it is sought. This is partly offset by the adoption of international agreements on intellectual property issues, the unifying requirements of which, especially the Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS Agreement (Trade-related, 2019), bring together the rules of intellectual property protection in most countries. International treaties minimize the negative aspects of the territorial nature of intellectual property rights and allow foreigners to have access to national legal systems of protection, reduce material and time costs in the process of registration of rights in several States (priority right, international registration, patenting and deposit systems), but the main issues of intellectual property protection are still solved on the basis of the national law of the State where the relevant protection is sought. At the same time, along with the substantive issues of the law, there are also problems of searching for applicable law for the protection of intellectual property rights in cross-border use of intellectual property (conflict of laws regulation, Leanovich, 2009).

Transboundary economy in the context of globalization poses a challenge to the principle of territoriality in the protection of intellectual property rights: intellectual property objects are actively commercialized, becoming objects of circulation not only within the borders of one state, but also outside them, which is facilitated by the Internet.

This, in turn, requires a review of the principal approaches to the protection of intellectual property rights and even suggests the possibility of universal protection of intellectual property rights (Sterling, 2005).

The development of integration processes in the Eurasian space and the strengthening of economic ties have also led to the active use of intellectual property in cross-border relations, in particular, in the import and export of goods between the countries of the Eurasian Economic Union. In this regard, the analysis of the current state of legal regulation of cross-border use of intellectual property on the example of the Eurasian Economic Union is of interest.

Materials and methods

The methodological basis of this study is made up of general and private methods of scientific research, primarily the method of comparative law and complex analysis, the empirical method of research. Modern national and international legislation regulating both the protection of intellectual property in general and legislation defining the peculiarities of cross-border use of the results of intellectual activity is analyzed.

The study of the peculiarities of law enforcement in the cross-border use of intellectual property involves a comparative analysis of the national legislation of the Eurasian Economic Union member states. Regulatory acts of such countries as the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Armenia and the Kyrgyz Republic have been studied. Both national civil codes of these countries and special laws regulating relations with regard to certain types of intellectual property were studied. The application of the comparative analysis method aims to identify common approaches in the regulation of cross-border relations within the Eurasian Economic Union, as well as differences that hinder the harmonization of national regulations in the system of unified law of the Eurasian Economic Union.

Among other private scientific methods used in this study is the formal legal method, which consists in the frontal study of international acts of the Eurasian Economic Union on the legal protection of intellectual property. Based on this analysis, a general idea of the state of legal regulation in the designated area is formed. In addition, the use of formal legal method allows us to identify the shortcomings of the existing legal regulation of the sphere of public relations. In addition, based on the formal legal method, proposals are formulated to improve the regulatory framework for the development of acts of the Eurasian Economic Union on the legal protection of intellectual property.

In parallel with this method, the method of interpretation of law is used, which allows to deepen and expand the results of the application of the formal legal method, to identify both literal and systemic meaning of legal prescriptions and to make a general picture of aspects and parties of legal regulation in the field of legal protection of intellectual property in cross-border use. An important role is played by acts of interpretation of legal regulations, which accumulate the results of interpretation activities of both national and international bodies in the field of legal protection of intellectual property.

The basis of the study was formed by international acts on intellectual property protection, acts of the European Union and the Eurasian Economic Union, which define the peculiarities of intellectual property protection, as well as national legislation and court practice of the Eurasian Economic Union member states.

DEVELOPMENT.

Results and discussions

Since the second half of the 20th century, the need for separate regulation of intellectual property protection has become apparent to developed countries, as reflected in the adoption of the TRIPS Agreement, and there has been an increase in the number of regional trade agreements, including those dealing to some extent with intellectual property protection. However, researchers have noted a number of shortcomings in the system of legal protection of intellectual property in cross-border use, as set out in the TRIPS Agreement. For example, K.Yu. Peter (2015) notes that this agreement, like many other international instruments on intellectual property, sets minimum standards for its protection, but not a unified set of mandatory rules. This feature does not allow for uniform enforcement, as national laws on intellectual property protection may conflict with each other.

The current trend is regionalism and the desire of countries to build trade relations taking into account the interests of regional partners.

At the same time, the integration of countries into the global economic system is impossible without appropriate attention to intellectual property protection issues, which are based on multilateral, national and regional agreements. At the same time, it is necessary to take into account the specifics of the functioning of each individual regional association, including their level of involvement in the world trade system. Thus, within the framework of the Eurasian Economic Union (Russia, Belarus, Kazakhstan, Armenia, Kyrgyzstan), there are both members of the World Trade Organization (WTO) and the country in the status of observer (Republic of Belarus), which implies their different obligations in the international trading system.

Currently, the legal regulation of cross-border relations regarding the use of intellectual property on the territory of the Eurasian Economic Union in the most general form is contained in the Agreement on the Eurasian Economic Union of 2014 (Agreement, 2014).

According to Article 89 of this Agreement, one of the important tasks of legal regulation of relations in the field of intellectual property is to protect the interests of holders of intellectual property rights of the Eurasian Economic Union member states. The cooperation of the Eurasian Economic Union member states in the field of intellectual property protection covers, in particular, such areas as the introduction of the system of registration of trademarks and service marks of the Eurasian Economic Union and appellations of origin of the Union's goods; ensuring the protection of intellectual property rights, including in the Internet; ensuring the effective customs protection of intellectual property rights, including through the maintenance of a single customs bond. In accordance with Article 90 of the Eurasian Economic Union Agreement, persons of one member state in the territory of another member state are entitled to national treatment with regard to the legal regime of intellectual property objects.

The Protocol on the Protection and Enforcement of Intellectual Property Rights (Annex No. 26 to the Agreement on the Eurasian Economic Union) does not contain provisions regulating in detail the issues of cross-border use of intellectual property within the Eurasian Economic Union. Rather, these rules are intended to ensure harmonization and unification of national regulation of relations in the field of intellectual property of the member states of the Eurasian Economic Union based on the standard established in the Agreement on the Eurasian Economic Union. At the same time, it is possible to single out certain provisions directly related to the legal regulation of certain issues of cross-border use of intellectual property.

Thus, one of the rules provides that the member states of the Union give right owners with regard to cinematographic works the right to permit or prohibit public commercial distribution of originals or copies of their works protected by copyright in the territories of other member states (paragraph 5 of the Protocol on the Protection and Enforcement of Intellectual Property Rights).

Other provisions of the Agreement on the Eurasian Economic Union provide for the possibility of registration of trademarks and service marks of the Eurasian Economic Union. Legal protection of these marks will be provided simultaneously in the territories of all member states of the Eurasian Economic Union (paragraph 14 of the Protocol on the Protection and Enforcement of Intellectual Property Rights). A similar rule is also provided for appellations of origin of goods of the Eurasian Economic Union (paragraph 22 of the Protocol on the Protection and Enforcement of Intellectual Property Rights).

The practice of registration of regional trademarks is well known to the European Union (EU): the registered trademark of the European Union is protected simultaneously and equally in all member states of the European Union on the basis of the European Union Trademark Regulation No. 2017/1001 (Regulation, 2017).

The abovementioned provisions of the Protocol on the Protection and Enforcement of Intellectual Property Rights will be fully operational after the entry into force of the Agreement on Trademarks, Service Marks and Appellations of Origin of the Eurasian Economic Union signed by the Council of the Eurasian Economic Commission at its meeting in St. Petersburg in late 2018. The document will work after 2020 (Order, 2016). It seems that on its basis the legal protection of these types of intellectual property in case of cross-border use will be carried out in a simpler manner.

The Agreement is aimed at creating a new system of registration of trademarks and appellations of origin of goods

of the Eurasian Economic Union. If right holders now have to register trademarks in five countries, the agreement will allow them to do so once in any of the intellectual property offices of the Union member states. Thus, the applicant will receive a single protection document, and all information on registered trademarks and appellations of origin will be contained in the unified registers of the Union (The EEC, 2018).

At the same time, the member states of the Eurasian Economic Union should resolve the issue of dual registration of the same intellectual property objects, primarily “Soviet” trademarks. Along with the existing national systems of registers of intellectual property objects of member states within the framework of the Eurasian Economic Union, a single register was created, as a result of which, after the opening of borders, the problem of double registration of the same intellectual property objects appeared within the association. This problem is one of the specific features of this regional association of states, predetermined by their joint historical past within the USSR. To solve this problem, the experience of the European Union in the creation of a single trademark of the European Union and the formation of a single electronic market can be used. In order to solve this problem, the Eurasian Economic Commission adopted a number of documents and established a special Advisory Committee on Intellectual Property.

As the recent report of the World Intellectual Property Organization (WIPO) shows, cross-border disputes on violation of intellectual property rights, including in the Internet, primarily concern trademarks (Khusainov, 2018).

Another important problem that needs to be solved within the framework of the Eurasian Economic Union is the need to create an effective patent system of the Eurasian Economic Union, which allows investors to avoid double registration in addition to the national patent offices and customs registers, which significantly increases costs and complicates the process of obtaining protection and entering the market (Soldatenko, 2017).

Particular attention should be paid to the problem of exhaustion of intellectual property rights, primarily exclusive trademark rights, in the territory of the Eurasian Economic Union countries with “parallel imports”. Paragraph 16 of the Protocol on the Protection and Enforcement of Intellectual Property Rights provides for a regional regime of the principle of exhaustion of exclusive rights not only with respect to trademarks of the Eurasian Economic Union, but also with respect to national trademarks. In case of entry into the territory of the Union, intellectual property rights shall be exhausted when crossing the border of one of the member states of the Eurasian Economic Union. At the same time, insufficient regulation of issues related to the exhaustion of exclusive trademark rights at the level of national legal systems of the member states of the Eurasian Economic Union and the lack of uniform approaches to this issue does not remove today the problem of admissibility of “parallel import” of goods within the Eurasian Economic Union.

In the most general way, the principle of exhaustion of law means the possibility of a third party to use the result of intellectual activity without the consent of the right holder as a result of its introduction into circulation. The modern doctrine of exhaustion of intellectual property rights is based on the idea of circumventing artificial barriers to free trade, which may be created by holders of exclusive rights to protected results of intellectual activity and the means of individualization equal to them, which was developed in the German law enforcement practice of the beginning of the XX century.

The idea of “parallel import” is based on the assumption that the goods marked with a registered trademark are imported into the territory of the state by a person other than the owner of the right or its official distributor, and another person - a “parallel” importer without obtaining a special permission of the right holder, it is enough that the goods were legally put into circulation within a certain territory. At the same time, if the legislator has fixed the possibility of free use of the result of intellectual activity as a result of the introduction of goods into circulation in any country, the international principle of exhaustion of the exclusive right is established, if only in the territory of this state (a group of states, for example, members of the economic community) - national (regional).

Today, the states have adopted different approaches to defining a territory where turnover within a territory will exclude infringement of intellectual property rights by parallel importers. Some follow the international principle of exhaustion of rights, allowing parallel importers to import goods lawfully introduced into civil circulation in any country of the world (Mexico, Thailand (with an exception for medicines), Azerbaijan, Georgia, and Armenia). Under this approach, exclusive rights “run out” at the time of sale of the goods. Other states recognize the national or regional principles of exhaustion of law, i.e., they prohibit or restrict parallel imports to some extent, such as Russia, Belarus and Kazakhstan. This provision of the national legislation allows to keep the market under control, which limits price competition, but at the same time makes it attractive for rights holders wishing to produce and import original products. In a number of countries, the principle is not established or a conditionally international principle is in force, according to which certain import restrictions are imposed.

The European Union has a regional principle of exhaustion of rights, which allows for parallel imports between EU countries. The legal position of the European Court of Justice is based on the principle of freedom of movement of goods in the European Union, enshrined in Art. 30 and 36 of the Agreement of Rome. This principle, in fact, is recognized as prevailing in relation to the EU legislation on intellectual property rights.

The assessment of the significance of this principle from the point of view of balancing the interests of rights holders and other interested parties is ambiguous. Thus, in the Recommendations of the International Chamber of Commerce it is indicated that the issue of the use by the right holder of intellectual property rights to control the distribution of goods put into circulation by himself or with his consent, by means of the doctrine of exhaustion of rights (the issue of parallel imports) with the globalization of the economy ... The importance of the issue is becoming increasingly

important. While many believe that international exhaustion of rights will have a strong negative impact on intellectual property rights and the distribution system, others argue that international exhaustion is a necessary and logical result of globalization and trade liberalization, as well as the emergence of electronic commerce (Recommendations, 2012).

The choice of the principle of exhaustion of intellectual property rights is one of the so-called flexibilities of the TRIPS Agreement. Guided by Article 6 of the TRIPS Agreement, the states have the right to decide this issue at their own discretion, based on their own national interests, taking into account their membership in the Eurasian Economic Union.

At present, the national legislation of the member states of the Eurasian Economic Union provides for different approaches to fixing the principle of exhaustion of the exclusive right to a trademark, which predetermines the possibilities of "parallel import" within the framework of this Union. Thus, today in the Russian Federation the principles of national and regional exhaustion of the exclusive right to a trademark are in force at the same time. The first one with regard to imports from countries that are not members of the Eurasian Economic Union (Article 1487 of the Civil Code of the Russian Federation), the second one - from member states of this Union. This means that those goods with trademarks placed on them, which were introduced into the civil turnover in the territory of the Russian Federation (a state that is a member of the Eurasian Economic Union), directly by the right holder or with his consent, may in the future be freely in circulation in the territory of these states. Import from other states of goods with trademarks of these right holders is allowed only with the consent of the right holders of these trademarks.

In the Republic of Kazakhstan, the international principle of exhaustion of rights was in force (although it was not officially established) until 2012, which allowed for the importation into the territory of the state of goods marked with a trademark by any person without the consent of the right holder at its first introduction into circulation in any country in the world. Since 2012, the national principle of exhaustion of exclusive rights, enshrined in paragraph 7 of Art. 19 of the Law of the Republic of Kazakhstan dated July 26, 1999 № 456-1 "On trademarks, service marks and appellations of origin of goods", as amended on 12.01.2012 (Law, 1999). In connection with the conclusion of the Agreement on the Eurasian Economic Union of May 29, 2014 and the harmonization of national legislation in accordance with the provisions of this Agreement from the beginning of 2015 in Kazakhstan is the regional principle of exhaustion of rights to the trademark. However, the national principle of exhaustion of rights continues to apply to goods that have crossed the border of the Eurasian Economic Union, which coincides with the "external" customs border of Kazakhstan.

Thus, if the goods cross the border of Kazakhstan and China, which coincides with the border of the Eurasian Economic Union, the national principle of exhaustion of law will be applied, then the turnover of goods will be based on the regional principle.

Thus, today parallel import in a number of states of the Eurasian Economic Union (the Russian Federation, Belarus and the Republic of Kazakhstan) is actually prohibited; only the right holder or other person with his written consent can import the goods. However, in the judicial practice of both the Russian Federation and the Republic of Kazakhstan we can observe a certain evolution of views on the problem of "parallel imports" from its complete prohibition to the assumption under certain conditions (Kiryushina, 2018; Serebryakov, Kiryushina, 2018).

"Parallel import" is perceived today as one of the instruments of free trade and one of the means of price equalization in the markets of different countries. The legalization of "parallel imports" in Russia is particularly relevant in relation to medicines, in Kazakhstan - in relation to spare parts for automobiles, which is possible in the context of the differentiated principle of exhaustion of the law allowing "parallel imports" in relation to certain types of goods. Draft Protocol of the Eurasian Intergovernmental Council of 24 April 2017 N 30 allows member states to establish exceptions to the regional principle of exhaustion of exclusive rights to the trademark in respect of certain types of goods, including goods not available in the domestic market of the Eurasian Economic Union or inaccessible in sufficient quantities (On the draft, 2017). However, to date, this problem has not been resolved in the national legislation of the Eurasian Economic Union member states.

At the same time, in the national practice of individual member states of the Eurasian Economic Union, there are approaches that actually contribute to cross-border violations of intellectual property rights. Thus, in paragraph 156 of the Resolution of the Plenum of the Supreme Court of the Russian Federation № 10 of 23.04.2019 "On the application of part four of the Civil Code of the Russian Federation" it is stated that "such actions as the acquisition of goods in which the trademark is expressed, regardless of the purpose of acquisition, as well as storage or transportation of such goods without the purpose of introduction into the civil turnover on the territory of the Russian Federation, do not violate the exclusive right of the right holder" (Resolution, 2019).

An ambiguous approach from the point of view of the problem of exhaustion of exclusive rights also has the problem of export of goods with trademarks applied to them. Despite the fact that the legislation of the Russian Federation does not explicitly refer to the export of goods containing intellectual property as a way of using a protected result of intellectual activity or means of individualization, in particular, a number of international agreements on intellectual property protection pay attention to this aspect. In particular, the Agreement on Trade-Related Aspects of Intellectual Property provides in Clause 51 that the right holders should be given the opportunity to apply to the competent authorities with a request to suspend the release into free circulation of counterfeit goods not only at the time of their import, but also at the time of their export. It seems that the legal export of goods containing the results of intellectual activity is possible only as a result of their legal introduction into the civil turnover on the territory of any of the member

states of the Eurasian Economic Union.

Thus, at present, separate steps have been taken within the framework of the Eurasian Economic Union to regulate the issues of cross-border use of intellectual property: along with the existing national systems of registers of intellectual property objects of the member states, the Eurasian Economic Union has created a unified register, adopted a number of normative documents that predetermine common approaches to intellectual property protection at the level of the governing bodies of the Eurasian Economic Union. At the same time, among the unresolved issues remain the creation of a unified system for the registration of trademarks and service marks of the Eurasian Economic Union and the elimination of double registration of trademarks, the establishment of common approaches to the problem of admissibility of “parallel imports” within the framework of the Eurasian Economic Union, and the creation of an efficient patent system of the Eurasian Economic Union.

Despite the above trend towards the development of a supranational (regional) level of legal regulation of cross-border use of intellectual property, the improvement of legal regulation of intellectual property protection in the context of cross-border use of intellectual property should be carried out not only within the framework of national or regional legal systems, but also at the international level. Since the late 1990s, the World Intellectual Property Organization (WIPO) has been discussing the need to adopt new international legal rules on jurisdiction in cross-border intellectual property disputes (WIPO, 2001). Preliminary drafts of conventions have been developed, but there has been no willingness on the part of member countries to start negotiations on them.

At the present stage, the gradual abandonment of the territorial principle of intellectual property will also be carried out as national legal regulation develops. Countries with high standards of intellectual property protection are more inclined to remove territoriality from their protection. In particular, the European Union (Justifications, 2008) initiates the discussion about this within the World Intellectual Property Organization. The development of conflict of laws and jurisdictional norms in relation to intellectual property rights will expand the possibilities of protection and enforcement of these rights for foreigners. Countries that are cautious about increasing the level of protection of intellectual property rights in order to protect the interests of national producers of goods and services are unlikely to seek to abandon the territorial principle. In any case, however, modification of the legal framework through the adoption of new national, supranational and international instruments is inevitable.

CONCLUSIONS

At the present stage, legal regulation of the use of intellectual property in cross-border relations is carried out at the international, national and supranational levels, in particular within the framework of economic unions of states, and their mutual influence on each other is noted: international standards in the field of intellectual property protection have a significant impact on the formation and development of national legislation, and in the context of regional integration, supranational law is becoming increasingly important. At the same time, the development of general legal regulation within the framework of the Eurasian Economic Union, including on intellectual property issues, may face the problem of its rejection by national legal systems. Such risks were previously mentioned in the scientific literature (Agamogademova, 2013; Karliuk, 2017), and were noted in the course of this study.

Currently, within the framework of the Eurasian Economic Union, there is no holistic system of legal regulation of cross-border use of intellectual property, which determines the peculiarities of intellectual property rights protection in such use. At the level of the Eurasian Economic Union, separate norms defining such peculiarities have been adopted, for example, within the framework of the Protocol on the Protection and Enforcement of Intellectual Property Rights (Annex No. 26 to the Agreement on the Eurasian Economic Union). However, the actions of these “framework” acts are hindered by the fact that so far they have not been adopted acts designed to detail the specifics of certain issues of cross-border use of intellectual property, for example, the Agreement on Trademarks, Service Marks and Appellations of Origin of Goods of the EAEU.

The unresolved issues of exhaustion of the exclusive right to a trademark at the level of the national legislation of the EEU member states does not allow to fully resolve the issues of admissibility of “parallel import” within the framework of the Eurasian Economic Union, which restrains competition in the national trademark markets of the Eurasian Economic Union member states.

Among the key problems of cross-border use of intellectual property within the framework of the Eurasian Economic Union is the need to create a unified system of registration of trademarks and service marks of the Eurasian Economic Union and to eliminate double registration of trademarks, to establish common approaches to the problem of admissibility of “parallel imports” within the framework of the Eurasian Economic Union, and to create an efficient patent system of the Eurasian Economic Union.

It appears that at present the improvement of legal regulation of the use of intellectual property in cross-border relations will follow the way of adoption of normative acts within the framework of regional unions of states (the Eurasian Economic Union, the European Union), taking into account the specifics of their economic and social development, as well as the way of improvement of national, including collision legal regulation in the field of intellectual property, taking into account the government position on this issue.

Thus, in the document of the European Commission “Single market of intellectual property rights” it is noted that the main purpose of the European Union strategy with regard to intellectual property rights is the formation of an integrated

regime of the European Union with regard to the protection of intellectual property rights, which determines the main directions of development and unification of the legislation of the member states of the European Union, including through the creation of a unified patent system, a system of protection of trademarks and brands, regulation of issues

At the same time, not all issues of cross-border use of intellectual property can be resolved at the level of national or regional legislation. A number of issues require the adoption of international legal acts, for example, in the framework of the World Intellectual Property Organization (WIPO), which is restrained today by the inconsistency of positions of the member countries of this international organization.

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