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Introduction

International trade law finds itself at a moment of heightened instability. As geopolitical tensions mount, the World Trade Organization (WTO) order faces persistent contestation, ranging from trade wars to institutional gridlock. This turbulence comes on top of the profound challenges created by the COVID-19 pandemic. This global crisis laid bare the fragility of global public health and political systems, sparking fierce debates about innovation, justice, and access to vital resources. The pandemic highlighted and reinforced both structural and cyclical tensions of the global knowledge economy.[1]

Since 1995 and the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), criticisms of the protection of intellectual creations as prescribed by the Agreement have been voiced as claims of injustice and unfairness on two levels: between developing and developed economies and between public and private interests.[2] Criticisms have focused on intellectual property rights (IPRs) as being both the product of and the driver behind injustices as evidenced by debates about access to vaccines, in which IPRs are accused of preventing populations from access to life-saving drugs. Lack of research and manufacturing capacity in developing economies, and also distribution channels are part of this ongoing

[1] For an overview, Ho (2022); Gagliani (2022); Gervais and Yu (2025).

[2] For this interpretation of the legitimacy crisis, Dinwoodie (2006), 206; Yu (2009), 1024 ff; Kur and Levin (2011), 526; Geiger and Desaunettes (2017). For a historical account, May and Sell (2006), 25–28. For a critical view, Pires de Carvalho (2014), 7–8. I will refer whenever possible to the concept of developed/developing economies (rather than States). This is meant to convey the most non-evaluative possible stance on the State itself (i.e., its political organisation and broader societal goals) and instead focus on economic capacity. See, for instance, the list of least developed countries (LDCs) recognised by the UN. The UNCTAD website uses a 'list of the least developed countries', before specifying that there 'are currently 44 economies' designated as such. https://unctad.org/topic/least-developed-countries/list (consulted on 15 April 2026).

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justice debate.[3] The criticisms extend beyond the realm of health to encompass access to vital resources required to live a satisfactory life. The demands raised by developing economies are not new. The negotiation history of the TRIPS and its nearly thirty years of existence have featured these concerns prominently.[4] Special Rapporteur on the Right to Food Michael Fakhri describes the TRIPS as resulting from a 'precarious agreement', leading to a 'schism' which is 'set against the backdrop of challenges to the very legitimacy of the TRIPS Agreement; people's rights to life and health are at stake, and contemporary forms of racism are reflected, in the current debate over COVID-19 vaccines and TRIPS Agreement waivers'.[5]

These criticisms are reinforced by what Yu calls the 'second transformation' of the international intellectual property regime, focusing on the increased role played by bilateral and plurilateral free trade Agreements and investment treaties. According to Yu, recent developments make 'evolving international IP norms less consistent, less coherent, and less equitable'.[6] Indeed, demands for a more just and balanced IP regime show the growing dissatisfaction of developing economies, not only with the TRIPS, but with economic and political globalisation in general.[7] But this dissatisfaction is also shared by nationalist movements in developed economies. Like the 'America First' credo, these waves of discontent are critical of a globalisation that would leave behind too many workers who were once the pride of industrialised countries.

The criticism of the international IP regime is also a criticism that runs along the private-public divide, prominently highlighting issues such as access to seeds, educational resources, and the promotion and safeguarding of public goods.[8] Mylly and Griffiths claim that current international IP norms – both the TRIPS and free-trade Agreements – 'lock in and hedge exclusive IP rights by seeking to immunise them from threats

[3] Special Rapporteur A. Xanthaki, 'Right to Participate in Science', 2024, A/HRC/55/44 (cited as Xanthaki 2024), § 17–18.
[4] For general references, UNCTAD (2005); Stoll, Busche and Wiebe (2013); Pires de Carvalho (2014); Taubman, Wager and Watal (2020); Correa (2020b); Gervais (2021). For the counterfactual question 'would the TRIPS be accepted today', see Yu (2023b), 2–7.
[5] Special Rapporteur M. Fakhri, 'Seeds, Right to Life and Farmers' Rights', 2021, A/HRC/49/43, § 37 (cited as Fahkri 2021).
[6] Yu (2021b), 186.
[7] Sekalala, Forman, Hodgson, Mulumba, Namyalo-Ganafa and Meier (2021); Çapar (2023).
[8] Geiger (2020), 119–120.

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arising from potentially conflicting rules in cultural, competition, health, consumer protection, human rights, and other laws and related international measures'.[9] The TRIPS and its implementation by WTO Members exemplify the complex balance between safeguarding private IPRs and meeting a State's responsibilities to its population. This criticism also directly affects private companies that face accusations of prioritising their revenue streams at all costs. Both domestically and internationally, they engage in intense lobbying efforts with States to craft legal norms that protect IPRs and restrict exceptions.

Overall, critics are calling for a more just regime to protect IP in a global knowledge economy whose very architecture – anchored in the WTO legal order – is undergoing a profound legitimacy crisis, as States and people alike question the distributive consequences and democratic credentials of economic globalisation.[10] In this context, the diplomatic success of the WHO Pandemic Treaty concluded in May 2025 offers a rare instance of renewed multilateral resolve. Other calls to revise or temporarily waive TRIPS provisions have faced insurmountable political resistance. The political climate forged by the Trump administration and its unilateral tariff decisions, but also the numerous violent conflicts across the globe, prevent any initiative meant to formally revise the TRIPS.[11] Could a more nuanced, interpretative strategy offer a pathway to reform? Could this strategy even be the most promising way to build a more just and resilient IP framework for the knowledge economy? These questions drive the exploration at the heart of this book, which aspires to address these legitimacy criticisms by contributing to and further developing a legal philosophy of the international IP regime structured around the TRIPS.

This legal philosophy is grounded in the conviction that the protection of individual freedom is about empowering individuals and communities to resist domination. This book counters the logic of both pure force by powerful States and unregulated power by private companies, proposing instead an interpretative ethos anchored in non-domination and the imperative to secure a decent life for all.

[9] Mylly and Griffiths (2021), 7–8.

[10] In the words of Mavroidis, 'the WTO has been exhibiting a moribund legislative function, and has not managed to add much to its arsenal since 1995'. Mavroidis (2022), 7. For a similar assumption, Mercurio (2021), 83; Watal (2021), 172–173. For the rise of emerging countries, Yu (2023a), 458 ff.

[11] For a slightly more optimistic reading, Yu (2023b), 8–9.

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This endeavour is best located within Gervais' periodisation of the TRIPS history as a phase of 'calibration'[12] that revolves around domestic and international efforts to interpret the 'flexibilities' entailed by the TRIPS. In a nutshell, the book aims to contribute to this calibration phase by conceptualising and rendering usable normative resources for the interpretation of the TRIPS. Doing so will involve examining the foundations of the TRIPS and situating them as part of WTO law and, more generally, public international law.[13] The first step is to revisit the interpretation of the TRIPS foundations (Articles 7 and 8 TRIPS), drawing upon philosophical reflections on the justification of IPRs, global justice accounts, and human rights law. This book introduces a novel interpretative framework for the TRIPS by mobilising two underexplored normative anchors: the human right to science and the human right to self-determination.

The second step is to operationalise this legal philosophy of the TRIPS by offering WTO Member States resources for interpreting TRIPS flexibilities when crafting domestic legislation, thereby improving the consistency of the international IP regime. The objective is not only to deepen the legal-philosophical grounding of IP norms but also to provide actionable interpretative guidance to make the TRIPS foundations resilient to critique. These normative foundations will be shown as promising resources in resisting all forms of domination in troubled times for international trade.

This introductory chapter is organised in the following manner. The first section details the scope and the expected contributions of this work, distinguishing among three clusters of contributions (doctrinal work on the TRIPS, legal-philosophical scholarship on IP, and methodology law/philosophy). The second section discusses the methodological approach chosen for this work while the third presents a primer on the foundations of the TRIPS, focusing on Articles 7 and 8 of TRIPS. The fourth section identifies and presents the main human rights resources used for the interpretation of the TRIPS' foundations. The fifth section explains how this interpretation is, in turn, used to interpret the flexibilities of the TRIPS. The sixth section considers the consistency-guaranteeing function of the TRIPS in an international IP regime marked by new IP Agreements and the importance of bi- and plurilateral free trade

[12] Gervais (2014a), 88–89. For the 'tradification' of IP, Gervais and Yu (2025).

[13] For a similar approach, Roffe (2006); Dinwoodie and Dreyfuss (2012); Seuba and Genovesi (2019), 88–89; Grosse Ruse-Khan (2021b).

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Agreements (FTAs). Overall, these sections mirror the chapters of this book and offer a general overview of the arguments to come.

1.1 Scope and Main Contributions of This Work

Clarifying the scope of the present work includes three points. Firstly, this work approaches the international IP regime from the perspective of international law, focusing on its trade-related aspects as regulated by the TRIPS within WTO law. Domestic examples to illustrate the margins of interpretation and implementation that WTO members should claim and use will only be mentioned.[14]

Secondly, this work will focus primarily on patents. Patents and their focus on technologies exemplify the balance required to achieve the societal objectives of IP.[15] Examining the conditions of this balance requires addressing underlying philosophical tensions pertaining to the justification of IPRs.[16] I will address copyright provisions in two related ways, the first being how copyright rules can challenge the general approach developed on patents. This challenge will mainly bear upon a renewed interpretation of limitations and exceptions applied to copyright. In addition, I will also discuss both the content and the legislative approach found in the Marrakesh Treaty for visually impaired people.[17] This World Intellectual Property Organization (WIPO) treaty provides compelling insights into a potentially better interface between IP protection and human rights.

Thirdly, this work does not address the lively discussion on the application of patent and copyright to digital technologies, mainly generative AI.[18] This application indeed raises crucial legal-philosophical questions for IP law, but it varies from the focus of this work: a renewed

[14] Frankel (2019b). See, for instance, the comparative approach chosen by Oke (2022). See also the 'interactional' approach advocated by Vidigal and Parwani (2024).

[15] Trade secrecy law will not be addressed in this work, despite their growing importance in specific jurisdictions and their relevance for the realisation of human rights (such as the right to health). As Durkin and co-authors write, 'protection for trade secrecy follows an arc similar to other forms of intellectual property (. . .)'. Durkin, Maria, Willmore and Kapczynski (2021).

[16] See, for example, Chatterjee (2022).

[17] Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (opened for signature 27 June 2013, entered into force 30 September 2016) WIPO Doc VIP/DC/8 (cited as Marrakesh Treaty).

[18] See, for instance, Abbott (2022b).

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interpretation of the TRIPS as a structural Agreement of the international IP regime. Numerous legal-philosophical insights developed here on global justice and IP could be applied either to national discussions on how to regulate IP-relevant questions of generative AI, or to global discourse on whether and how TRIPS interpretation should directly address these technological developments. Overall, as Yu notes, these doctrinal and policy debates have an impact on the TRIPS, not least by forcing us to rethink 'what constitutes the "trade-related" aspects of intellectual property'.[19]

Given these three specifications regarding its scope, the ambition of this book is to combine and contribute to distinct bodies of scholarship, thereby mirroring the multiple dimensions of the legitimacy criticisms.

The book's first contribution lies in doctrinal scholarship on the interpretation of TRIPS provisions, referring to the Vienna Convention on the Law of Treaties' (VCLT) interpretative canon.[20] It offers a comprehensive conceptual and normative reconstruction of TRIPS' foundations, mainly its Articles 7 and 8, which can be used as a guiding light to address further important provisions of the TRIPS. The objective is to precisely define the meaning of these norms and to 'awaken' them, echoing Geiger and Desaunette's description of these norms as a 'sleeping beauty'.[21] Thanks to their reflections on how to interpret Articles 7 and 8 of TRIPS, as well as their relevance beyond TRIPS, Frankel and Grosse Ruse-Khan have laid the groundwork for the general approach advocated here.[22] This book enriches their scholarship by explicitly embedding justice-based reflections into legal arguments about how to best interpret the TRIPS foundations.[23]

This work's second contribution is to legal-philosophical scholarship on international IP law. In contrast to philosophical scholarship that assesses IP law from an external perspective (drawing, for instance, upon a standard of justice),[24] I aim to construct what will be referred to as an

[19] Yu (2023b), 11.
[20] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980 (cited as VCLT). Cottier (2017); Seuba (2020), 285; Cottier (2021), 25 ff.
[21] Geiger and Desaunettes (2017), 85 ff. On this potential, Romero (2020).
[22] Frankel (2019a); Grosse Ruse-Khan (2021b).
[23] For a similar objective, Bodimeade and Deane (2023).
[24] See the contributions in Drahos (1996); Gosseries, Marciano and Strowel (2008); Lever (2012); Moore and Himma (2022).

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internal legal philosophy of the TRIPS.[25] International human rights law offers promising resources to operationalise both philosophical debates about the justification of IPRs and global justice debates. The approach advocated here complements existing legal scholarship and its focus on the right to health, food, or education by conceptualising the right to science as the structuring norm of the interface of IP and human rights. This reconstruction can then be used to revisit exceptions and limitations, compulsory licensing, or requirements to support developing economies. Overall, this book directly contributes to one of the tasks ahead identified by Gervais and Yu: 'if the Appellate Body is ever allowed to function again, one of the major challenges facing panels and the new Appellate Body will be to develop further the interface between the TRIPS Agreement and non-WTO instruments'.[26]

The third contribution of this work lies in its methodological discussion of the intersections between law and legal philosophy. The ambition to interpret the TRIPS necessarily deals with issues of justice. In Besson's formulation, this approach draws upon the resources immanent to the law for the sake of addressing justifications and critiques that are characteristic of legal practice *qua* normative practice.[27] The work presents a method on how to draw upon resources that might be called moral or philosophical as part of legal interpretation using the method of 'reflective equilibrium' as coined by Rawls. This first aspect contributes to theoretical debates on interpretation in international law by focusing on the specific challenges of interpreting foundational norms.[28]

As will be shown, applying a reflective equilibrium approach to these foundational norms requires specifying a thin theory of justice for international law. To define this benchmark, I will draw upon a republican

[25] In questioning the philosophical justification of IP laws both in the national and international systems, Merges seems to rely on a similar foregoing. Merges (2011). Following Sheff, the philosophical work on IP law can be classified along the following categories: (1) the jurisprudence of the IP system; (2) philosophical analysis of IP law; (3) applied philosophy in IP; and (4) normative theory of IP. The present work is a combination of 1 and 2, with a contribution to 4. Sheff (2021).

[26] Gervais and Yu (2025), 4–5.

[27] Besson (2016a), 402–403. On the relationship between philosophy and legal doctrine (arguing in favour of an inner approach to legal doctrine), Peczenik (2004). In the context of TRIPS, this point on the potentialities of the law is highlighted by Taubman (2007), 115 ff.

[28] For instance, Bianchi, Peat and Windsor (2015). The approach advocated here could be made useful in the domestic reinterpretation processes highlighted by Vidigal and Parwani (2024).

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(freedom defined as non-domination) and sufficientarian (global justice as ensuring 'having enough' for every individual) definition of a State's prerogatives and obligations as a matter of international law. This contribution is meant to enrich the dialogue between international law and political theory – described by Ratner as a 'dialogue of the (near)-deaf'[29] – thereby contributing to the legal theory of international trade law.[30] It provides a concrete application of a republican approach to justice in trade law.[31] With respect to republicanism, the argument can be read as a contribution to the rich literature generated by the renewed interest in freedom as non-domination, as Pettit has proposed.

This work is structured into five main chapters that are briefly presented in each of the following sections.[32]

1.2 Outline of the Methodological Approach

The methodology chapter aims to answer a seemingly simple question: how can one apply the VCLT to interpret the foundations of the TRIPS?[33] The VCLT canonical approach faces challenges in the context of foundational norms labelled as 'values', 'principles', or 'objectives', because of their normative structural indeterminacy and their relevance for the object and purpose of a treaty.[34] The book sets forth the following twofold blueprint to address these interpretative challenges: (1) a reflective equilibrium approach clarifying how and why legal interpretation can take advantage of philosophical resources, and (2) an outline of the thin legal-philosophical theory used for the sake of this interpretative effort.

[29] Ratner (2015), 20.

[30] For an overview, de Bres (2016); Beck (2018). For important contributions, Suttle (2017); Christensen (2017).

[31] In that sense, it operationalises the general arguments presented by Brandi (2017); Ó Laoghaire (2018).

[32] To facilitate readability, references given in the footnotes of this introduction are not exhaustive but should exemplify the kind of literature referred to. Comprehensive references are provided in the following chapters.

[33] On foundational norms of the TRIPS, generally, Trebilcock, Howse and Eliason (2013). For instance, on national treatment, Horn and Mavroidis (2013). For a similar approach addressing the fundamental values of IP protection, Merges (2011). For a similar ambition to address values and principles relevant to the whole IP regime, Dinwoodie and Dreyfuss (2012).

[34] On the underlying conception of principles as special norms, Besson (2011a), 24 ff; Rochel and Zysset (2011), 92 ff; Waluchow (2012), 194.

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As the first component of this methodological blueprint, the reflective equilibrium approach builds upon a preliminary reading of the normative foundations of a treaty (expressed by its object and purpose), and subsequently adds relevant insights gained through the analysis of the relevant interpreters' perspectives. It can be compared to a back-and-forth movement between the norms to be interpreted, an initial and preliminary interpretation, its formalisation, and the distinct interpretations proposed in the relevant practice(s) (such as case law, interpretations given by relevant States or non-State actors, scholarship, etc.).[35] The core movement of this approach is incremental and iterative rather than linear. It is best represented as a spiral-like search for an equilibrium point.

The interpretative effort required is constructivist in spirit.[36] In that sense, the objective is not to discover the normative foundations of a specific legal regime, but rather to constructively ascribe meaning to them. The objective is not to use 'interpretation' as a mechanism of importing moral content into legal determinations, but rather to harness the characterisation of the law as a normative practice that inherently makes room for immanent normative work that could draw upon philosophical resources.[37] This methodological stance is particularly pertinent given the current turbulent geopolitical landscape in which the formal revision of a multilateral treaty like the TRIPS is politically unfeasible. Interpretation becomes not a second-best alternative, but the most viable strategy for resisting regressive power shifts and reaffirming multilateral principles.[38]

The second component of the methodological blueprint pertains to the thin substantive position needed to justify one's interpretation as part of the reflective equilibrium. The reflective equilibrium approach cannot be entirely devoid of normative presuppositions, for instance, on defining assumptions about international law or the importance of States and their responsibility with respect to individuals. In other words, interpreters of the TRIPS should make explicit their presuppositions about

[35] For a similar qualification of this iterative process, Sunstein (2018), 16 ff.
[36] In the field of political philosophy, the approach proposed here shares commonalities with James' constructivist political theory of global trade. James (2013), 15 ff.
[37] Green (2008), 1051–1052.
[38] Collins defines trade law principles as 'the ideas that form the basis of the technical trade rules from which participating States profit and to which they are held accountable'. Collins (2025), 15.

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international law, mainly their position on the State and their prerogatives and obligations.

Following Buchanan and co-authors, the argument adopts an overlap strategy focusing on the common ground between different approaches to justice.[39] This common ground focuses on 'extreme deprivation' (i.e., circumstances which render decent life impossible) and on 'basic political and economic inequalities' (i.e., severely unjust inequalities in political power and a lack of access to important bodies and forms of social cooperation).[40] This common ground will be reconstructed from a republican and sufficientarian standpoint[41] wherein the republican dimension focuses on the relevance of freedom as non-domination, while the sufficientarian dimension focuses on the fulfilment of basic needs required to achieve a decent standard of living.

According to the tradition of republicanism coined by Pettit, freedom means the absence of domination.[42] For Pettit, the political ideal of non-domination is a permanent effort to diminish arbitrary interferences and transform them into non-arbitrary interferences.[43] This is true for the individual but also for political communities such as States.[44] This definition of freedom is used to highlight potential threats to individuals and the responsibilities of States as well as to reconstruct TRIPS' foundations in a way that mitigates these risks.

In sufficientarianism the key insight is to define the State's responsibility as being primarily, but not exclusively, about ensuring that individuals have sufficient resources – 'sufficient' here as determined by a normative threshold (e.g., 'a decent life').[45] The main rationale of a sufficientarian theory of justice is the following: every human being ought to reach a certain threshold in terms of resources and capabilities to live a decent life. The moral urgency of supporting those living below this threshold indicates that they should have priority in resource distribution

[39] Buchanan, Cole and Keohane (2011), 310.

[40] This strategy is also chosen by Pogge (focusing on fundamental human rights), Pogge (2009), 552 ff.

[41] For the sketch of this position, Rochel (2015), 250 ff. See also, Laborde (2010).

[42] See Pettit (2008); Pettit (2010).

[43] As Pettit writes, 'an act is arbitrary, in this usage, by virtue of the controls – specifically, the lack of controls – under which it materializes, not by virtue of the particular consequences to which it gives rise'. Pettit (1997), 55. See also Pettit (2010), 75.

[44] In the context of trade, see the definitions used by Brandi (2017); Ó Laoghaire (2018).

[45] For an introduction to this concept, Gosseries (2011). Resources might also be expressed in the form of capabilities, as coined for instance by Sen (2005). See further Nussbaum (2000).

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from States and private companies.[46] I will draw upon a capability approach to specify this threshold.[47]

Taken together, the republican and sufficientarian insights form the basis of the thin substantive position used here for the purpose of interpreting TRIPS' foundations. As I will show, this approach possesses the strength of its own weaknesses. It is developed from within TRIPS as it currently stands and has a *status quo* bias, especially as compared to critical philosophical approaches to IP. In the meantime, it can genuinely claim to be action-guiding when it comes to interpreting TRIPS norms according to the VCLT framework. In Buchanan's description, it is an example of 'progressive conservatism': in effect, maximising the potential of existing legal values and principles in order to propose a renewed interpretation of a legal regime.[48] This overlap strategy is especially suited to counterbalancing the current legitimacy crisis of international trade law, offering a normative grounding that might transcend divisions by focusing on the shared objectives of sufficiency and non-domination.

In the end, this blueprint arguably creates relevant interpretative resources for the TRIPS, but also policy-guiding insights and a renewed framing of the treaty. In times of deep uncertainty about international trade, this last contribution is an essential communicative act: it shapes and justifies a specific understanding of the objectives of the TRIPS and the functions that this Agreement should play in international trade relations. This framing will find its place in the justificatory discourse addressing the legitimacy criticisms of the international IP system and critically assessing the current state of norms-interpretation and norms-drafting.[49]

1.3 Interpreting the Foundations of the TRIPS

Applying the methodological blueprint presented in Chapter 2, Chapter 3 focuses on the interpretation of the TRIPS' foundations to contribute to legal scholarship by revitalising the discussion on the functions and content of Articles 7 and 8 of TRIPS.[50] It explains why

[46] As I qualify them, these positions are also 'prioritarian'. See Parfit (1997), 217 ff.
[47] For an overview, Robeyns and Byskov (2020).
[48] Buchanan (2004), 63.
[49] For instance, Dinwoodie and Kur (2018), 296.
[50] For a similar objective, Haugen (2007); Yu (2009); Grosse Ruse-Khan (2015); Slade (2016); Geiger and Desaunettes (2017).

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their status as foundational norms makes them especially important interpretative resources for further TRIPS norms.[51]

In a nutshell, the chapter offers a complete interpretation of Articles 7 and 8 of TRIPS from a republican perspective. Firstly, it identifies resources at the core of Article 7 of TRIPS to address the fundamental question of how to justify IPRs in the first place. The conditions defined by Article 7 of TRIPS, such as 'social and economic welfare' or the 'mutual advantage of producers and users of technological knowledge', will be highlighted as the normative core of the justification matrix for IPRs. IPRs, like property rights more broadly, are a bundle of rights which, taken together, aim at achieving specific societal goals. These justifications can be classified into three main categories:[52] a Lockean justification,[53] a broadly utilitarian justification (focused on fostering utility, prosperity, or innovation),[54] and the justification of fair competition.[55] As I will highlight, each justification will depend on a qualification of the parameters set by Article 7 of TRIPS. The societal goals and conditionalities entailed by Article 7 of TRIPS are a central component of the justification matrix of IPRs.

Secondly, the chapter addresses the contours of Article 8 of TRIPS as a competence norm. The analysis of Article 8 of TRIPS underlines the importance of national autonomy, which is key to implementing TRIPS obligations in a way that respects and guarantees the capacity of States to make political choices. Expressed in the language of freedom as protection against domination, a Member State should have the competence (*de jure*) and ability (*de facto*) to define its justice obligations (both domestic and global) and to act accordingly.

1.4 Human Rights and TRIPS: The Right to Science as Interface

Chapter 4 specifies the relevance of international human rights law in the context of the TRIPS at the junction of WTO law and IP law. As Helfer and Austin argue, 'unavoidable intersections' between human rights and

[51] On the five functions of Articles 7 and 8, Yu (2009), 1019 ff.
[52] Bernier distinguishes four categories, including a Hegel-based 'self' argument. Bernier (2010), 100 ff.
[53] Nozick (1974); Moore (2012).
[54] Taubman (2007); Sonderholm (2010), 1112. For a critical view, Moore (2003).
[55] Kieff (2006); James (2013), 285–304.

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IP exist.[56] Both the conditions determined by Article 7 of TRIPS and the margin of action protected by Article 8 of TRIPS necessitate further specification by considering international human rights law.[57]

Among the three possible interactions conceptualised by Helfer (conflict, coexistence, and IP as a possibility for fostering human rights), human rights are often perceived as conflicting with IPRs, whereby human rights act as external constraints on existing IPRs.[58] In contrast, this book explores the possibilities and limits of a coexistence perspective. From this perspective, human rights are considered an integral part of the interpretative resources required to comprehend the obligations stipulated by the TRIPS.

This work focuses on human rights entailed by the International Covenant on Economic, Social and Cultural Rights (ICESCR), such as the rights to health, food, and education.[59] It complements the already rich scholarship on the access modality of these rights (e.g., access to drugs, seeds, and educational material) by focusing on both the right to science and the right to self-determination as interpreted in a republican way.

On the one hand, this book takes advantage of the human right to science to revisit the interface between IP and human rights.[60] This contribution is timely considering the General Comment on Article 15 ICESCR[61] and the growing interest in the definition and function of this undertheorised human right.[62] It highlights the relevance of accessing

[56] Helfer and Austin (2011), 504 ff.

[57] See, for instance, on drugs, Hestermeyer (2007). For general overviews, Walker (2006); Dreyfuss (2010); Geiger (2015b); Plomer (2015); Beiter (2016); Okediji (2018); Torremans (2020); Yu (2020).

[58] Helfer (2015), 8 ff.

[59] For a similar choice, Bernier (2010); Sellin (2015).

[60] For a similar strategy, Shaver (2010), 182 ff.

[61] CESCR, General Comment No. 25: science and economic, social, and cultural rights (article 15 (1) (b), (2), (3) and (4) ICESCR (30 April 2020) E/C.12/GC/25 (cited as General Comment 25).

[62] Most importantly, Article 27 of the Universal Declaration of Human Rights, General Assembly resolution 217 A (1948) (cited as UDHR) and Article 15 (1b-c) of the International Covenant on Economic, Social and Cultural Rights: UN doc A/RES/2200 (XXI), annex; 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3; entered into force 3 January 1976 (cited as ICESCR). See Special Rapporteur F. Shaheed, 'Copyright Policy and The Right to Science and Culture', 2014, A/HRC/28/57 (cited as Shaheed 2014). Further, Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications (2009), SHS/RSP/HRS-GED/2009/PI/H/1 (cited as Venice Statement). For preliminary reflections in the conceptualisation of IP on this basis, Risse (2012).

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scientific progress and its benefits, but focuses mainly on the importance of a participative and inclusive approach to identifying and defining a population's needs and priorities.[63] This is one of the main contributions of the right to science to the IP scholarship: the competence to determine this science framework has a deep participatory dimension. Members of a political community (e.g., a State) have the right to decide how they want their community to organise the public good of science and, internationally, how they want to cooperate with others. I will show how this call for more participation should impact all policy choices at the junction of IP and science policies.

On the other hand, the right to self-determination is shown to provide a strong basis for Article 8 of TRIPS and the claim to national regulatory autonomy asserted by WTO Member States. A republican understanding of this self-determination focuses on the right and capacity of a State to shield the domestic policy space from both economic coercion and regulatory harmonisation imposed through asymmetrical multi- or bilateral arrangements. Self-determination also plays a crucial role for the claims of political communities organised within a State, such as indigenous communities. In all these cases, this understanding of self-determination as capacity to resist domination should be a key feature of our interpretation of the TRIPS.

1.5 A Renewed Interpretation of the TRIPS' Key Provisions

Chapter 5 shifts the focus from interpreting the TRIPS' foundations to applying this incrementally developed legal philosophy to key TRIPS' 'flexibilities'. These flexibilities are defined as a set of norms entailed by the TRIPS that allow a margin of appreciation for the Member States in fulfilling the obligations foreseen by the treaty.[64]

First, the republican-sufficientarian framing is applied to the decisive question of how to identify and interpret limitations and exceptions in the TRIPS. From a republican perspective, both the identification of these norms as such and their interpretation represent a potential risk of domination over weaker States.

[63] On this right to science, Chapman (2009); Helfer and Austin (2011), 221 ff; Mancisidor (2015); Romano and Boggio (2024); Plozza (2024); Haugen (2025).

[64] For this definition, see High-Level Panel on Access to Medicines. See for a national implementations taxonomy, Deere (2009), 74 ff.

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As an illustration, I will show how the interpretation of the three-step tests is an important *locus* of the legitimacy challenge that the TRIPS faces. The three-step tests are the norms through which the justification of IPRs and the balance they require are operationalised. The interpretation of each of the three steps must be informed by the object and purpose of the treaty in general (the justification matrix of Chapter 3), and it must qualify the rule-exception relations. The interpretation of these exception provisions is therefore crucial for the intrinsic balance of any IP regime.

Beyond this first point about interpreting limitations and exceptions, the chapter secondly addresses important TRIPS provisions. It shows the influence of the republican-sufficientarian reframing on exceptions to both patent (Article 30 TRIPS) and copyright (Article 13 TRIPS), compulsory licensing issues (Article 31 TRIPS), and the obligations of developed economies regarding technology transfer and technical assistance (Articles 66–67 TRIPS).

All these flexibilities enable Member States to craft and interpret their domestic IP legislation in ways that are aligned with their putative duties of justice. While most of the TRIPS' provisions describe in detail how IPRs shall be protected, Articles 66–67 of TRIPS explicitly mention what developed States and private entities are expected to do.[65] In this respect, these provisions are crucial pieces of the overall bargain that the TRIPS represents.

1.6 The TRIPS as Consistency-Anchor in the International IP Regime

The legal philosophy of the TRIPS does not only have an internal 'guiding light' function, but also an external function to promote consistency in the international IP regime. This consistency-guaranteeing function is crucial in troubled political times in which powerful trade countries are tempted to use pure force in bilateral negotiations. As a structuring international Agreement, the TRIPS plays the role of a normative anchor significant with respect to two developments of the international IP regime: the concretisation of post-TRIPS international IP Agreements and the importance of FTAs and

[65] For an overview of the current policy initiatives around technology transfer, Fernández (2025).

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their IP-related provisions (often described as 'TRIPS-plus'[66]) in current trade relations.

The first part of Chapter 6 focuses on a crucial post-TRIPS Agreement, namely the WIPO Marrakesh Treaty for visually impaired people. This treaty, especially its human rights objective and mandatory exceptions, enriches the republican-sufficientarian legal philosophy of the TRIPS. It offers significant republican lessons on the recalibration of the balance in copyright (and more generally in IP law), on the IP/human rights interface, and on international law-making for future IP Agreements. For instance, mandatory exceptions and limitations are shown to be deeply republican in reinforcing the position of the weakest parties in the balancing act that IPRs require. They reinforce their position both procedurally (by providing security and predictability) and substantially (by requiring consideration of their interests as part of the concept of 'social and economic welfare' of Article 7 of TRIPS).

The second part intends to apply the renewed TRIPS framing to the context of bilateral and plurilateral FTAs that involve norms for IP protection. This investigation will raise questions about the content of these TRIPS-plus norms, but also about the normative dimensions of the strategy of 'forum shopping' or 'regime shifting' that many actors choose.[67] This section will present the case for considering TRIPS as fulfilling a consistency-guaranteeing function. Articles 7 and 8 of TRIPS form a normative framework that shall constrain States' ability to pursue inconsistent bilateral policies. In brief, the argument revolves around consistency: if Member States commit to specific values, principles, and objectives (as captured in the object and purpose of the TRIPS), their bilateral policies should not undermine them. Drawing *inter alia* upon Article 41 of VCLT, the consistency-based argument will focus on *inter se* modifications that threaten key features of the TRIPS.[68]

This argument contributes to the debate on trade justice by applying a specific anti-domination mechanism already embedded in international law and by highlighting the value of consistency in an international regime. A republican TRIPS appears central to 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

[66] Ho (2011), 225; Helfer (2015), 7.
[67] For description of this strategy, Helfer (2009); Sell (2011).
[68] For a similar approach, Grosse Ruse-Khan (2018).

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the 'bilateral turn' of the international IP regime[69] and the threats to multilateralism from the Trump administration's aggressive trade policy. The TRIPS simultaneously functions as a vehicle for ensuring consistency (as a multilateral structuring framework) and as the content of this consistency (in terms of its substantive standard).

Overall, Chapters 5 and 6 aim to deliver the insights promised in the methodological chapter: using an incremental and reflective approach to interpreting the TRIPS' foundational norms, analysing anew important TRIPS norms, and identifying policy-making proposals for the international IP regime. The republican-sufficientarian account aims to address the legitimacy criticisms of the international IP regime by identifying and justifying a just interpretation of the TRIPS. In difficult political times, this contribution is both necessary and urgent.

[69] As proposed by Stoll (2022).

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