

**TRIPS IMPLEMENTATION IN THE CONTEXT OF A POSSIBLE
MILLENNIUM ROUND**

UNICE POSITION PAPER

I. INTRODUCTORY REMARKS

- From the very start of the Uruguay Round in September 1986, UNICE worked very hard, alongside the Commission, on drafting and adoption of the Agreement on trade-related aspects of intellectual property rights (TRIPs). This unique agreement, which defines minimum standards for intellectual property protection, aims at guaranteeing the worldwide level playing-field for protection of intellectual property necessary to reduce distortions and impediments to international trade.
- European industry considers adoption of the TRIPs agreement to be one of the most fundamental and important results of the Uruguay Round but only a starting point in the achievement of its aim. The effective value of the agreement can only be assessed through its effective implementation by all WTO member countries.

II. STATE OF PLAY

- The TRIPs agreement is still in its infancy as only four years have elapsed since its adoption which is nothing for an agreement which aims at establishing a worldwide level-playing field among countries whose culture, economies, politics and level of development are extremely disparate.
- As a result of concerted efforts and use of the dispute-settlement mechanism, industrialised countries have broadly implemented the agreement satisfactorily and in time.
- On 1 January 2000, the transition period for implementation of the TRIPs agreement by developing countries (LDCs) will expire (Article 65.2). If some of them have prepared to meet this deadline actively, many others tend to see this date as a starting point to bring their legislation into line with the agreement. The year 2000 deadline will therefore be respected by only a minority of WTO member states and UNICE sees the years to come as the beginning of a real crusade to ensure effective implementation of the agreement by all its signatories.
- In addition, the TRIPs agreement grants least developed countries (LLDCs) a further additional period until 1 January 2006 to make the required changes to their legislation. This of course is based on the assumption that they will see this date as a deadline and not as a starting point. UNICE is concerned that a large number of these countries will not by that date have adopted the laws and regulations bringing them into compliance with both the letter and spirit of TRIPs (“*pacta sunt servanda*”). It can easily be foreseen that TRIPs implementation by LDCs and LLDCs will not be smooth and timely.

III. ANALYSIS OF THE SITUATION

- This global picture shows that the TRIPs agreement, which represents a radical change to the philosophy and legal framework of many WTO member countries, has to be seen in a long-term perspective. If developed countries have started to reap the benefits of the agreement, many LDCs or LLDCs have still to understand the added value that this agreement can bring to their economy, namely increased research activities, increased investment opportunities, and increased transfer of the latest technology. In this context, a major educational process is needed.
- UNICE considers this as a major challenge which will require active involvement of industry at worldwide level in the years ahead. In this context UNICE has welcomed the various initiatives from WIPO, WTO and developed countries to provide LDCs and LLDCs with the technical assistance which some of them need to carry out the necessary legislative reforms.
- As indicated above, industry takes this action very seriously, in particular in the light of current discussions in various international bodies which directly oppose and challenge some of the provisions of the TRIPs agreement on the basis, among others, of environmental, public health consumer protection, trade and traditional knowledge grounds. UNICE is concerned that several WTO members openly call their TRIPs commitments into question, and might invite others to follow.
- UNICE notes that several developing countries feel that because of the Uruguay round single undertaking principle, they have had obligations imposed on them in the field of intellectual property that they would like to renegotiate downwards. The attitude of some leading LDCs towards the year 2000 deadline and their TRIPs obligations clearly shows their current thinking on the subject.

IV. UNICE'S VIEW ON A POSSIBLE "TRIPs II"

- UNICE understands that the possibility of placing intellectual property on the agenda of a possible forthcoming new WTO round is currently being discussed. UNICE would like to make clear that this suggestion derives more from political consideration than from a real request from industry. Before the current discussions, nobody in industry ever mentioned the need to relaunch further WTO negotiations in the field of intellectual property.
- As indicated above, industry believes that there is still a tremendous work programme to implement and that time needs to be given for the agreement to mature and to allow WTO members to come closer to the basic philosophy of TRIPs and to reap the huge benefits which can derive from it if it is adequately implemented. This is not the case for the time being and industry does not want to see attention distracted from proper implementation of TRIPs. If this were to happen the value and strength of the agreement would be put in serious jeopardy.
- Before going any further, UNICE would also like to express its scepticism about the term "TRIPs II" which is often presented as a completely separate agreement. UNICE can hardly subscribe to assurances that the provisions of the TRIPs agreement would not be affected by further WTO negotiations on the field of intellectual property, a formulation UNICE prefers to TRIPs II. UNICE understands that the future round would also be based on the single undertaking principle. This kind of negotiation is based on compromises and horse-trading. If intellectual property were to be further negotiated at WTO level, nothing can be excluded from the agenda.

Concessions will have to be made on some subjects and nobody can ensure that this will not affect the content of the TRIPs agreement. Just to give an example, if the Commission could not oppose international exhaustion or further compulsory licensing regimes it would undoubtedly affect the

TRIPs agreement. Extensions of transition periods can also be taken as another example to show that it is impossible to assume that compartmentalisation will be maintained between the TRIPs agreement and further global negotiations.

- Further WTO negotiations on intellectual property would mean, for European industry, strengthening and widening the scope and content of the TRIPs agreement. This would indeed send a bad signal to LDCs and LLDCs countries whose transition periods have not elapsed and which show from passive to active reluctance in implementing the basic provisions of the TRIPs agreement. A step-by-step approach is needed on this subject and, before any further building-up exercise is launched, it should be ensured that the basis of the TRIPs agreement is consolidated. The converse would create a growing rift between demand and reality and could call into question implementation and value of the whole agreement.
- UNICE is not saying that no further improvements could be achieved at world level. Some sectors might be interested in further discussing uniform rules on specific aspects of intellectual property protection. But there is a time and a place for everything and in the light of the above arguments UNICE, which is the umbrella organisation for all sectors of European industry, believes that the time is not ripe to include intellectual property as a subject for new negotiation in an imminent WTO round, apart from what is foreseen by the built-in agenda. This conclusion is based on a thorough assessment of the situation in the fields of patent, trademark and design and copyright.
- In addition, UNICE would like to stress that in order to ensure the on-going enforcement process, it is indispensable that any moratorium on dispute settlement cases is explicitly excluded from the launch of a new round. UNICE urges the Commission and EU governments to adopt a clear statement that enforcement of past WTO agreements and dispute settlement cases will continue unaffected by the launch of a new round.

V. THE WAY AHEAD

- UNICE could easily draft a list of subjects on which improvements at worldwide level would be welcomed by European industry. It is also easy to guess what sort of demands LDCs and LLDCs would have in negotiating what they see as more balance in their favour. Current discussions in the TRIPs Council, the Trade and Environment Council and other international fora are extremely revealing. But this is not the question at stake.
- The question which matters for the companies UNICE represents is how to ensure effective improvement for the protection of intellectual property in order to benefit from the level playing-field which TRIPs can allow. This will not be achieved for the time being by further WTO global negotiations. What matters now is enforcement. If in 10 years from now the TRIPs agreement is efficiently implemented by most WTO member states, then the TRIPs agreement could be regarded as a success. Having potential improvements on paper will not help in this.

VI. HOW TO ACHIEVE THE NEEDED IMPROVEMENTS

- UNICE believes on the contrary that efforts aimed at improving the international situation in the field of intellectual property must be based on the existing TRIPs agreement, its dispute-settlement mechanism and its built-in agenda. Looking at the latter, it can rapidly be seen that a full work programme has been agreed by WTO members. This work program is progressive, well scaled in time and leaves room for sensible improvements. The built-in agenda includes:

- review of the exclusion from patentability for certain plants and animals (Article 27.3) which should start four years after the date of entry into force of the WTO agreement, ie 1999;
 - review of TRIPs implementation in the year 2000 (Article 71.1);
 - review of the TRIPs agreement itself in 2002 (Article 71.1), on the basis of the experience gained in its implementation;
 - possibility under Article 71.1 to undertake review in light of any relevant new developments;
 - use of the dispute settlement against countries that failed properly to implement their TRIPs obligation.
- This is a very extensive programme which should be respected and which is the right way to build upon the TRIPs agreement. The built-in agenda already represents a challenge in itself for European industry of how to negotiate improved protection of intellectual property without calling into questions the ongoing implementation of the agreement.
 - The provision of Article 71.1 could be used to discuss specific questions as, for example, the impact of technological changes on copyright protection, or any other new development, without having to discuss intellectual property in the context of a global round based on the single undertaking principle. This could be discussed in the TRIPs Council if all its members agree.

VII. CONCLUDING REMARKS

- The TRIPs agreement is one of the major achievements of the Uruguay round and it must be given time to develop and to allow all WTO members to work together towards its full and effective implementation. UNICE is concerned that a failure by a substantial number of developing countries to implement TRIPs in a proper and timely fashion will seriously call into question its viability and its value.
- UNICE believes that the right strategy that will allow the building-up of strong and harmonised intellectual property protection is to concentrate for the time being in injecting life to the provisions of the agreement at worldwide level by proper implementation, enforcement and assistance to those countries which need it.
- UNICE is of the strong opinion that the time is not ripe to include intellectual property as a subject for further negotiation in an imminent WTO new global round. The European and international atmosphere in the field of intellectual property is not propitious to this exercise. This would endanger the “acquis” of the TRIPs agreement and would upset its effective implementation.
- In addition, UNICE is of the firm opinion that instead of imposing to those countries which are already showing resistance to implementing the basic provisions of the TRIPs agreement higher standards for protection for intellectual property rights, industry needs to concentrate on further education of and discussion with those countries to help them in fulfilling their obligations.
- Discussions in the field of intellectual property should therefore be limited to ensure effective and timely implementation of the TRIPs agreement and pursue the work programme embodied in the built-in agenda. Once the agreement has been consolidated, further negotiations could be launched, on the basis of experience.
- UNICE and the companies it represents do not want to see attention distracted from implementation of the agreement and urge the Commission and EU governments to restrict any discussion to this field rather than embarking on risky and hazardous negotiations which might result in compromises which can undermine irremediably the content and implementation of the TRIPs agreement.

- In this context, UNICE urges the Commission and EU governments to adopt a clear statement that enforcement of past WTO agreements and dispute settlement cases will continue unaffected by the launch of a new round.

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