

## TRIPS and the Promotion of National Interests

How unreasonable people are! They never use the freedoms that they have but demand those they do not have.

*Søren Kierkegaard, Either/Or*

This concluding chapter reviews the essential character of TRIPS as a legal instrument within a trade law system, concentrating on the critical role of the domestic policy maker. The real-world impact of TRIPS depends on how its principles are translated, and given actual effect, in national laws and their administration and enforcement, and how the WTO dispute settlement system influences the choices of national legislators and policymakers on IP matters. The essence of the practice of TRIPS law consists in probing, understanding, and optimizing the linkage between TRIPS as a legal system, governing international relations, and the national layer of IP law and policy.

In retrospect, the idea of trade agreement on IP protection now seems a natural consequence of the increasing knowledge content of international trade, and the tensions and uncertainty that can result from disagreement over what constitutes an adequate or fair level of IP protection. TRIPS was thus intended to foster greater certainty and stability in the management of trade relations concerning IP, establishing an objective level of mutual expectations and offering the benefits of a rules-based system. Even so, TRIPS does have unsettled, contested aspects. Its formal legal scope can still be unclear on key questions: it took a case

(*Havana Club*) to go to the AB, and a reversal of a panel's findings, to clarify whether TRIPS obligations covered the entire field of business name protection at all. And its actual effect on government behaviour and on legislative and administrative choices varies greatly: portions of some national legislation are taken directly, word for word, from the TRIPS text; in some cases, legislation is lacking altogether in certain areas of IP law, in tension with longstanding obligations; even a formal finding of non-compliance with TRIPS does not necessarily lead to immediate revision of the laws in question; but the more general experience is for legislation to be crafted according to specific national needs and interests, with a view also to respecting TRIPS and other international obligations.

Understanding how countries determine their national interests under TRIPS, how those interests feed into specific policy and legislative choices, and how they defend those choices, is essential for a thorough practical working knowledge of TRIPS. The 'trade' context of TRIPS—its situation within the broader body of trade law, transparency and review processes and dispute settlement administered by the WTO—clearly sharpens attention to international obligations. Even so, countries perceive and act upon their interests relating to TRIPS in diverse ways.

## Beyond IP Producer versus IP Consumer?

Analysis of national interests under TRIPS frequently begins with a stark choice: a country is either a net consumer of IP protected material, and thus its interests consist in maximizing exclusions, exceptions, and limitations to the extent legally defensible under TRIPS; or it is a net producer of IP and thus may have an interest in 'strong' or 'TRIPS plus' IP protection, higher than the bare minimum required. Yet any country's perceived interests under TRIPS, as mediated through the WTO dispute settlement mechanism, will be more complex and variable than this monochrome picture suggests.

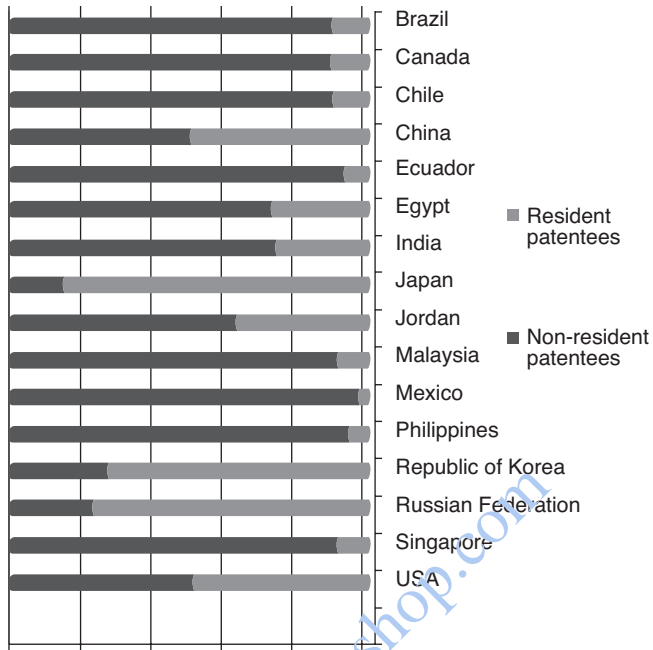
Most countries are net 'importers' of IP, however one measures the flow of IP—in almost all economies, whether developed or developing, IP is predominantly owned by foreign firms, and most report a net outflow of royalties and licence fees and net imports of trade in IP-based goods and services. Yet many countries look to more effective management of knowledge and deployment of IP law and policy as central to their economic strategies. The national treatment principle rules out the possibility of offering stronger IP protection only to domestic interests. And a 'stronger' IP system is seen as a means of attracting

investment and the inflow of investment. TRIPS compliance can be used as a signal to this end. A country may seek to pursue interests both as consumer *and* as producer of IP, by accepting the systemic benefits of IP protection as essential infrastructure for the knowledge economy, regardless of whoever may own or exercise individual IP rights. Against this view, predominant foreign ownership of IP may induce a kind of mercantilist instinct—the idea that knowledge capital only benefits a nation to the extent that it is owned by its own nationals, rather than as a means of enabling mutually beneficial trade and commercial exchanges. Yet a low level of patent, trademark or design applications by foreign firms does not necessarily promote economic growth, and increased practical activity by foreign applicants can be both a cause and effect of improved technological and economic growth. Considering exceptions and limitations to IP rights, domestic nationals stand to benefit more from an expanded public domain than foreign nationals, simply by virtue of their physical location.

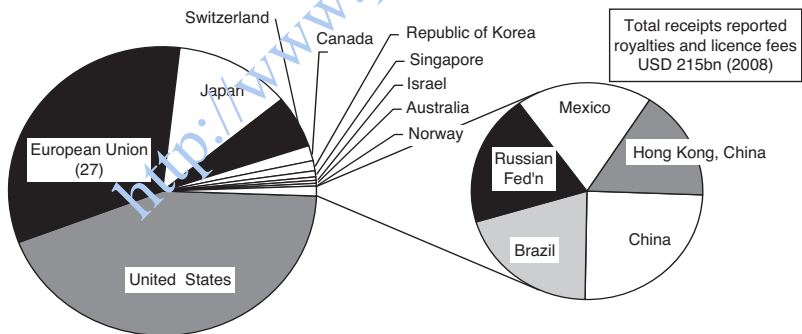
Figure 7.1 illustrates three ways of measuring national trade interests in IP.

- IP assets—proportion of local to foreign right holders.
- iTunes trade—exporting royalties or licence fees.
- iPod trade—exporting high technology goods.

These perceptions of IP-related interests flow into how countries manage their international trade relations. TRIPS and subsequent bilateral and regional deals on IP standards are, in effect, agreements to recalibrate the terms of trade in the intangible material recognized as IP, by negotiating the scope of subject matter that is protected, the scope of rights that flow from protection, and the scope for limitations or exceptions to those rights. But should a country see such deals as inherently a net trade concession to foreign interests, accelerating a net outflow of IP-related earnings, and for which a compensatory trade-off in ‘traditional’ market access should be negotiated? Or can such ‘strengthening’ of IP protection be inherently worthwhile, as an objective step towards laying the groundwork for a robust indigenous innovation economy? Are exports of royalties indicators of a sound investment in a knowledge economy, or a pay-off to foreign rent-seekers as the pragmatic cost of holding together an otherwise beneficial multilateral trading system? Or can they be both?

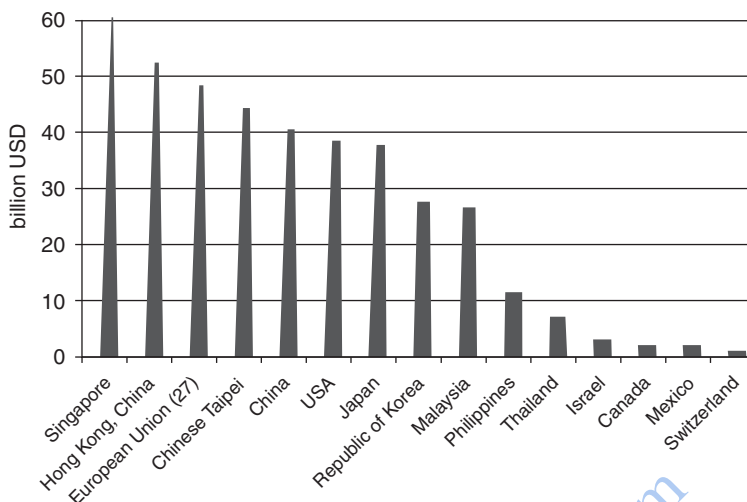


i. Proportion of Patents Granted to Domestic and Foreign Patentees, 2008  
Source: WIPO



ii. 'iTunes Trade'? Top 15 Exporters of Royalties and Licence Fees, 2008  
Source: WTO

Figure 7.1 Measuring 'Trade-Related Aspects' of IP



iii. 'iPod Trade'? Top 15 Exporters of Integrated Circuits and Electronic Components, 2009  
Source: WTO

Figure 7.1 (cont.)

## And Beyond Zero-Sum Trade-Offs?

Conventional trade negotiations are typically zero-sum in character. Deals on market access are considered as 'concessions' or trade-offs—so to gain market access in one country, you must pay for it by granting equally valuable access to your market. Yet classical trade theory tells us that liberalized international trade is mutually beneficial, and that trade 'concessions' towards reduction of trade barriers promote welfare even if they are made unilaterally. Even so, we need the two-way reciprocal dynamic to structure and to drive progress towards trade deals—the instinct to trade and barter is so deeply engrained. Negotiations on IP issues confront a similar paradox: a nation's IP laws should promote public welfare; TRIPS:7 itself enshrines this as the objective of IP protection. No advocate of stronger IP laws or higher IP standards argues that such revisions would actually damage the public's wellbeing. Yet IP negotiations—negotiations over the terms of trade in knowledge products—retain a strong zero-sum flavour, and are structured through trade-offs, especially through linkages with other sectors. The Uruguay Round package itself is the archetype of this phenomenon—without

the logic of a 'single undertaking' involving commitments on trade in agriculture, textiles, and industrial goods, it is most unlikely that the majority of developing countries would have unilaterally accepted the standard of IP protection established in TRIPS. Yet, on the face of it, TRIPS-level protection of IP is intended positively to serve the interests of all those countries which apply its standards. Casting IP protection as a bare trade concession suggests a lack of practical confidence in systemic benefits from strengthened IP law and administration.

In fact, such orderly, mutually exclusive caricatures of national interests rarely do justice to the range and complexity of the actual interests of any country: few are, or aspire to be, exclusively either consumers or producers of IP. IP policy-making is a more complex game, involving the reconciliation of diverse, but intertwined, domestic and foreign interests. What is an incentive to foreign investment, technology-based commercial exchanges and technology diffusion, and what is a concession to foreign economic interests? The very same measure could be seen as both—and, often, the difference can seem more a matter of perception and ideology than a clear objective division. Similarly, when IP legislation is influenced by foreign models and international standards, is this submission to foreign interests, or is it a means of importing the benefits of policy development elsewhere, and facilitating mutually beneficial transactions? As in much of the world of working with TRIPS, both could be true: policymakers cannot construct a system of IP protection in total isolation from global standards; but, equally, they cannot ensure the optimal policy settings to promote national interests by uncritically importing foreign models.

In principle, policymakers should seek, objectively, to determine what their priority domestic interests are; then review at the domestic level what policy options would best further those interests; and only then to consider the international environment—trading and political relationships as well as legal obligations—which sets legal, political, and pragmatic bounds to domestic choices. But TRIPS also set a significant precedent—the idea that standards of IP protection can be used in trade negotiations to leverage market access in other sectors. Thus the cost of concessions made to purchase trade access in other sectors (typically agriculture and industrial goods such as textiles) may be measured by the degree to which preferred domestic policy options on IP matters are precluded by the legal constraints negotiated under TRIPS. Most countries did not enter the TRIPS negotiations having already concluded that their economic wellbeing objectively required at least a 20-year patent term and a three-step test to govern exceptions to patent rights; compulsory licensing of patents was effectively dormant in many countries yet had not been identified domestically as a priority need for legislative review or for the tighter procedural safeguards of TRIPS.

## Assessing Impact in a Changing Context

The nature of IP protection means that it can be very difficult to predict the subsequent effects of negotiated changes in IP standards—both in terms of the actual legal scope of new standards agreed to, and the economic costs and benefits of such constraints on domestic policy choices. The effect of negotiated changes may only be fully felt or even become measurable years after the deal has been closed. By then, the constantly evolving international legal and political environment may have shifted considerably, so that expected costs may be deflected, unlooked-for gains may be reaped, and new flexibilities explored. And, above all, with rare exceptions, international agreements such as TRIPS do not directly predetermine specific outcomes from IP protection at the national level, and these remain within the province of national sovereignty.

Equally, the initial calculation of interests prior to or during negotiations may overlook possible benefits from accepting certain obligations and renouncing independently preferable domestic policy choices. An autonomous search for domestic perfection in policy settings may drive out a more attainable second-best outcome that permits cooperation on the administration and enforcement of IP. Few countries have sufficient resources to meet in complete isolation the administrative challenge of ensuring high quality examination and registration of IP, and some convergence of criteria for IP protection may enable improved practical outcomes even within a less than ideal set of legal standards. Equally, convergence in IP standards may facilitate trade and investment flows that outweigh losses from falling short from a theoretically optimal, autarchic regulation of IP.

An objective determination of national interests under TRIPS must take account of the dispute settlement dimension. Actual decisions made in dispute settlement under TRIPS provide an immediate imprint of the concrete trade interests prioritized and pursued by a country. Disputes over IP norms and standards mostly do not concern a distinct knowledge economy, but are very much linked to the world of trade in goods. For instance, the United States and Australia pursued the 'TRIPS' dispute *EC—Trademarks and Geographical Indications* partly out of concern for effective future market access for agricultural products—'stuff you can drop on your foot'. The dispute dealt with fundamental non-discrimination rules under the GATT, the central agreement on trade in goods agreement, alongside the disputed provisions of TRIPS. The only fully successful defence against a TRIPS complaint in the WTO dispute settlement system was by Indonesia; the case, *Indonesia—Autos*, did not concern IP protection as such, but challenged trademark measures that were part of a national car programme, a conventional form of industry policy. And Antigua and Barbuda, Brazil, and Ecuador have

explored cross-retaliation under TRIPS to leverage market access in agricultural goods and online gambling services.

## **Towards Richer Ideas of ‘Compliance’: Treaty Implementation as Good Policy, and Good Policy as Treaty Implementation**

There is a rich academic debate about the precise legal character of WTO obligations, and TRIPS obligations in particular—the extent to which legal compliance is a multilateral obligation in itself, or whether TRIPS can be seen as a more pragmatic system of managing the IP dimension of bilateral trade relations. To take a conservative view of its legal character, TRIPS is strictly a legal regime between discrete legal entities, determining mutual expectations regarding protection of IP in national jurisdictions. In conjunction with the DSU, TRIPS provides a framework for determining compliance with those expectations and containing reactions to disappointed expectations. Complaints about failure to meet expected standards are initiated, pursued and ultimately sanctioned by other WTO Members through bilateral disputes, rather than by the WTO as such.

If what mattered to countries were not compliance as an end in itself, but rather concern about the costs of non-compliance, then the ultimate effect of TRIPS on domestic policymakers and legislators would be defined more by a pragmatic assessment of the likely impact of findings of non-compliance, including the political fallout from being found non-compliant and the cost of the coercive ‘sanctions’ that popular commentary attributes to the WTO as its distinguishing characteristic. The principles of the DSU stipulate that TRIPS should essentially function to prevent or settle bilateral disputes in a more objective, less divisive and predictable multilateral framework, and should set a fair ceiling to legitimate retaliation, in contrast to the more anarchic state of affairs that applied prior to the incorporation of multilateral standards on IP within the trade law framework. Ideally, TRIPS should objectify trade disputes over IP-related commercial interests, contain the escalation of disputes and limit their linkage with unrelated trade interests.

Early analyses of TRIPS as a multilateral regime emphasize trade sanctions and the heavy compliance costs for developing countries. Compliance with TRIPS, and willingness to bear the burden of compliance, are assumed to be motivated by the risk of ‘sanctions’, rather than acceptance of the inherent legitimacy of the

agreed standards. This political background may suggest that choices actually to comply with TRIPS—its real influence on state behaviour—would be determined by an objective risk assessment as to the likelihood of a successful dispute or, to take a harder-nosed approach, the likelihood of a dispute in which the ultimate assessed compensation or withdrawal of concessions was costlier than compliance; in other words, compliance is no longer an end in itself. Yet many countries have sustained TRIPS-inconsistent provisions in their laws for years without legal repercussions, and formal determinations of TRIPS inconsistency may be unresolved for years. And limited non-compliance with TRIPS—'cross-retaliation'—is accepted as a legitimate means of pursuing trade interests in other fields.

So if TRIPS compliance were rooted in fear of sanctions, not from commitment to comply as a true legal obligation and acceptance of the inherent legitimacy of the obligations, this would suggest that a calculation as to the likelihood and impact of 'sanctions' would be the principal factor setting the bounds of state behaviour, and that a naïve reading of treaty obligations would be less influential. Yet the actual experience since 1995 has shown general willingness to comply with TRIPS, and a strong, consistent record of good faith endeavours to implement its standards (even if specific deadlines are not always met). We have seen how TRIPS dispute settlement has not unfolded as expected—the majority of TRIPS cases were filed against developed countries, and only three findings of non-compliance have been established against developing countries; no retaliatory sanctions have been approved, let alone implemented, developing countries have used TRIPS within dispute settlement system to leverage access for agricultural products and to defend their trade in generic medicines.

So what does 'TRIPS compliance' mean in practice: what pathway should a country take when confronting a difficult, borderline policy choice that may raise issues about TRIPS consistency in an area where the law is unclear? It might legislate according to how it best interprets its interests and a fair reading of its treaty obligations, scrupulously formulate sound policy reasons for taking that choice (avoiding discriminatory treatment or special pleading), and then, armed with that policy rationale and legal analysis, respond to any request for clarification or consultations posed by its trading partners. If the legislative choice were to trigger dispute settlement proceedings that flowed through to a panel or AB report, then this outcome would give clearer guidance on how to resolve a domestic policy dilemma; if the case led to finding of TRIPS inconsistency, the rules allow reasonable time to make the necessary revisions. The guidance provided by a dispute settlement panel would indeed be likely to reduce the risk of over correction and excessive restraint in domestic policymaking, more likely than choices made in the face of legal uncertainty.

Some countries have dealt with TRIPS along these essentially pragmatic lines, at least on some sensitive issues. Domestic policy choices may be guided by a practical, informed assessment of TRIPS implications. TRIPS 'compliance' and transparency processes, consultative mechanisms and formal settlement under TRIPS disputes then shades into the general management of domestic policy-making and bilateral trading relations; rather than being seen in terms of a stand alone, discrete regime compelling compliance as an end in itself.

Yet in wider policy debates TRIPS as a legal system is rarely analysed in this pragmatic, precisely legally informed manner. This means that its actual legal operation and its effective policy influence can diverge: in effect, there is a 'black letter law' of the actual provisions of TRIPS itself, and a more uncertain or contentious 'oral jurisprudence' of what it is argued or supposed to require. TRIPS plays multiple roles: as a benchmark for a level of IP protection needed to attract foreign investors; offering detailed policy guidance to domestic regulators (and setting boundaries to policy and legal); and a ghostwriter for national legislatures (in the late 1990s, 'implementing TRIPS' came close to defining the sum and substance of the workload of a generation of IP legislators in many countries; more recently, its opposing bookend, 'implementing TRIPS flexibilities' define an IP reform agenda in reaction to that process). Many officials in developing countries were relieved to find, as they approached the deadline for compliance with most substantive provisions in January 2000, that there were no automatic 'sanctions', nor even any formal determinations of non-compliance, apart from the 'rite of passage' through the TRIPS:63 transparency process. Compliance with TRIPS was not, after all, on the model of parking tickets issued routinely in response to each formal breach. In practice, it transpired that compliance was more to do with establishing a formal and objective framework for organizing trade relations on IP matters between states.

Political economic analysis of TRIPS concentrates on how the dynamics of the Uruguay Round's single package of negotiations had the effect of imposing upon developing countries a set of developed country policy choices on how to manage the knowledge economy when it was assumed that developing countries would mostly have chosen different pathways for IP policymaking and norm setting in the absence of the deal making of the Uruguay Round and the economic and political coercion that lay behind it. Objectively, comparing the laws that legislators had drafted relatively freely prior to their incurring TRIPS obligations, most developing countries had considerably more work to do than almost any developed country to bring their laws into line with TRIPS. So TRIPS became for many critics of conventional IP law and policy a symbol for a wider range of developments, notably the privatization of knowledge resources on a neo-liberal Western model. Yet the assertion that legislation is 'TRIPS compliant' also served

as a metonym—a brand, even—of a country's willingness and capacity to provide a regulatory regime that is receptive to the trade interests that defined 'new economy' or innovation-based models of growth and prosperity.

For the sake of analysis only, if we assumed, improbably enough, that the assessment of options for domestically initiated IP legislation were insulated from broader political and legal influences beyond the border, and could be undertaken from an immediate perspective of domestic self-interest, then a country could, in principle, take one of four different approaches to treaty standards:

- Neutrality to international standards: draft and implement national IP laws without choosing to work towards compliance with international standards, even while drawing on international texts and foreign laws as benchmarks for standards of protection.
- Planned limited compliance: develop national laws consistent with domestic interests and constitutional constraints, compliant as far as possible with TRIPS and other international standards, conscious that some limited elements of the law may remain technically inconsistent with certain TRIPS provisions while giving effect to its objectives and principles, and calculating that the consequences of such non-compliance will not outweigh the benefits of the approach taken.
- Domestically responsive full compliance: craft IP laws consistently with domestic interests and constitutional constraints, with the express aim of complying with TRIPS obligations as they are understood in good faith to apply to the country; use actual policymaking experience in developing a workable national IP regime that meets domestic concerns from the point of view of practicality, constitutionality, and equity as the basis for promoting an approach to implementation that does justice to the treaty text while providing a positive model for other countries dealing with similar implementation issues and seeking to find an equitable balance of interests in practice.
- Reactive compliance: implement national IP laws essentially to conform with agreed international standards and with external judgements, in particular those of trading partners, as to what amounts to an adequate level of protection, possibly making use of external legislative models including the text of TRIPS itself, with limited tailoring or adaptation in view of distinct domestic needs and priorities.

These distinctions are not, in practice, entirely exclusive. For instance, there is considerable potential overlap in terms of the scope of actual outcomes between the second and third options, precisely because of the scope of discretion in national implementation and because of the inevitable subjectivity that arises when assessing the intent of national administrations in the context

of treaty obligations. A trading partner's expectations as to detailed TRIPS implementation will typically reflect their own domestic settings which, in turn, may provide the background for treaty interpretation. Of course, one country's proper exercise of sovereign discretion can be argued, by its critics, to be a defiance of international standards. Even so, the second approach (planned limited compliance) is inherently undesirable for legal, policy, and immediate pragmatic grounds:

- The formal obligation to implement treaty obligations in good faith (*pacta sunt servanda*) and the ongoing systemic interest in an international culture of compliance with treaty obligations in the IP domain.
- The general policy interest in supporting the predictability, clarity, and equity that flows from a strengthened trend to interpret and implement treaties consistently prima facie with their text and with their objectives. An approach of planned limited compliance in one expedient case may be used to justify a comparable approach by other economic partners in ways inimical to core interests.
- The need to limit friction in trade relations, and reduce the prospects of trade-based retaliation based on a claimed failure to abide by international standards.
- The need to ensure continuing input into the interpretation and application of treaty standards, including serving as a potential model, and the commensurate loss of influence and credibility that would flow from planned limited compliance.
- Potential for influence in future negotiations if a country has a track record of reasonable and effective implementation of international standards.

The fourth option—passing laws solely as a reactive means of complying with international standards—is clearly suboptimal, and ultimately unworkable. TRIPS is silent on some basic questions at the heart of IP policy, questions that lie at the heart of national assessments of social and economic interests and the advocacy of sectoral interests, such as the very nature of an invention, the doctrinal basis of copyright and ideas of originality, the nature of distinctiveness that defines a mark as a trademark, and the function of a geographical indication as a means of denoting a product and connoting its properties. It does not touch on key areas of IP law, such as the entitlement to apply for and to hold IP, and issues such as inventorship and authorship. It only establishes general principles in other areas, requiring detailed elaboration and application under national law—for example, the definition of exceptions and limitations to rights; the substantive grounds for compulsory licences; the specific mechanism required to protect test data against unfair commercial use; the regime of

exhaustion of rights and the entitlement of right holders to curb parallel importation; and the expectation that trade in counterfeit and pirated goods would be eliminated. And in other areas critical to maintaining a dynamic balance of interests, TRIPS is permissive of regulatory action but does not impose obligations—for instance, in curbing abusive licensing practices. So a purely reactive, text-driven approach to compliance is unlikely to deliver on the expected benefits for both domestic *and* foreign interests.

The formal legal aspect of TRIPS compliance is, nonetheless, practically important—as it provides a certain safeguard against external leverage, in determining objectively what can and cannot be a legitimate complaint about the level and effectiveness of IP protection. A wide range of legitimate and defensible policy options remain open within a TRIPS-compliant framework. But a richer approach to TRIPS compliance entails taking the broad principles it sets out, and putting them to work in practice—in determining what makes legal and policy sense as a 'legitimate interest', 'unreasonable prejudice', a 'balance of rights and obligations', 'fair and equitable procedures'—valuable concepts enshrined in TRIPS but with limited direct benefit in the more rarified air of the multilateral legal system. Thus the domestic policymaker, in establishing a fair, effective, and balanced IP system under national law, while complying formally with TRIPS, is, in a way, engaging in a higher form of 'treaty interpretation'. The actual choices taken and implemented at the domestic level ultimately shed light on the real effect and import of the treaty language, and can provide practical guidance and an informal benchmark to others addressing the same challenges. The expectation of 'social and economic welfare' articulated in TRIPS:7 is a constant reminder of why this challenging and exacting task—giving effect to the broad principles of treaty language in more tangible form on the domestic plane—is also an essential one.