

## **Implementing TRIPS—A Test of Political Will**

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January 1, 2000 was a watershed date for TRIPS and for the WTO—it was the day TRIPS went into effect for developing countries. They were the real targets of TRIPS because they, by and large, had minimal or no IP systems in place. Developed countries already had adequate IP protections in place, albeit with differing approaches to protection and enforcement; for them, TRIPS only shores up some areas and provides new remedies or enforcement mechanisms. For developing countries, however, TRIPS requires adoption of an entire new body of law, together with a framework to effectively enforce these new rights. This is a substantial legal and political undertaking.

The real test of TRIPS (and of the WTO) will be whether developing countries meet these obligations, and if they do not, whether developed countries will hold them accountable until they reach full compliance with TRIPS. Though it is still early (less than a month since the January 1 deadline passed), all indications point toward significant noncompliance by key developing countries.

TRIPS was a major milestone. For the first time, TRIPS laid out a minimum level of adequate IP protection *and* enforcement on an international scale. Achieving a minimum standard of adequate and effective IP protection was a major breakthrough. TRIPS did so by setting wholesale “positive” obligations on members to adopt a new body of law into their national systems. These “positive” obligations were a first for the WTO repertoire of agreements; up until then, agreements had set only negative prohibitions, not large-scale affirmative obligations.

The significant noncompliance with TRIPS that we are facing now poses a real challenge to the WTO members: It tests their commitment, to IP protection and to the WTO system itself. Those of us who believe in strong IP protection and who worked hard to negotiate this agreement to set minimum standards for IP protection need to ensure that our objective in TRIPS, to ensure a minimum standard of adequate *and* effective IP protection, not be undercut. But even more broadly, WTO members as a whole need to support TRIPS, because if they fail to hold members to their commitments in TRIPS, the WTO itself loses prestige, revealing itself to be either unable or unwilling to enforce the agreements that its members negotiate. And if the WTO is to maintain any credibility or power for the future, it has to be able to deliver on the agreements that its members negotiate. This is especially significant if the WTO moves into new areas that may also require members to adopt new legal or regulatory systems.

Supporters of TRIPS need to develop a comprehensive strategy to implement TRIPS successfully and expeditiously, within the timetable envisaged by TRIPS. Members need to use litigation selectively, bringing, in the first instance, those cases that they know they can win, and that present the strategic issues that will develop the necessary body of precedent. Some instances of noncompliance will be better suited to other tools, such as negotiation and conciliation. In either event, members need to have strategies to leverage these gains into larger gains: By picking the cases that will establish legal precedent broad enough for other members to follow and by indicating the resolve of members to pursue dispute settlement as far as necessary until there is full compliance with TRIPS.

## **I. Reexamining Our Assumptions during the TRIPS Negotiations**

In order to diagnose what brought us to this current situation, we must go back to the negotiations and take a look at some of the assumptions we made at that time. Looking back on the negotiations, it appears that we may have placed a bit too much faith in our belief that developing countries would make honest efforts to comply with the letter and the spirit of the agreement voluntarily and that for those countries that did not, litigation would be an adequate backstop.

We are now embarking on an era of significant noncompliance. While many developing countries are striving toward full compliance, some appear to be carving out major areas. Invoking dispute settlement for all of these, would involve substantial litigation, on a scale that was never really contemplated by the negotiators.

**A. Overreliance on the Rule of Law**

In putting our faith in the rule of law, we generally believed that the force of this concept was so infectious that it would necessarily spur voluntary compliance by developing countries to implement effective protection. They would feel bound by their commitments in the agreement and would make honest efforts to meet them. At the same time, however, we underestimated the power of the domestic political and economic forces that complicate a developing country's ability to comply with TRIPS. The new TRIPS commitments create a host of new rights. In countries that did not protect those rights in the past, they necessarily come into conflict with the people who, under the old system, used IP freely without compensating the holders of the IP rights. It is largely a matter of economics, transferring money from users of IP to the creators of IP. And for some developing countries, the costs of fully compensating holders of IP rights are a substantial political burden.

The attitude toward TRIPS implementation reflected in the run-up to Seattle is further troubling because it indicates movement in the wrong direction. A number of developing countries sought an extension of their implementation deadline and a negotiating mandate to roll back TRIPS. Developed countries, for their part, while not conceding an official extension or a new negotiating mandate, apparently agreed to “exercise restraint” in bringing cases. This desire to backslide on the TRIPS commitments indicates that at least some developing countries do not accept the proposition that IP protection, even minimum standards, will be beneficial to them. We need to address this attitude directly; acquiescing to an erosion of TRIPS is a mistake.

In addition, we underestimated the ability of countries to reinterpret the commitments in TRIPS to respond to domestic political and economic pressures. Those of us involved in the negotiations thought that for the most part we had a clear idea of what the provisions meant. And yet, even what should be the most straightforward provisions are being challenged.

A classic example of such a challenge comes from a developed country, one that is even a member of the quad. Canada has cast doubt on Article 33’s seemingly clear 20-year term of protection for patents. In the *Canada 17-20* case, Canada defends its term of *17 years from grant* for certain patents as consistent with Article 33’s required term of *20 years from filing*. Canada contends that the terms are equivalent and that if Canada’s term turns out to be shorter in some instances, that is due to circumstances within the control of the applicant. If Canada wins this case, the case could be read, at its broadest, as standing for the proposition that there are no objective standards in TRIPS. Such a holding would be extremely damaging not only to TRIPS, but to the WTO system as a whole because it eviscerates the agreement negotiated by the members and undermines respect for compliance with WTO obligations.

The impact of revisionism is particularly pernicious for an agreement, such as TRIPS, that requires countries to adopt an affirmative body of law, a set of minimum standards of protection. TRIPS is essentially the only WTO agreement to require adoption of an entire body of law; other agreements, in contrast, merely provide negative prohibitions. When a body such as the WTO negotiates an agreement that requires affirmative steps by countries, as TRIPS does, it will have to go through a period of defending the text of those agreements against attempts to loosen the text by creative lawyering. The TRIPS agreement, like other WTO agreements, is a consensus document, but must be implemented in different legal systems. Implementing *affirmative* requirements is necessarily more difficult than implementing negative prohibitions because it requires members to overcome political inertia to get laws passed and to find ways to implement what may be largely new concepts into a tradition that has no established way to accommodate them.

### **B. Overreliance on Litigation**

In drafting TRIPS, negotiators may have also relied too heavily on litigation as a fallback tool for achieving compliance. This reliance may stem in part from the affinity for litigation as a problem-solving tool, within the United States and among lawyers in particular. For TRIPS, however, litigation is an imperfect tool for several reasons. For one, the sheer volume of potential litigation would overwhelm the system: There would be too many cases, too many countries, and too many provisions of TRIPS at stake. And the cases are complex. In addition to the factual backdrop, they have substantial political dimensions, which are more acute here because TRIPS imposes “positive” obligations that require affirmative steps by countries to comply. WTO litigation should have been relied upon primarily to fill in holes in the agreement, not to fix the type of systemic problems that we face with TRIPS implementation.

We need a strategy to address these new problems more effectively. Asking a country to adopt an entire body of law that has substantial impact on the way the country's economy and society are structured is a major task that requires an array of tools, not simply a panel or Appellate Body report declaring that the country is in noncompliance. Certainly in the most egregious cases, we should pursue our rights through litigation in line with an overall strategy, but at the same time, we need to develop and deploy nonconfrontational ways to convince countries that IP protection is in their interest. And we must look for ways to leverage the gains from particular cases to achieve increased compliance from other developing countries.

## **II. A Strategy to Successfully Implement TRIPS**

The crucial implementation phase of TRIPS raises a serious question for the future of the WTO—Are members committed to the WTO system? If they are, now is the time to prove it by demonstrating the political will to implement the agreement that they negotiated, and to implement it *as it was negotiated*, not watered-down. To water it down now would set a dangerous precedent for the future, that commitments made in negotiations are not binding, that the deal is not actually the deal. To avoid this challenge to the system, members must take action to deal with what appears to be significant noncompliance with TRIPS obligations by developing countries.

### **A. The Need for Political Will**

Successful, expeditious implementation of TRIPS requires two things: a healthy dose of political will and a strategy. Developing countries need political will to implement the hard responsibilities mandated by TRIPS. They need to enact the new body of law prescribed by TRIPS and to set up the enforcement measures to ensure that the IP protections are actually

provided. Developed countries, likewise, will need the political will to live up to the agreement themselves, and to hold developing countries accountable. The real test is whether the US, EC, and other developed countries that believe in strong IP protection will have the political will to bring cases.

## **B. Picking the Right Cases**

We are entering a period of political will as countries decide whether to bring cases. Our task, however, is not just to bring cases. There would likely be too many to bring and they would overwhelm the WTO's dispute resolution resources. Our task is to bring the *right* cases, and to leverage them to get other countries that were not the target of the particular case to observe its result and bring their systems into compliance. Accordingly, we need an overarching strategy. Bringing cases must fit into this strategy.

A successful strategy will contain the following components:

**1. Selective litigation according to a strategic plan; other tools for situations not suited to litigation.** In order to use WTO dispute settlement system most effectively, we should continue to bring cases that are winners—simple, straightforward cases with strategic issues that will build a body of precedent that addresses the systemic issues. Picking only the winners may mean that we do not go after the most commercially-significant country in every instance, so long as we are carefully building the right legal precedent. In making these selections, moreover, we must bear in mind that not every case is a clear violation of TRIPS. For these situations, we must use other tools, such as negotiation and conciliation. The United States should also be working with other countries that support strong IP rights, particularly other members of the quad, to bring cases jointly or to divide up the responsibility of bringing cases.

**2. Leverage efforts to maximize impact.** The most important aspect of the strategy will be to leverage the dispute resolution decisions into greater compliance from all members. Bringing the sure-winners allows us to leverage these gains to encourage other countries to come into compliance on their own, without a need to bring more cases against each country. Diplomacy offers another tool for increasing compliance with TRIPS. Diplomacy can be used at the government-to-government level, but it can also be used in a private context. The business community, especially companies with a major presence in a country, can play a role in helping countries to understand the benefits of fully implementing the legal regime required by TRIPS.

### **III. Lessons from Seattle**

In closing, it is worth taking a quick look at Seattle—the good news and the bad news from Seattle. First the bad news. The fact that members were unable to reach consensus even that the WTO should start negotiations on issues that the members had already agreed to negotiate (agriculture and services) indicates a real breakdown in the system. This breakdown hits TRIPS particularly hard because mustering strong political will is key to carrying TRIPS through the critical stage of implementation by developing countries. Another bad sign was the failure of US and EU cooperation in Seattle which had been the foundation for past success in the GATT/WTO system. Without this cooperation, we would not have had the WTO system upon which TRIPS was built. The US and EU will need to rebuild this partnership to steer through the challenges of the implementation stage.

The good news is that members did not have a chance to tinker with TRIPS. Because there was no Ministerial Declaration, they did not have to deal with the cross-currents

that were building on IP. It is imperative that TRIPS be given a chance. If it is going to succeed, the ministers have to confirm their support for TRIPS now that it is in its most important phase.

We are at a pivotal time for TRIPS, when we will see whether TRIPS has achieved its purpose of bringing developing countries to a minimum level of IP protection. It is also a pivotal time for the WTO generally, when we will see whether the TRIPS model of imposing “positive” obligations on members is a viable approach to future WTO negotiations.