

TRIPS comes of age...?

reflections on TRIPS at 20:
whatever next?

- 20 years of TRIPS:
 - a 2 minute trajectory
- where it stands today
 - 6 ‘impossible things’ about TRIPS
- twin challenges:
 - coherence and policy legitimacy
- harvesting the lessons of implementation

Marrakesh 1994

1. **A 'TRIPS Agreement'**: trading partners have a legitimate interest in how IP is protected;
2. **new international organisation**, building the law of IP and its administration integrally into the architecture of trade law;
3. **uniform dispute settlement mechanism**
IP-related economic interests defended through a legal process, potentially linked to other trade interests

in short...

an “Agreement on Trade-Related Aspects
of Intellectual Property Rights”

or

agreement that intellectual property

is

trade-related

- IP standards now part of the deal in trade negotiations
 - an integral dispute settlement mechanism
 - multilateral institution for IP aspects of trade relations
- legal/institutional place of TRIPS still not entirely settled:
 - what's the **cause of action for TRIPS disputes** – beyond 'compliance'?
 - is TRIPS a 'market access' agreement?
 - what are legitimate expectations?
 - sole TRIPS issue before WTO Ministerial Conferences
 - in 2009, 2011, 2013...
 - symptomatic of theoretical uncertainty about those 'trade related aspects' of IP

TRIPS @ 0

initial concerns: 'TRADE & IP'

- no place for **IP in a trade law** system?
 - a 'behind the border', 'trade and ...' agreement
 - not about trade, but protectionism
- **fragmentation** of international IP law – divergent 'trade-related' and 'conventional' readings of the same legal standards?
 - Berne *qua* Berne, Berne *qua* TRIPS (Dinwoodie)
- punitive **trade sanctions** to enforce grudging compliance by developing countries?

early 'trade and IP' anxieties

Then there was the question of intellectual-property protection, and the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement -- another potential obstacle. Intellectual property does not belong in the WTO, since protecting it is simply a matter of royalty collection. But the matter was forced onto the WTO's agenda during the Uruguay Round by the pharmaceutical and software industries, even though this risked turning the WTO into a glorified collection agency. The move gave multilateral legitimacy to the use of trade sanctions to

Bhagwati

The TRIPS Agreement: Imperialistic, Outdated, and Overprotective

*Marci A. Hamilton**

Final documents of the Eighth Conference of Heads of State or Government of Non-Aligned Countries, held at Harare, Zimbabwe, from 1 to 6 September 1986

(iv) The Heads of State or Government recognized that GATT did not have jurisdiction in the areas of services, intellectual property and investment. They

TRIPS @ 5:

“IP & trade, and TRIPS & ...”

the policy context broadens:

“TRIPS and ...” debates

- Health
- Biodiversity
- Food security
- Human rights
- Development



UNITED NATIONS HIGH COMMISSIONER
FOR HUMAN RIGHTS

UNITED
NATIONS

E

Intellectual property rights and

Sub-Commission on Human Rights



Economic and Social
Council

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GENERAL

E/CN.4/Sub.2/2001/13
27 June 2001

Original: ENGLISH

19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The impact of the Agreement on Trade-Related Aspects of Intellectual
Property Rights on human rights

Report of the High Commissioner

(01-5860)

WORLD TRADE
ORGANIZATION

MINISTERIAL CONFERENCE
Fourth Session
Doha, 9 - 14 November 2001

DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

Adopted on 14 November 2001

TRIPS @ 10:

coming to terms with implementation

an implementation narrative

- a richer empirical base of differentiated experience
- across a wider, more inclusive geographical base

an analytical narrative

- a new strain of international IP jurisprudence
- growing multilateral cooperation on policy analysis

a different 'fragmentation' narrative

- a shift in the centre of gravity of normative work



**Economic and Social
Council**

Distr.
GENERAL

E/C.12/GC/17
12 January 2006

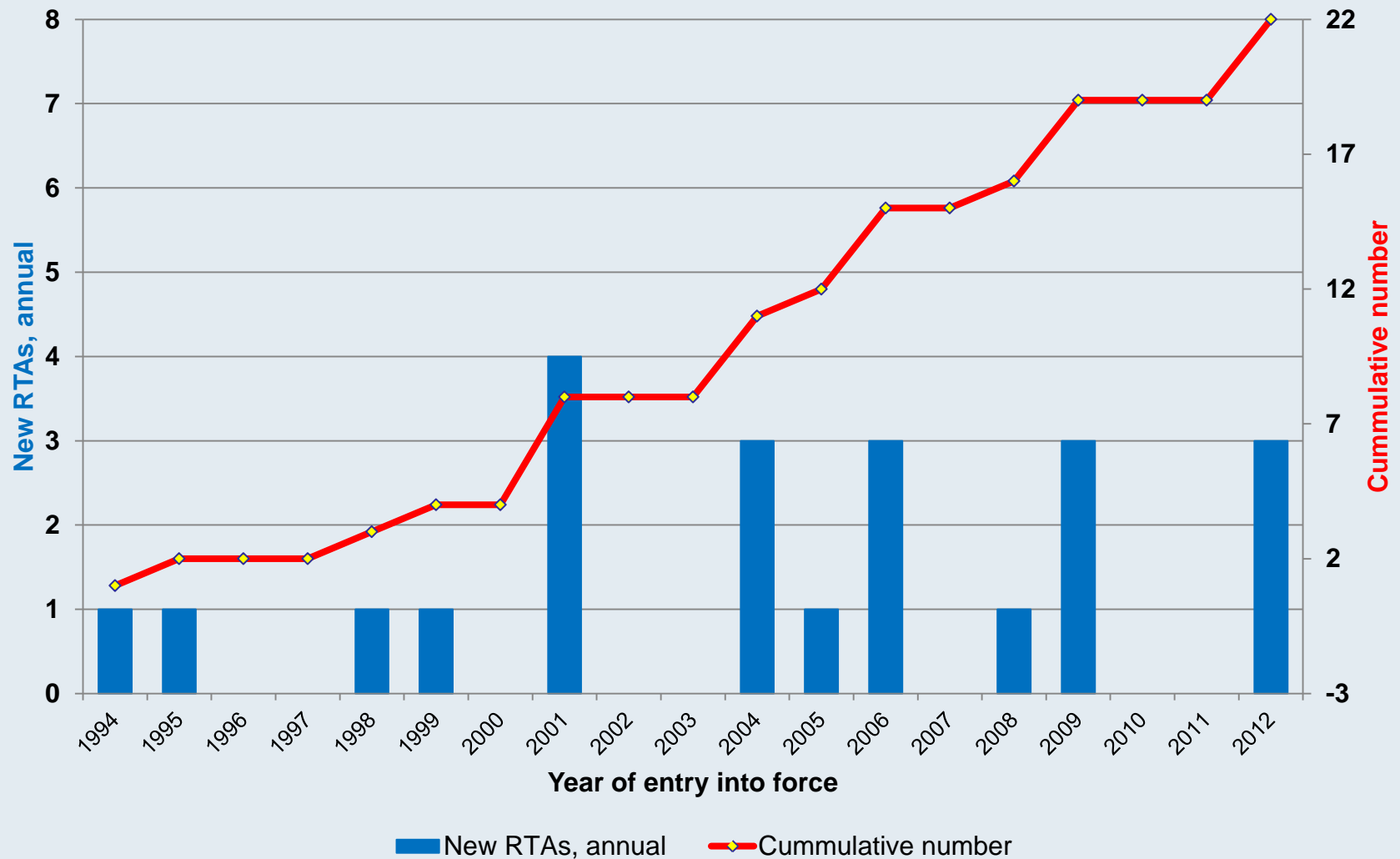
Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Thirty-fifth session
Geneva, 7-25 November 2005

GENERAL COMMENT No. 17 (2005)

The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)

non-violation dispute settlement in bilateral trade agreements



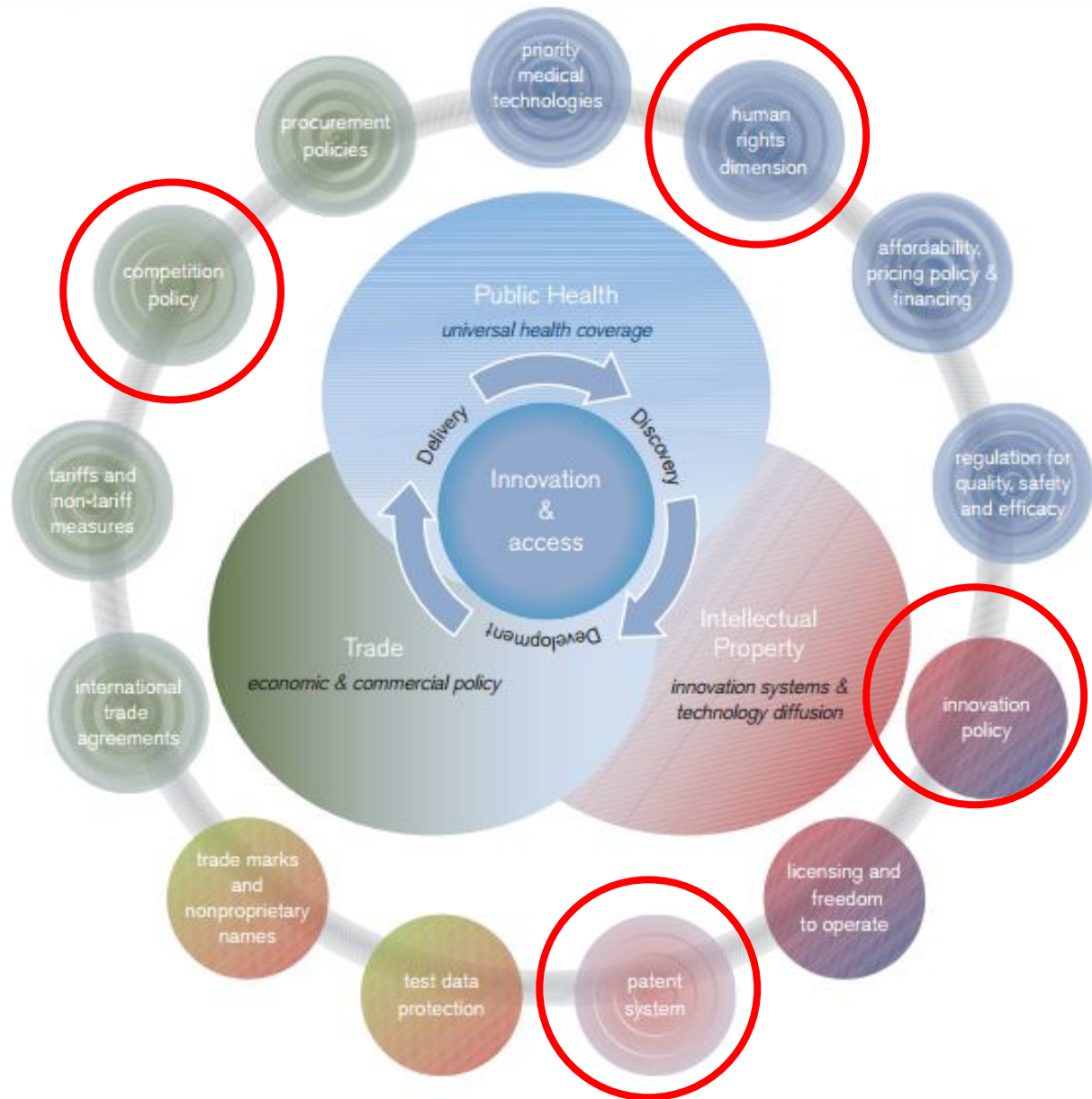
TRIPS @ 20:

multilateral coherence, bilateral diversity

- TRIPS an emerging benchmark of legitimacy?
 - a framework for a balanced, coherent system
 - enabling reasonable interoperability of national IP systems, not a model law: ‘flexibilities’ & policy options
 - echoes of Paris, 1883
- building substance into the ‘coherence’ narrative
 - health: a collaborative review of access and innovation policy measures within their operational context

Promoting Technological Intersections

Mapping the policy intersections: key areas of law and policy for innovation and access



Health is a fundamental and universal human right. The attainment by all peoples of the highest possible level of health is the foundational objective of the WHO. The Preamble of the WHO Constitution emphasizes that international cooperation is essential for the promotion of health:

"The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all.

Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger."

This central objective of the WHO, the essential logic of international cooperation, and the responsibility to take practical action have compelling implications for the international community. Accordingly, public health outcomes are of importance to WIPO, which also focuses on the social and developmental dimensions of innovation and the transfer and dissemination of technology. WIPO policy discussions and technical cooperation activities, including a range of programmes conducted in partnership with the WHO and the WTO, have focused increasingly on public health matters.

WTO members have stressed the need for a positive link between public health and the global trading system. In the Declaration on the TRIPS Agreement and Public Health (Doha Declaration),¹ members "recognize the gravity of

the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics", and articulate "the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of wider national and international action to address these problems".

*"... we will be exploring how best to harvest the potential of [the three organizations'] reserves of knowledge and information, to strengthen cooperation towards a goal all can surely share: put simply, that of getting needed medicines to the people who are in most need."*²

Pascal Lamy, *Director-General, WTO*

1. Policy coherence

The WHO, WIPO and the WTO each have distinct, but complementary, mandates to work on issues relating to public health, innovation and intellectual property (IP), and trade. The three organizations therefore share a responsibility to strengthen practical dialogue between themselves and other partners in order to fulfil their mandates more effectively, to ensure the efficient use of resources for technical cooperation and to avoid duplication of activities.

Coherence is vital in international action to address public health problems. Such coherence has never been

and now....?



**Why,
sometimes I've believed
as many as six impossible
things before breakfast**

6 ‘impossible things’ about TRIPS

1. no ‘**trade sanctions**’ for non-compliance
2. **dispute settlement** activity initially more transatlantic than ‘north vs. south’; then ‘south vs. north’
3. judicious, progressive, **adaptive implementation** of TRIPS, not grudging, zerosum compliance
4. **coherence**:
 - external: recognition of public international law and policy
 - internal: no fragmentation of IP law
5. IP might be ‘**trade-related**,’ after all....
6. **developing countries use TRIPS** to leverage ‘traditional’ market access and progress interests

... and one more....

7. 'TRIPS demandeurs' and litigants are mostly not from central casting

WORLD TRADE ORGANIZATION

Trade Negotiations Committee

DRAFT DECISION TO ENHANCE TRIPS AGREEMENT AND THE

Communication from Brazil, China, Colombia, Ecuador, Guatemala, Honduras, India, Indonesia, Jamaica, Kenya, Liechtenstein, Madagascar, Mauritius, Mexico, Morocco, Nicaragua, Oman, Pakistan, Paraguay, Peru, Philippines, Singapore, Sri Lanka, Thailand, the ACP Group, and the United States

The following communication, dated 15 April 2011, is being circulated at the request of the delegations of Brazil, China, Colombia, Ecuador, Guatemala, Honduras, India, Indonesia, Jamaica, Kenya, Liechtenstein, Madagascar, Mauritius, Mexico, Morocco, Nicaragua, Oman, Pakistan, Paraguay, Peru, Philippines, Singapore, Sri Lanka, Thailand, the ACP Group, and the United States

WORLD TRADE ORGANIZATION

Trade Negotiations Committee

DRAFT DECISION TO AMEND SECTION 3 OF PART II OF THE TRIPS AGREEMENT

Communication from Albania, China, Croatia, European Union, Georgia, Guinea, Jamaica, Kenya, Liechtenstein, Madagascar, Sri Lanka, Thailand, Turkey, and Switzerland

The following communication, dated 15 April 2011, is being circulated at the request of the delegations of Albania, China, Croatia, European Union, Georgia, Guinea, Jamaica, Kenya, Liechtenstein, Madagascar, Sri Lanka, Thailand, Turkey, and Switzerland

TN/C/W/60
19 April 2011

(11-2028)

Original: English

the current dynamic of dispute settlement

<u>DS467</u>	Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Indonesia)	Consultations requested: 20 September 2013 Current status: Panel composed
<u>DS458</u>	Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Cuba)	Consultations requested: 3 May 2013 Current status: Panel composed
<u>DS441</u>	Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Dominican Republic)	Consultations requested: 18 July 2012 Current status: Panel composed
<u>DS435</u>	Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Honduras)	Consultations requested: 4 April 2012 Current status: Panel composed
<u>DS434</u>	Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Ukraine)	Consultations requested: 13 March 2012 Current status: Panel composed
<u>DS409</u>	European Union and a Member State – Seizure of Generic Drugs in Transit (Complainant: Brazil)	Consultations requested: 12 May 2010 Current status: In consultations
<u>DS408</u>	European Union and a Member State – Seizure of Generic Drugs in Transit (Complainant: India)	Consultations requested: 11 May 2010 Current status: In consultations

dispute settlement in context

- 162 members: on average fewer than 2 TRIPS disputes per year; most settled or effectively withdrawn without a panel finding.
- 12 determinations of TRIPS non-compliance.
 - No ‘sanctions’ for noncompliance
 - One agreed arbitrated compensation (EU v US)
- in 20 years, 3 findings of TRIPS non-compliance by developing countries (India 1997, China 2009)
- in the past five years, the only ‘TRIPS disputes’ are those filed **against developed countries** by Brazil, India, Cuba, Dominican Republic, Honduras, Indonesia and the Ukraine .

meanwhile, ‘implementation’ ...

- notified laws of 132 distinct jurisdictions
- 6,500 legal texts; over 150,000 pages
 - a plethora of legal and policy diversity
- 100 overviews of enforcement mechanisms
- 800 TRIPS Council review documents
 - detailed record of unique multilateral review
 - an interactive dialogue about policy choices
- LDC process – identifying/meeting individual priority needs from development perspective
- trade policy review, accessions, regionals

132+ versions of that ‘should’

the policy context:

TRIPS articulates the “should” of IP

protection of intellectual property rights should:

- contribute to the promotion of technological innovation and
- to the transfer and dissemination of technology,
- to the mutual advantage of producers and users of technological knowledge and
- in a manner conducive to social and economic welfare, and
- to a balance of rights and obligations.”

WTO TRIPS Agreement, art. 7

'TRIPS' discourse today

11 INTELLECTUAL PROPERTY, CLIMATE CHANGE AND DEVELOPMENT	7
12 INTELLECTUAL PROPERTY AND INNOVATION: COST-EFFECTIVE INNOVATION	8



The screenshot shows the WTO website header with the logo, navigation menu, and search bar. The main content area features a breadcrumb trail: [home](#) > [trade topics](#) > [trips](#) > [climat change](#). Below this is a sub-header 'TRIPS: CLIMATE CHANGE' and a main title 'The WTO intellectual property (TRIPS) agreement and climate change'. An image of two hands shaking is shown next to the title. The main text discusses the relevance of intellectual property rights to climate change technologies and mentions the WTO's TRIPS Agreement and Council meetings.

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TRIPS: CLIMATE CHANGE

The WTO intellectual property (TRIPS) agreement and climate change

Intellectual property rights – how they are granted, regulated and exercised – are relevant to how technologies related to climate change are developed and transferred to developing countries. So, more specifically, is the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). International policy debate on climate change has touched on several issues concerning intellectual property in general, and the TRIPS Agreement in particular. WTO members have discussed this in TRIPS Council meetings.

coherence and legal stability

- in TRIPS dispute settlement, conscious policy choice to ensure coherence in international law and policy....
 - elucidation, not balkanization, of IP law
 - interpreters seek legal and policy coherence
 - avenues for recognition of wider policy issues
- ... while remaining true to the actual text as agreed between WTO Members
 - benefits of the rule of law, given inevitability of disputation over IP component of trade

so, two essential challenges....

the challenge of **coherence**
or the 'TRIPS and...' debate

the challenge of **legitimacy**:
or, how to give effect to that 'should'?

the challenge of coherence
the challenge of legitimacy

and the two challenges together:

**coherence integral to legitimacy ...
and integral to practical effectiveness**

navigating public policy issues

- an international 'TRIPS implementation' agenda?
 - in a 'steady state' period what does it mean to use
 - TRIPS standards
 - TRIPS flexibilities
 - in working towards broader policy goals
 -on a richer more diverse empirical and theoretical base?
 - ... how can we **learn collectively** from what has been done individually?
- ultimately, concerns are practical
 - actually delivering on innovation and access to food, health, clean technology....
 - **'collective management of TRIPS'** as a practical vocation...