7

Conclusion

In a period of deep troubles for the multilateral economic order, the TRIPS and with it the international IP regime face a double legitimacy criticism: the first resting on the axis between developing and developed economies and the second consisting of an axis between public and private interests. While the COVID-19 pandemic has both revealed and amplified these two lines of critique, more recent turbulence within the forty-seventh presidential administration of the United States has made the future even more unpredictable.

This work has been built upon the conviction that a republican reading of the TRIPS can make an important contribution to justice and resilience. A key insight of the republican approach is its capacity to tame power and leverage procedural guarantees to limit risks of domination. This approach holds promise in improving the calibration of the TRIPS and contributing to a more legitimate IP regime.

Mirroring the general structure of this work, this concluding chapter has three sections: a reflection on the reflective equilibrium as method for international law, a synthesis of the republican-sufficientarian reframing of the TRIPS, and a summary of its implications for the sake of interpreting further norms.

7.1 The Method of the Reflective Equilibrium

The interpretation of foundational norms, characterised by their structural indeterminacy (such as Articles 7 and 8 of TRIPS), is challenging for the traditional methods of interpretation prescribed by the VCLT. A Rawls-inspired reflective equilibrium approach was claimed to be promising in transforming a potentially opaque interpretation into a process intelligible and open to contestation. Using this step-by-step approach, akin to a spiral-form iterative enrichment of one's interpretation, this work has offered a renewed interpretation of the structuring norms of the TRIPS. The reflective equilibrium requires the interpreters to

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make their own normative presuppositions explicit in the form of a thin ideal theory (sufficientarian-republican for the purposes of this work). In the words of Besson, this approach is an example of the ambition to 'theorize the law in order to identify its immanent morality and hence the immanent critique within the law as a normative practice'.[1]

This concluding section offers the opportunity to briefly come back to the criticisms mentioned in the methodological chapter: the plurality of interpretations, the missing critical force, and the danger of transparency.[2]

Firstly, the sufficientarian-republican reading proposed here does not claim to be the only way to give meaning to the TRIPS' foundations. The methodology and the thin ideal theory assumed here (sufficientarian-republican) are distinct. On the one hand, the methodological argument clarifies how to justify an interpretation X using the reflective equilibrium (drawing at least upon a conception of the States' obligations and prerogatives and the individuals as rights-bearers). On the other hand, there are advantages of the sufficientarian-republican approach in the context of the TRIPS, as I briefly recall in the next section.

Secondly, the reframing of the TRIPS outlined in this work has an important critical force. Human rights offer powerful interpretative resources to address the legitimacy criticisms voiced in the IP scholarship. Most fundamentally, the present work highlights the importance of self-determination considered both as a pillar of public international law and as an important human right that individuals organised as political communities shall enjoy. Self-determination has heightened relevance in the context of the TRIPS: as justification for a State to have the general right to regulate (and thereby fulfil its obligations of domestic and global justice), as obligation with respect to specific communities and their capacity to decide for themselves (such as indigenous communities), but also as a means to protect a concrete capacity to resist domination (for instance, in the context of bilateral trade policy). In combination with this right to self-determination, the right to science deploys an important republican protection of the capacity to co-decide on science-related choices and make one's interests heard in this process. These two rights represent crucial elements for a normatively demanding human rights reading of the TRIPS.

[1] Besson (2013b), 126.
[2] *Infra* (Ch. 2.1.2.3.).

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This version of a human rights interpretation of the TRIPS can represent a rejoinder with putatively more radical criticisms of the TRIPS. In that sense, both the method and content proposed in this work can be used to follow Mylly and Griffiths' claim according to which the 'transformation of global IP law necessitates a broadening of the constitutional discourses relevant for IP'.[3] This argument in turn also connects with critical scholarship of the international IP regime, such as post-colonial or anti-hegemony critiques. The combination of self-determination with the participatory framework required by the right to science is powerful in outlining domestic and international decision-making processes able to secure a demanding conception of freedom. This combination is also powerful in preventing and resisting abuses of power by bullying States. It recalls that the right to self-determination is a key pillar of a just international law-based order.

As a third criticism mentioned in the introduction, the transparency required and made possible by the reflective equilibrium could have been detrimental to diplomatic negotiation processes or to high-stakes interpretation of the TRIPS by WTO bodies. With respect to this third criticism, the contribution of this work operates on two levels: on the potential domination effect of missing clarity on how to understand foundational norms and on why a sufficientarian-republican interpretation is able to address legitimacy criticisms.

On the one hand, the absence of clarity about how to interpret foundational norms (for instance, the relative silence on Articles 7 and 8 of TRIPS by Panels and AB) cannot be considered neutral. In republican terms, the absence of clarity means a legal insecurity to draw upon these foundations to interpret specific norms, such as exceptions and limitations. This absence is mainly detrimental for weaker States that cannot compensate this uncertainty through commercial or political power. In contrast, the Doha Declaration has provided clear guidance on how to interpret these norms and its effects can be described as empowering.

On the other hand, what concrete level of clarification and justification is expected from a WTO Panel when determining the content of Articles 7 or 8 of TRIPS remains a trade-off between a perfectly transparent justification along the reflective equilibrium method (including the required thin ideal theory) and the constraints of an international judicial body. A key expectation is the capacity of external actors to understand

[3] Mylly and Griffiths (2021), 5 ff.

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the decision and critically engage with it, providing them with the opportunity to contest it on legal grounds.

Overall, the reflective equilibrium does not claim to be the silver-bullet solution to any interpretative challenge. In specifying the VCLT canon, it channels interpretative resources, identifies disagreement, and requires the interpreters to clarify their own presuppositions. In that sense, it contributes to the identification of the disagreements and provides more transparency in giving meaning to international law obligations.

7.2 The Republican-Sufficientarian Reframing of the TRIPS

This work has outlined and justified a sufficientarian-republican reframing of the TRIPS that ascribes meaning to the key concepts of Article 7 of TRIPS ('social and economic welfare', 'mutual advantage', and 'balance of rights and obligations' as well as the focus on technology), and to the competence-giving Article 8 of TRIPS.

At the core of the reframing is a reflection on the justification of IPR, which, like property rights, are a bundle of rights that aim at achieving specific societal goals. For the TRIPS in particular, Article 7 of TRIPS defines these societal goals which are a central component of the justification matrix of IPRs: the justification of IPRs depends on these goals being fulfilled. It is important to clearly distinguish between a discussion on these internal conditionalities fulfilled by an IP regime and the external constraints that might affect IPRs (for instance, a compulsory licence).

The main implication of the reframing is that IP protection must be justified in the first place. This justification must draw upon identified parameters (mainly those of Article 7 of TRIPS). It means that without a convincing justification for the existence of IPR (e.g., with respect to the scope of patentability), the *per default* situation is absence of protection. Taking again the image used by Kur, IPRs are islands of exclusivity in an ocean of access.

This important clarification has implications for the interpretation by States of numerous provisions of the TRIPS. Exceptions and limitations are directly impacted by this requirement to justify IPRs in the first place. Concepts used in the three-step test, but also the functioning of the test itself, should be approached against this background. Similarly, the interpretation of a compulsory licence, for example, the qualification of the remuneration required, must integrate this finding.

Overall, this clarification recalls the importance of a balanced IP regime. A consequentialist justification of IP does not equate to a

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maximisation of IPR holders' interests; quite on the contrary: IP is a legal instrument built on the fulfilment of societal interests and which, by its very definition, requires a balanced approach.

The justification matrix and its implications in terms of balancing requirements are central components of the sufficientarian-republican reframing of the TRIPS. From a republican perspective, the balance always deploys two consequences. On the one hand, it forces the identification of interests that are at stake and ascribes a specific normative value to them. The societal goals of Article 7 of TRIPS deploy an integrative effect on the IP regime by requiring interpreters to look for the relevant interests encapsulated in a concept like 'social and economic welfare' or 'balance of rights and obligations'. This requirement is particularly significant in the context of the TRIPS as a regime characterised by a structural imbalance in favour of IPR owners' interests.

On the other hand, the balance goes further than the mere identification of these interests and requires these identified interests to be brought into a specific relational equilibrium. As argued earlier, the interpretation of this relational equilibrium points out two distinct elements: a minimum expressed in terms of a threshold to be reached and a procedural dimension meant to prevent domination from happening, whether by negating others' interests or by simply ignoring them.

This search for a relational equilibrium paves the way for a combination with a sufficientarian perspective. Claiming that a domestic IP regime should be conducive to social and economic welfare means that it should contribute to achieving a minimal threshold, defined in our account by capabilities. This threshold is further defined by drawing upon human rights obligations by States. These obligations are used as interpretative resources to identify the content and the level of demandingness of this threshold more precisely. In brief, the threshold has been shown to be structured around the ideal of a free individual in a free State. Free individuals are protected in their basic interests (e.g., health and food), but they must also be empowered to be critical citizens able to resist domination (e.g., capacity to access information and critically engage with it).

Drawing upon human rights to specify this sufficientarian-republican ideal is a promising way to proceed, but does in turn raise further interpretative challenges. The ideal of the free individual seems to remain elusive and hard to properly capture. It is indeed possible to adopt a stronger normative benchmark, drawing, for instance, on a Nussbaumian conception of central human capabilities. However, this approach faces

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challenges as to the justification of a specific benchmark. In facing this challenge, the previous reflections have outlined how important a procedural approach is. If there is a rational disagreement on the ideal of the free individual in a free State, the interpretation of international law should be able to proceed based on procedure to collectively determine the contours of this ideal, or, alternatively, to explicitly choose not to define these contours and offer States a corresponding margin of appreciation. The example of self-determination for indigenous communities has shown that alternative conceptions of freedom and of the relations between an individual and a community should and could also be considered relevant.

7.3 The Reframing of the TRIPS in Action

The final chapter of this work has exemplified how the reframing of the TRIPS should be used to interpret, on the one hand, further TRIPS' norms and, on the other, norms of the international IP regime.

The normative ideal of the free person living in a free State is the backbone of the republican-sufficientarian account proposed in this work. This account has implications for the multilevel responsibility of States as international lawmakers, as responsibility-bearers in their international relations, and as responsibility-bearers with respect to companies.

In their capacity as international lawmakers, States have drafted, negotiated, and eventually accepted the TRIPS and therefore must respect the interests mentioned by the TRIPS as part of the balance inherent in IP protection. This is to be combined with self-determination, mainly the competence of a State to adapt its domestic policy according to its specific needs and priorities.

As a common thread for the operationalisation of the reframing of the TRIPS, the responsibility of States is especially important when they qualify and apprehend norms of limitations and exceptions. How to ascribe meaning to the norms is indeed key, but the qualification of the normative relations between the exception norm and the main norm it refers to is also crucial. Following that argument, L&E norms must be considered, *per default*, as equally important as the norms they refer to. While one could assert that an exception norm is meant to be of secondary importance, this argument cannot be assumed. In the context of the TRIPS, L&E norms have a structural importance. They are the norms through which the justification matrix and the balance it requires are operationalised. The way these norms are interpreted is therefore

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crucial for the intrinsic balance of any IP regime, and, in the case of the TRIPS, for the overall balance of the structuring Agreement of the international IP regime. The capacity of TRIPS' interpreters to respect the TRIPS' balance depends on the correct qualification and interpretation of L&E norms.

In their capacity as international trade partners, States bear responsibility upon substantive orientations (content of the trade policy, but also commitments towards development aid, technology transfer, and assistance) and upon procedural dimensions (such as conditions of negotiations and respect for the partner and its domestic stakeholders). All these elements are expressions of the republican principles guiding a State with respect to its international relations, trade policy, and general commitments towards its global partners. More specifically, because they have human rights responsibilities, affluent States must help other States fulfil their own duties.

Firstly, the responsibility bears upon the safeguard, or better reinforcement, of the flexibilities entailed by the TRIPS. Powerful States need to improve the capacity of weaker States to use these flexibilities. From an international law perspective, this means at least reducing the legal uncertainty regarding the interpretation of these flexibilities and the way they could concretely be used in domestic matters.

Secondly, States should respect and reinforce the role of the TRIPS as a general normative framework for trade relations. The protection of the object and purpose of the TRIPS is the normative core of this responsibility. A republican TRIPS appears as a central piece of the international IP regime thanks mainly to its integrative and protective function with respect to interests and stakeholders that are structurally under-represented. This republican mechanism is especially important given the 'bilateral turn' of the international IP regime.[4] The consistency-guaranteeing function of the TRIPS has the potential to deter some of the threats found in bi- and plurilateral trade relations. Across their trade negotiations, either for FTA or BIT, States should commit to respecting the TRIPS as a form of structural protection of under-represented interests. Consistency, then, amounts to a protection mechanism for the weaker stakeholders.

Thirdly, the respect of the balance required by the TRIPS has procedural implications. During these negotiations, powerful States should

[4] As proposed by Stoll (2022).

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remain committed to the ideal of non-domination, both for the process of negotiation and for the quality check of the content of the negotiated agreement. It is both a question of consistency with their own constitutional values and with the obligations as WTO Member States. In that context, these procedural implications arguably connect to a broader discussion on the quality of consent to be required as a matter of trade policy or, more generally, for international law. The TRIPS is simultaneously the vehicle of consistency (as a multilateral structuring framework) and the content of this consistency (its substantive standard). Both work in a mutually reinforcing manner.

In their capacity as responsibility-bearers with respect to companies, States have the responsibility to enact regulation that forces companies to discharge their obligations or, in specific constellations explored earlier, to provide incentives for them to do so (e.g., Article 66(2) of TRIPS with respect to technology transfer by private companies). The anti-domination mechanisms identified recall that the State bears a general primary responsibility that frames and limits what private companies should be able to do.

Most importantly in the context of State-investor arbitration, States, especially powerful ones, should draft BITs in a way that ensures control over private companies and their capacity to upset the balancing nature of the TRIPS and of its domestic implementation by the Member States. In addition to these State responsibilities, private companies are also direct bearers of human rights responsibilities, including both a general responsibility to respect human rights and a responsibility to achieve societally desirable goals (in light of the relevant human rights).

As highlighted by the COVID-19 pandemic and political attacks on multilateralism, the future of international IP law lies in its adaptability and responsiveness to the evolving demands of States, where justice in and through trade remains a crucial issue. Drawing upon a republican-sufficientarian conception of the individual and of the State, this work has outlined an internal legal theory for a resilient TRIPS. Reframed in this way, the TRIPS' foundations offer a demanding compass to follow when it comes to interpreting international IP obligations and assessing the behaviours of States, private companies, and further relevant stakeholders.

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