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EURASIAN CHALLENGES TO INTERNATIONAL ECONOMIC LAW

NEW DEVELOPMENTS AFTER
BREXIT AND IN THE CONTEXT
OF THE COVID-19



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This book compares the evolution of the legal systems of Central Asia, Europe, and East Asia, under the impact of economic factors, both structural and crisis-inspired. The COVID-19, one of the severest challenges faced by humanity, alters the social order and the way people think. Already, changes impact the socio-economic and political-legal spheres. Geopolitical and geo-economic shifts affect the place of states and regions in the world order. The UK's withdrawal from the EU, superimposed onto the pandemic, inflicted not only political and socio-economic losses but reputational losses as well. It signalled the limits of regional integration if the world's most successful economic grouping needed to revise its own development.

This book analyses three salient international political/legal problems for states and regions of Eurasia: trade and financial issues, regional and interregional issues, industrial and socio-economic issues. It also looks at the US trade policy towards Eurasia and China, the US military presence in South Korea, the EU experience for the EAEU, as well as WTO issues, etc. It follows *Le régionalisme et ses limites* (2016), *Mutations de société et réponses du droit* (2017), *On the European and Asian origins of legal and political systems* (2018) and *The Challenge of change in the legal and political systems of Eurasia and the New Silk Road* (2020).

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Implementing WTO standards protecting intellectual property rights in Kazakhstan during COVID-19

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The development of science and technology, global computerisation and international trade have led to the widespread use of the results of intellectual and creative activities. In this regard, the issue of protection of intellectual property rights is becoming more relevant for states. The latter need an effective mechanism for legal regulation of the Institute of intellectual property.

In order to create an effective and universal international legal mechanism for the protection of intellectual property rights among states, international legal acts were adopted. However, these international legal acts did not sufficiently regulate issues related to trade.

Under these circumstances, a mechanism for the protection of intellectual property rights was created within the framework of the World Trade Organisation (WTO). It will act on the basis of the systematisation and improvement of all achievements enshrined in the adopted international agreements in the field of intellectual property. It becomes an effective international legal mechanism for countering violations in the field of intellectual property rights. This regulatory mechanism operates on the basis of the agreement on Trade Related Intellectual Property Rights (TRIPS Agreement).¹

Kazakhstan, as a member of the WTO, undertakes to implement the requirements of the TRIPS Agreement in the domestic national legislation in the field of intellectual property.

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Available on the website <https://www.wto.org/english/tratop_e/trip_s_e/ta_modules_e.htm> (date of access: 15.04.2020).

I. Formation of the system of legal protection of intellectual property in Kazakhstan

Kazakhstan's legal system is the result of the introduction of various institutions into the current national legal system. Since 1991, some institutions and other legal systems have been adapted to the Kazakh legal system, which passed numerous laws, amendments and additions to the existing legal acts, noted Y.T. Omirzhanov.² Today Institute of intellectual property is one of the most important institutions.

The first stage of the formation of legislation on the legal protection of intellectual property in Kazakhstan took place during 1992–1996. The National Patent Office of the Republic of Kazakhstan and the Committee on copyright and related rights were the first specialised organisations in the field of legal protection of intellectual property. During these years, the country adopted laws regulating the field of intellectual property. Resolutions were adopted that characterise the status of bodies and organisations that make up the infrastructure of intellectual property relations, and regulations on service inventions.

The second stage of the development of intellectual property legislation was associated with the decision of the country's leadership to join the WTO. The first of the measures was to bring the legislation of Kazakhstan on intellectual property in line with the requirements of the WTO, in particular, with the TRIPS Agreement. Among the institutional changes, the committee on intellectual property rights was established as part of the Ministry of Justice of the Republic of Kazakhstan. The National Institute of intellectual property of the Committee on intellectual property rights of the Ministry of Justice of Kazakhstan was presented as an expert body for all types of intellectual property objects.³

Kazakhstan has gradually expanded its participation in World agreements on certain issues of intellectual property protection.

² Y. T. Omirzhanov, "The influence of European and Asian Values on the features of Kazakhstan's legal system" (in English), Book chapter, 2018, pp. 67–73.

³ Analytical report: "Improvement of the legislation of the Republic of Kazakhstan: trends and prospects" (Prepared by the Institute of Legislation of the Republic of Kazakhstan based on the results of scientific research in 2011), pp. 92–93.

II. Implementation of TRIPS Agreement in the legislation of the Republic of Kazakhstan

From 2004 to 2012, measures to bring the legislation in line with the agreement on trade-related aspects of intellectual property rights were carried out. By making appropriate changes to the current legislation, a number of amendments to the current legislation were adopted.

As a result of the work carried out, copyright was extended to works of any form. The period of protection of objects of copyright and related rights was increased (70 years were introduced instead of 50 years after the death of the author). The protection of computer programmes was equated with the protection of literary works.⁴

Taking into account the recommendations of WTO member countries, Kazakhstan will introduce protection of the rights of authors and performers on the *Internet*. Therefore, Kazakhstan adopted the laws of the Republic of Kazakhstan on 16 April 2004 on the accession of the Republic of Kazakhstan to the treaty of the World Intellectual Property Organisation on copyright⁵ and on 16 April 2004 on the accession of the Republic of Kazakhstan to the treaty of the World Intellectual Property Organisation on Performers and phonograms.⁶

One of the conditions of the TRIPS agreement is to provide citizens of other WTO member countries with treatment no less than that which it offers to its own citizens.

In order to suppress the facts of import (export) of goods violating intellectual property rights, the Kazakh customs authorities were given the right to act on their own initiative in cases where goods passing

⁴ Scientific and production enterprise Brochure for the round table 3.06.2015. Available on the website <<https://atameken.kz>> (date of access: 19.04.2020).

⁵ Law of the Republic of Kazakhstan dated April 16, 2004 N 547 "On accession of the Republic of Kazakhstan to the copyright agreement of the World Intellectual Property Organization" Available on the website <http://adilet.zan.kz/kaz/docs/Z040000547_> (date of access: 19.03.2020).

⁶ Law of the Republic of Kazakhstan dated April 16, 2004 N 546 "On accession of the Republic of Kazakhstan to the Treaty of the World Intellectual Property Organization on performances and Phonograms" Available on the website <http://adilet.zan.kz/kaz/docs/Z040000546_> (date of access: 22.03.2020).

through the customs border are suspected of violating intellectual property rights (principle “ex officio”).⁷

III. Improving legislation in the field of intellectual property

Kazakhstan’s legislation in the field of legal protection of intellectual property, despite the fact that it has been formed to a large extent and meets the main international requirements, requires amendments and additions to a number of issues.

On 3 July 2018, the Law “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Improving Legislation in the field of Intellectual Property”⁸ came into force. The law is largely aimed at regulating the following areas: improvement of legislation in the field of intellectual property; simplification of the procedure for registration of intellectual property objects; elimination of administrative barriers in the field of intellectual property protection. In accordance with this law, amendments were also made to the Civil Code of the Republic of Kazakhstan, the Patent Law of the Republic of Kazakhstan, the tax code and some other normative acts.

The procedure for reviewing applications for patents for inventions, utility models and industrial designs has changed.

The “two-level” procedure for the examination of applications in the expert organisation and the authorised body has passed only to the “one-level” procedure in the expert organisation. The expert organisation “Republican state Enterprise on the right of economic Management” National Institute of Intellectual Property (NIIP) after the examination still does not give an opinion, makes a decision to grant a patent.

The procedure for issuing a patent for industrial property objects has changed.

⁷ Scientific and production enterprise Brochure for the round table 3.06.2015. Available on the website <<https://atameken.kz>> (date of access: 19.04.2020).

⁸ Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on improving Legislation in the field of Intellectual Property” dated June 20, 2018 No. 161-VI Available on the website <<http://adilet.zan.kz/rus/docs/Z1800000161>> (date of access: 22.04.2020).

NIIP not only register inventions, utility models and industrial designs in the relevant state registers, but also issue patents for these objects of industrial property, that is, the grant of a patent is removed from the competence of the Ministry of Justice of the Republic of Kazakhstan and transferred to the competence of NIIP. It is also stipulated by law that the relevant state registers will be posted on the internet resource of the NIIP, and information on the registration of NIIP will be published in the bulletin on a weekly basis. These changes will ensure the issuance of a patent and timely access to patent information as quickly as possible.

The definition of the scope of legal protection provided by a patent for an industrial design has changed.

The scope of legal protection is now determined only in conjunction with its essential features, which are presented in the images on the appearance of the product. The product is now a protected industrial design, provided that it contains all the important features presented in the images of its appearance. When determining the scope of protection of an industrial design, the set of features listed in the list of essential features of an industrial design described in words was not used.

The norms related to the terms of granting rights to industrial property objects and license agreements and their registration have changed.

The law on amendments under the new procedure, in accordance with the “single-level” procedure for registering contracts, the NIIP registers the contract in the relevant state Register of inventions, utility models or industrial designs. In addition, information about the agreement is published in the official bulletin. Now the entire procedure for registration of the contract will take place in the NIIP.⁹

Most of the changes were related to the license terms.

The definition of two types of licenses has been clarified. The license agreement states that the licensor grants the licensee the right to use an industrial property object in the following cases: with the preservation of the licensor’s ability to use it, but without the right to transfer the license to other persons (the only license); does not retain the licensor’s ability to use it, but may provide for the transfer of the license to other persons without the right (exclusive license).

⁹ Civil Code of the Republic of Kazakhstan (Special part) dated July 1, 1999, as amended on June 20, 2018. Available on the website <https://online.zakon.kz/document/?doc_id=1013880> (date of access: 22.04.2020).

In addition to the registration of license agreements and sublicense agreements, it is planned to register comprehensive license agreements and register another agreement containing the terms of the license agreement. The six-month restriction on issuing a license agreement for registration has been lifted. The term of validity of the license is determined by law and, if it is not specified in the contract, it is established in the usual manner for a period equal to five years.¹⁰

Reduced terms of examination of applications for intellectual property objects.

An important change is the reduction of the terms of the examination of applications for intellectual property objects, according to which: examination of applications for a trademark has been reduced from 9 to 7 months; in the name of the place of origin of the product from 3 months to 30 working days; in the topology of integrated circuits from 35 working days to 10 working days.

The total terms of registration of industrial property objects have been significantly reduced, and the deadline for entering information and their changes in the state Register of rights to copyright-protected objects is one working day.¹¹ Information about applications for trademark registration will now be published in the Bulletin within five working days from the date of completion of the preliminary examination.¹²

In connection with non-use, an amendment was made to cancel the sign.

If it was previously possible to cancel the mark due to its non-use within three years from the date of registration or from the date preceding the date of filing the objection, at present the interested person can

¹⁰ Law of the Republic of Kazakhstan No. 422-I of 13 July 1999 On the protection of breeding achievement, as amended on June 20, 2018. Available on the website <https://online.zakon.kz/document/?doc_id=1014046&doc_id2=1014046#pos=5;-98&pos2=349;-96> (date of access: 25.04.2020).

¹¹ Law of the Republic of Kazakhstan “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on improving Legislation in the field of Intellectual Property” dated June 20, 2018 No. 161-VI Available on the website <<http://adilet.zan.kz/rus/docs/Z1800000161>> (date of access: 22.04.2020).

¹² Law of the Republic of Kazakhstan “On Trademarks, Service Marks and Appellations of Origin of Goods” of July 26, 1999 N 456 as amended on January 01, 2016, June 20, 2018 Available on the website <https://online.zakon.kz/document/?doc_id=1014203> (date of access: 22.04.2020).

challenge the registration due to non-use of the mark only within three years preceding the date of filing the objection.¹³

The term “counterfeit goods and their packaging” are defined.

Counterfeit goods and their packaging, in which a trademark or similar mark is placed without the consent of the copyright holder to the degree of confusion, are recognised as counterfeit. Counterfeit goods and their packaging, as well as weapons, equipment or other means and materials used for their manufacture, are subject to withdrawal from circulation and destruction at the expense of the offender on the basis of a court decision that has entered into legal force.¹⁴

Although the law on amendments has already been introduced, the work on improving the legislation in the field of intellectual property will not stop.

IV. Protecting of intellectual property rights during COVID-19

Today, the national constitutions of many states and international treaties legally binding on human rights fully recognise the right of every person to the highest accessible level of health. Currently, a generally recognised part of the right to health is access to the most necessary medicines.

Article 25 of the Universal Declaration of human rights states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹⁵

¹³ Law of the Republic of Kazakhstan “On Trademarks, Service Marks and Appellations of Origin of Goods” of July 26, 1999 N 456 as amended on January 01, 2016, June 20, 2018 Available on the website <https://online.zakon.kz/document/?doc_id=1014203> (date of access: 23.04.2020).

¹⁴ Civil Code of the Republic of Kazakhstan (Special part) dated July 1, 1999, as amended on June 20, 2018. Available on the website <https://online.zakon.kz/document/?doc_id=1013880> (date of access: 22.04.2020).

¹⁵ Universal Declaration of Human Rights. Available on the website <<https://www.un.org/sites/un2.un.org/files/udhr.pdf>> (date of access: 22.03.2020).

Article 12 of the International Covenant on economic, social and cultural rights is binding on almost 85 % of WTO member countries. H. Hestermeyer noted, that in the context of access to medicines, subparagraphs 12 (2) (c) and (d) are very important, as they clarify that the content of the right to health includes the prevention, treatment of epidemic and other diseases and the availability of health care and medical care in the event of illness. Access to medicines is an integral part of therapy for most and is therefore essential in the prevention, treatment and control of diseases, as well as for health care in the event of illness.¹⁶

The TRIPS agreement obliges all WTO members to introduce protection of intellectual property rights, including patent protection for medicines. Fortunately, some provisions of the TRIPS Agreement allow WTO member countries to take into account their health interests in the process of introducing the TRIPS Agreement into national legislation. These rules are called the “flexible TRIPS rules in the field of health care”, which help countries balance the interests of public health with the personal rights granted by patents.¹⁷

Recovery from COVID-19 requires all countries and all people to have access to cheap medicines, vaccines, diagnostics, and other medical products. However, the monopoly powers granted to pharmaceutical companies under the WTO agreement on trade-related Aspects of Intellectual property Rights allow companies to artificially restrict global supply and generate extravagant profits and set prices that may be banned for most countries in the world.

In order to prevent, contain and treat COVID-19, early October 2020, India and South Africa made an official recommendation to the WTO to abandon some provisions of the TRIPS Agreement. The reason for this refusal is that pharmaceutical companies block other manufacturers from producing COVID-19 vaccines and medicines and prevent the expansion of production.

The WTO agreement treats the pandemic as an exception and recognises that intellectual property rights can be revoked. Experts believe

¹⁶ H. Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines*, OUP 2008, p. 105, available on the website <<https://www.corteidh.or.cr/tablas/25644.pdf>> (date of access: 29.03.2020).

¹⁷ OSI, *Playing by the rules: Using Intellectual Property Law and Policy to Improve Access*. Available on the website file: <///C:/Users/user/Downloads/playing_20080818.pdf> (Date of access: 29.03.2020).

that the flexibility in the TRIPS Agreement is not enough to meet global needs, and therefore point out that it should be abandoned.

The proposal to waive the trip rights, submitted on 2 October 2020, assumes that WTO member countries should not fulfil, apply or ensure compliance with certain obligations in the field of intellectual property rights in the TRIPS Agreement as an obstacle to the prevention, treatment and containment of COVID-19.

These provisions apply to the following sections of the TRIPS Agreement: Copyright and related Rights (Section 1); Industrial Designs (Section 4); Patents (Section 5); Protection of Undisclosed Information (Section 7).

The exclusion proposal applies to COVID-19 health products, including medicines, vaccines, diagnostics and other technologies such as masks and fans.

This is not a waiver of all the obligations under the TRIPS agreement, but only applies to the rules necessary for the prevention, containment and treatment of COVID-19.

The exact deadline for refusal is not clearly stated. However, the rejection proposal states that it is necessary to continue until a large-scale vaccination is carried out in the world and most people around the world have developed immunity. The exact duration depends on the negotiations of the members and is limited in time (according to WTO rules). This refusal applies to all WTO members and is not mandatory. Any country that does not want to give up its intellectual property obligations can continue to fulfil them.

On 17 December 2020, based on the proposal of the TRIPS Council, the WTO General Council will agree to extend the discussion of the waiver proposal until 2021.

Informal and official sessions of the TRIPS Council were to be held in mid-January and February 2021, and meetings of the general council on 1–2 March. A number of questions and additional evidence of refusal in connection with the circumstances were considered.

For example, *proponents* of the rejection proposal argue that IP (Internet Protocol) contributes to innovation. Many pharmaceutical corporations are trying to commercialise scientific achievements that are taking place in public laboratories and through government funding around the world. IP rules guarantee a large pharmaceutical company a

monopoly on the market and may even require offer and pricing from governments through other measures to improve the economy. These rules prevent pharmaceutical companies from producing vaccines and medicines by other manufacturers, prevent production expansion, restrict supply, and artificially keep prices high.

Opponents of the waiver said the intellectual property would hinder COVID-19 medicines and technologies, such as diagnostics, medical equipment, treatments and vaccines. For example, South Africa has faced problems accessing essential chemicals for COVID-19 diagnostic testing due to proprietary testing equipment and reagents. In northern Italy, patent holders threatened manufacturers of vent valves for 3D printing with lawsuits for patent infringement. The South Korean manufacturer has developed an alternative version of the pneumonia vaccine for children (PCV13), but Pfizer's aggressive patent strategy forced the company to stop its development and postpone the release of the available version of the vaccine.¹⁸

To date, the issue of making a decision in connection with the extension of the term of withdrawal from certain provisions of the TRIPS Agreement remains open. However, WTO members should carefully consider the health issues related to the COVID-19 situation and come to a common solution.

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In conclusion, the implementation of TRIPS standards requires considerable work from many developing countries to review national legislation and significant financial and human resources necessary to address intellectual property issues.

TRIPS standards are being implemented in the legal system of Kazakhstan through the direct introduction and publication of domestic acts in the field of intellectual property. During the entire period of formation and further development of the system of protection of intellectual property, many changes have been made to the legislation of Kazakhstan. In particular, the authority for registration of rights to

¹⁸ Available on the website <<https://publicservices.international/resources/news/---?id=11516&lang=ru>> (date of access: 26.04.2020).

intellectual property objects was transferred to the expert organisation (NIIP).

Currently, this system has reduced the terms of consideration and registration of applications. The possibility of pre-trial consideration of registration disputes has been expanded. In accordance with the Civil Code, disputes related to the registration of industrial property objects are subject to mandatory pre-trial consideration. According to statistics, the appeal Council under the Ministry of Justice of the Republic of Kazakhstan is an effective tool for pre-trial settlement of disputes. According to the law, the right holder had the right to demand compensation from the offender in the amount determined by the court, depending on the nature of the violation, the market value of unique goods, instead of compensation for damage when the fact of the offense was proved. This innovation will ensure transparency in the activities of the expert organisation.

In the case of COVID-19, the TRIPS agreement plays an important role. The TRIPS Agreement requires all WTO members to protect intellectual property rights, including patent protection of medicines. Although some states have temporarily abandoned some TRIPS regulations due to the obstacles caused by COVID-19, their positions on the overall intellectual property protection system have not changed.