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(IL)LEGITIMACY OF INTERNATIONAL INTELLECTUAL PROPERTY REGIME?

Gürkan Çapar *

ABSTRACT: The recent Covid-19 global health crisis not only brings into sharp relief the current problems afflicting the international intellectual property regime (IIPR) but also calls into question its legitimacy as an international authority. Against this backdrop, the article aims to launch an investigation into the legitimacy of the IIPR, as an international coordinative authority, designed to protect IP rights without prejudice to international trade norms. Drawing on Raz's service conception of authority, it explores whether the IIPR lives up to its promises by enabling coordination between states over IP rights without undermining the initial balance on which it is founded, struck between developing and developed countries, as well as between international protection of IP- cum-trade rights and domestic regulatory autonomy. It does so by classifying the historical evolution of the IIPR under three different phases: i) its foundation, ii) before and iii) after the TRIPS-plus. Upon showing the legitimacy challenges inherent in its undemocratic foundation, the article points to the success of the regime in finding a balance between conflicting interests before the TRIPS-plus era. Later, it underlines the many challenges that come with linking the IIPR to the investment regime and argues that the FTAs and frequent regime- shifting activities put further pressure on the authority and legitimacy of the regime. Stressing the importance of democratic participation for the legitimacy of a coordinative authority, the article casts doubt on the IIPR's legitimacy and concludes by raising some points to overcome the ongoing legitimacy challenges.

KEY WORDS: intellectual property; interlegality; international regimes; legitimacy; legitimate authority

1. Introduction

The recent Covid-19 global health crisis brought into sharp relief the current problems afflicting the international intellectual property regime (IIPR)[1]. Although developing and least-

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developed countries are legally allowed to use the TRIPS flexibilities[2] and a proposal advanced by South Africa and India to waive the IP rights of pharmaceutical companies received significant support[3], it is fair to admit that the IIPR failed to meet expectations. For once, the current 'cumbersome rules, political and economic pressures and a lack of transparency' have led the IIPR to contribute to the global health crisis and inequalities.[4] That impugns the legitimacy of the IIPR, an international authority whose ultimate purpose is to promote public welfare through the use of private rights, as worded in Article 7 of the TRIPS Agreement:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Authority is legitimate, according to Raz, only if it does better than what an individual would do by itself.[5] In other words, states or individuals have recourse to authority with the expectation that it helps them better achieve their objectives. The IIPR, an international authority that renders the coordination of IP rights possible, supplies states with a key service impossible to attain it its absence[6]. Further, the IIPR, resting on a compromise between developing and developed countries, made possible the establishment of the WTO and the creation of an international trade regime. Less developed countries are entitled to access the markets of developed countries on the condition that they concede to protect the IP rights at least over the minimum standards set globally.[7] The WTO-TRIPS compromise is held to

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[1] My purpose lies here in the intellectual property regime developed through the TRIPS agreement and supported by the WTO Dispute Settlement Body. Because intellectual property rights are closely connected with many other rights from different regimes including climate change, biodiversity, and protection of cultural heritage; the term international intellectual property regime is selected to leave those other regimes aside. The term global intellectual property regime can be used for an analysis that includes those regimes.

[2] The flexibilities allow nation-states to derogate from the international IP rights in compliance with the IIPR. It includes transitional periods, compulsory licensing, government use exceptions, parallel importation, exceptions to IP rights, IP rights standards, and other procedural measures. M. El Said, 'The Impact of "TRIPS-Plus" Rules on the Use of TRIPS Flexibilities: Dealing with the Implementation Challenges', in C.M. Correa and R.M. Hilty (eds.), *Access to Medicines and Vaccines: Implementing Flexibilities under Intellectual Property Law* (2022), 297 at 307-309. For detailed explanations, see www.wipo.int/ip-development/en/agenda/flexibilities/.

[3] World Trade Organization Members to continue discussion on proposal for temporary IP waiver in response to COVID-19. Available at www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm.

[4] Sekalala et al., 'Decolonising Human Rights: How Intellectual Property Laws Result in Unequal Access to the COVID-19 Vaccine', (2021) 6 *BMJ Global Health* 1, at 4.

[5] J. Raz, 'The Problem of Authority: Revisiting the Service Conception', (2006) 90 *Minnesota Law Review* 1003.

[6] P. K. Yu, 'International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia', (2007) *Michigan State Law Review* 1, at 4.

[7] E. Siew-Kuan Ng, A. Guangzhou Hu, 'Flexibilities in the Implementation of TRIPS: An Analysis of Their Impact on Technological Innovation and Public Health in Asia', in R.C. Dreyfuss and E. Siew Kuan Ng (eds.), *Framing*

increase trade, promote public welfare, enable technology transfer from developed to developing countries; and disseminate scientific, technological, and cultural knowledge. This underlying idea on which the IIPR is founded constitutes the main reason for states to delegate their right to regulate to an international authority, leaving at the same time considerable discretion to them in accordance with their national autonomy. As argued by Dinwoodie and Dreyfuss, the TRIPS is to be assessed, not as 'a comprehensive code' based on the logic of harmonization, but as a neo-federalist compromise that 'gives states autonomy to address the complexity, diversity, and historical contingency of intellectual property law, but it requires them to act within the overlay of a coordinated international intellectual property regime'.[8]

The form international intellectual property law has taken today is highly complex. As a regime whose historical origins may be traced back to the late nineteenth century when the Bern and Paris Conventions were signed, protecting respectively industrial property and copyrights[9], it has undergone significant transformations in the last three decades. The first transformation occurred when the IIPR is married with the international trade law (ITL) through the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) as part of the WTO agreement in 1994 in Marrakesh[10]. The mushrooming of bilateral, plurilateral trade and investment agreements marking a turn away from multilateralism to minilateralism and bilateralism ushered in the beginning of the second transformation (TRIPS-plus) around the mid-2000s.[11] As a result, the IIPR today is a highly complex regime (regime complex)[12] that covers different norms originating from distinct international regimes (investment, trade, health, food, environment). Even if it is under the

Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, Culture and Human Rights (2018), 115 at 118-19.

[8] G. B. Dinwoodie and R. C. Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (2012), at 6, 14.

[9] 1886 Berne Convention for the Protection of Literary and Artistic Works, 1161 UNTS 30.

[10] See, J. Griffiths and T. Mylly, 'The Transformations of Global Intellectual Property Protection', in J. Griffiths and T. Mylly (eds.), *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights* (2021), 1 at 1 (depicting the marriage as 'a turning point in the mid- 1990s'); F.M. Abbott, T. Cottier and F. Gurry *International Intellectual Property in an Integrated World Economy* (2019), at 4 (portraying it as 'a sea change'); P. K. Yu, 'The Second Transformation of the International Intellectual Property Regime', in Griffiths and Mylly, *supra* note 10, 176 (calling it the first transformation); see also for a different three-fold classification (addition, subtraction, and calibration), D. Gervais, 'TRIPS 3.0: Policy Calibration and Innovation Displacement', in N. W. Netanel (ed.), *The Development Agenda: Global Intellectual Property and Developing Countries* (2009), 51.

[11] See, e.g., P. K. Yu, 'Intellectual Property and Human Rights in the Nonmultilateral Era', (2012) 64 *Florida Law Review* 1045; H. Grosse Ruse-Khan, 'Effects of Combined Hedging: Overlapping and Accumulating Protection for Intellectual Property Assests on a Global Scale , in Griffiths and Mylly, supra note 10, 23 at 26-37; S. K. Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP', (2011) 18 *Journal of Intellectual Property Law* 447; see Yu, *supra* note 10, at 176-177; C. F. Lo, 'Relations between the TRIPS Agreement and the Anti-counterfeiting Trade Agreement: A Plurilateral Instrument Having Multilateral Functions with Little Multilateral Process', (2013) 48 *Foreign Trade Review* 105.

[12] See Dinwoodie and Dreyfuss, *supra* note 8, at 9-14; see Yu, *supra* note 6, at 4.

pressure of other regimes, it has so far been successful in protecting IP rights, even increasing their level of protection, first from incentives to commodities and then from commodities to assets.[13] Contrary to the common-sense assumption that the force of a legal order rests on its unity and coherence,[14] the IIPR has so far fared well, even though it stops woefully short of being a full-fledged legal order and falling under the category of regime complex.[15] In a nutshell, the IIPR, as an authority, does fulfil the expectations, yet whether it does so in a legitimate way is yet to be addressed.

To address these questions, the article benefits from Raz's service conception of authority, according to which authorities are legitimate only if they provide us with better service than we may do ourselves.[16] In doing so, it is concerned not with the legitimacy of an international court[17] or an administrative body, but with the legitimacy of a regime, established through international treaty and converged around a court.[18] Further, it approaches the regime from a historical perspective to shed light on the tensions on which its legitimacy is founded and to show the challenges which it encountered[19]. The IIPR is an authority whose legitimacy rests on it being a better service provider than its alternatives, be it other regimes or domestic legal orders. The concept of legitimate authority is apt to provide a better framework than its alternatives, say, constitutionalism, in addressing the problems plaguing the regime. Further, it allows us to approach the IIPR with conceptual clarity and thereby avoid using the term constitutionalism in a negative and pejorative sense, as it is done with the new constitutionalism[20]. Against this backdrop, the paper first explores what it takes to be a

[13] See, R. Dreyfuss and S. Frankel, 'From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property', (2015) 36 *Michigan Journal of International Law* 557.
[14] For regime complexes see, K. Raustiala and D. G. Victor, 'The Regime Complex for Plant Genetic Resources', (2004) 58 *International Organization* 277; for an investigation into the climate change governance see, G. Çapar, 'From Conflictual to Coordinated Interlegality: The Green New Deals Within the Global Climate Change Regime', (2021) *7 Italian Law Journal* 1003.
[15] See Yu, *supra* note 10; K. Raustiala, 'Density and Conflict in International Intellectual Property Law', (2007) 40 *University of California Davis Law Review* 1021, at 1025-1026; see Dinwoodie and Dreyfuss, *supra* note 8, at 9-14.
[16] See Raz, *supra* note 5.
[17] See, e.g., Howse et al. (eds.), *The Legitimacy of International Trade Courts and Tribunals* (2018); H. G. Cohen, A. Føllesdal and G. Ulfstein, *Legitimacy and International Courts* (2018); A. Føllesdal, 'Survey Article: The Legitimacy of International Courts', (2020) 28 *Journal of Political Philosophy* 476.
[18] See, e.g., H. Breitmeier, *The Legitimacy of International Regimes*, (2008); for the human rights regimes, see, A. Føllesdal, J. K. Schaffer and G. Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (2013), Vol. 4.
[19] For a legitimacy assessment of the TRIPS built on Franck's subjective conception of legitimacy see, D. Shanker, 'Legitimacy and the TRIPS Agreement', (2003) 6 *Journal of World Intellectual Property* 155. See also, S. Frankel, 'The Legitimacy and Purpose of Intellectual Property Chapters in FTAs', (2011) 1 *Victoria University of Wellington Legal Research Papers* , at 9-10; see also for a legitimacy assessment of the IIPR based on its internal standards J. Rochel, 'Intellectual Property and its Foundations: Using Art. 7 and 8 to Address the Legitimacy of the TRIPS', (2020) 23 *The Journal of World Intellectual Property* 21.
[20] S. Gill and A. C. Cutler, *New Constitutionalism and World Order* (2014).

legitimate authority in the international realm (Section 2). Then, upon examining the IIPR through its evolution with a particular emphasis on the TRIPS era (Section 3.1), the paper shows how the TRIPS-plus puts further pressure on the legitimacy of the IIPR (Section 3.2). Upon evaluating the legitimacy of the IIPR at its foundation (Section 4.1), before (Section 4.2) and after the second transformation, the article concludes with the latent challenges to the IIPR's authority legitimacy and offers some institutional and adjudicative solutions apt to ward off those challenges (Section 5). In short, it argues that even though the IIPR's undemocratic foundation poses a significant challenge to its legitimacy, it did well in providing states with authoritative guidance and being responsive to their initial reasons after its problematic foundation. Nevertheless, there remain latent challenges to its authority and legitimacy under the TRIPS-plus era.

2. Legitimate Authority Beyond Nation-States

2.1. The concepts of Legitimate Authority

There exist two main approaches that account for the legitimacy of political institutions. If legitimacy is approached descriptively, it focuses on how authority is perceived and believed by people as legitimate without any normative yardstick to assess it externally.[21] In contrast, when legitimacy is explained normatively, an authority's legitimacy depends on the extent to which it meets some external and normative criteria[22]. Though two are conceptually separate, it is hard to separate the sociological/subjective from the normative/objective account of legitimacy. In Hart's primitive society for instance, the authority of law relies on its being accepted as an authority by the participants of a community-based legal order.[23] Raz also draws attention to the importance of acceptance, though it fails to shoulder the justificatory burden of an authority, by noting that acceptance is apt to increase the overall effectiveness of the government.[24] When considered further that effectiveness, at least to a certain extent, is one of the necessary properties of legitimate authority, the functional connection between sociological

[21] See, e.g., T. M Franck, 'Legitimacy in the International System', (1988) 82 *American Journal of International Law*, 705, at 750.
[22] P. Fabienne, 'Political Legitimacy', in E. N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2017), available at www.plato.stanford.edu/archives/sum2017/entries/legitimacy.
[23] H. L. A. Hart, *The Concept of Law* (1961).
[24] 'Legitimation (acceptance) is by no means sufficient for legitimacy. But it means that a major hurdle is overcome.' J. Raz, 'Democratic Deficit', (2018) *Columbia Public Law Research Paper No: 14-587*, at 18.

and normative accounts of legitimacy becomes apparent,[25] even though they rest in conceptually separate worlds.

A further distinction may also be made within the normative accounts of legitimacy.[26] Some concentrate on the coercive use of power and examine the conditions under which the authoritative use of coercive power is justified.[27] I will call this enforcement-based account of legitimate authority. The other (practical) account, however, places its emphasis on how authority changes the normative situations of its subjects and establishes a connection between authority and practical reasoning without placing much emphasis on the problem of enforcement.[28] Those two different approaches have further implications for what it means to have a right to rule (claim, liberty, or power) and what the respondents' (citizens) corresponding responsibility (duty of obedience, non-interference, liability) is.[29] Joseph Raz who develops one of the best examples of the practical account of legitimate authority underlines that to understand what authority is, it is necessary to grasp how it presents itself. Raz's explanation of Ladenson's conception of authority may be illuminating in this regard.

> Ladenson offers an explanation of legitimate authority in terms of de facto authority. It is justified de facto authority. De facto authority is then understood as some form of power over people. The analysis fails because the notion of a de facto authority cannot be understood except by reference to that of legitimate authority. Having de facto authority is not just having an ability to influence people. It is coupled with a claim that those people are bound to obey.[30]

What may be inferred from the foregoing is that how authority presents itself and how it claims to rule over people is an indispensable component of authority. As Raz argued, it is in

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[25] N. Roughan, 'From Authority to Authorities: Bringing the Social/Normative Divide', in M. Del Mar and R. Cotterrell (eds.), *Authority in Transnational Legal Theory: Theorizing Across Disciplines* (2016), 280.
[26] N. P. Adams, 'Institutional Legitimacy', (2018) 26 *Journal of Political Philosophy* 84, at 97.
[27] See, e.g., R. Ladenson, 'In Defense of a Hobbesian Conception of the Law', (1980) 9 *Philosophy and Public Affairs* 134, and R. Dworkin, *Law's Empire* (1986).
[28] J. Raz, *The Authority of Law* (1979), at 9.
[29] See for a summary of those two approaches, Adams, *supra* note 26, at 87-90. For the weaker and stronger versions of 'the right to rule', A. Buchanan, 'Legitimacy of International Law', in J. Tasioulas and S. Besson (eds.), *The Philosophy of International Law* (2010), 79 at 81-85; and D. Lefkowitz, *Philosophy and International Law* (2020), at 99-105. Buchanan's explanations about the stronger and weaker versions of the right to rule resonates with the distinction I made between enforcement- and non-enforcement-based accounts of legitimate authority. Even though Raz's service conception of authority entails that authority provides individuals with pre-emptive reasons, I do not think that his pre-emption thesis brings him closer to the enforcement-based accounts. His arguments about the possibility of a legal system (or authority) lacking coercive institutions like the society of angels lend further credence to this argument. See for a contrary view based on the focal and monist understanding of legitimacy, J. Tasioulas, 'The Legitimacy of International Law', in Tasioulas and Besson, *supra* note 29, , 97 at 98-99.
[30] J. Raz, *The Morality of Freedom* (1986), at 27-28.

the nature of law to claim legitimate authority, even though it may not possess it every time. Acknowledgement of law's claim to legitimate authority does, therefore, allow us to approach authority from a different perspective by observing what it does through how it affects an individual's practical reasoning. The enforcement-based account of legitimacy prioritizes the product of authoritative institutions over the process through which they impact individual practical reasoning. It is, therefore, concerned more with the justification of enforcement and coercion than how authority affects individual practical reasoning. However, the practical account of authority may allow us to sever the questions of how authority does from what authority does.[31] Thinking of authority through the claims it made and how it affects individuals' practical reasoning opens a space in which we may account for many sorts of authorities that do not resemble the state and fall short of exercising comprehensive coercive power over its subjects. That is so because not all authorities have administrative mechanisms to ensure compliance, nor are the different functions of states (legislation, execution/administration, and adjudication) performed by one institution in the global realm.[32] Given the inherent compliance or enforceability problem afflicting international institutions, the practical account of legitimate authority appears highly promising. Even though Raz's service conception is criticized for its inability to explain the interaction of authorities between legal orders,[33] it, turning attention from the justification of coercive use of power towards how it affects an individual's normative space, makes itself one of the most favourable standards for the legitimacy assessment of legal orders beyond nation states.[34]

2.2. Instrumental and Conditional Nature of Legitimate Authority

Authority demands obedience from individuals and expects them to follow its decisions without further inquiry.[35] Since 'those who apply rules are usually applying rules written by someone else',[36] whenever authority is invoked, it poses a challenge to individual autonomy. Raz introduces two different theses to overcome this problem. At the core of service

[31] 'Theoretically the main conclusion of the foregoing discussion is in the emphasis on the separateness of the issues of (1) the authority of the state; (2) the scope of its justified power; (3) the obligation to support just institutions; (4) the obligation to obey the law.' See Raz, *supra* note 28, at 194.
[32] See Raz, *supra* note 28, at 107.
[33] For authorities between legal orders see, N. Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Authority* (2013).
[34] See Tasioulas, *supra* note 29, at 100.
[35] This corresponds to Raz's pre-emption thesis, see Raz, *supra* note 28, at 16-25. Besson succinctly explains it as follows: 'A has legitimate authority over C when A's directives are (i) content- independent and (ii) exclusionary reasons for action for C.' S. Besson, 'The Authority of International Law: Lifting the State Veil', (2009) 31 *Sydney Law Review* 343, at 351.
[36] B. Bix, *Law, Language, and Legal Indeterminacy* (1995), at 23.

conception sits the idea that authority 'is more likely to act successfully on the reasons which apply to its subjects' (the normal justification thesis).[37] The NJT emphasizes the conditional nature of authority, for it grounds the legitimacy of an authority on its service providing capacity i.e., whether it helps individuals better reach their own objectives by acting as a mediator between their short-term interests and objective reasons.[38]

Further, he notes with his dependence thesis (DT) that 'all authoritative directives should be based, in the main, on reasons which already independently apply to the subjects of the directives'.[39] The DT is intended to underscore that the reasons why authorities are entrusted with decision-making power are also the limitations imposed on them as to how to use their power. The importance of the DT may be undervalued when seen from the perspective of states whose claim to authority is unlimited.[40] Yet, when today's functionally delineated global regulatory sphere is considered, the DT turns out to be a crucial tool in assessing the legitimacy of any authority using institution beyond nation-states. For instance, if the UN, as an international institution established to protect peace and security and promote human rights, acts in a way that contradicts these functional purposes, then it may be argued that this will run counter to the demands of the DT.[41] Although the DT presumes that authority's reasons should echo the objective reasons embraced by individuals, what it does envision is 'enhanced' not 'perfect conformity'.[42]

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[37] J. Raz, 'Authority and Justification', (1985) 14 *Philosophy & Public Affairs* 3, at 20.

[38] There is also one additional condition for legitimate authority, that is, the independence condition suggesting that authority should give way to individual autonomy when it is less important for an individual to act according to the right reason than to decide for oneself how to act. See Raz, *supra* note 5, at 1015. Even though I disregard its role in this paper, One may still assume that the DT partially covers the reasons associated with the independence condition.

[39] See Raz, *supra* note 37, at 14.

[40] 'In most contemporary societies the law is the only human institution claiming unlimited authority.' See Raz, *supra* note 30, at 76. The state is also depicted as a general end entity, G. Palombella, 'Theories, Realities and Promises of Inter-legality: A Manifesto', in J. Klabbers and G. Palombella (eds.), *The Challenge of Inter-Legality* (2019), 363 at 369.

[41] As an example, the seminal *Kadi* case and its analysis, see, G. Palombella, 'The Rule of Law Beyond the State: Failures, Promises, and Theory', (2009) 7 *International Journal of Constitutional Law* 442.

[42] See Tasioulas, *supra* note 29, at 102. D. Viehoff, 'Debate: Procedure and Outcome in the Justification of Authority', (2011) 19 *The Journal of Political Philosophy* 248, at 258.

2.3. The Coordinative Legal Authority and Democratic Coordination Justification

Developed to explicate the nature of authority, the service conception, when applied to political institutions, 'invites a piece-meal approach to the question of the authority of governments' and admits that the scope of authority 'varies from individual to individual and is more limited than'[43] it claims for itself. Owing to the instrumental and conditional nature of authority, it 'all depends on the person over whom authority is supposed to be exercised' as well as the capacity of government.[44] Nevertheless, Raz also clearly states that when it comes to the coordination of collective interests, the scope of authority should be based on it 'having legitimate authority over the population at large'[45] rather than on its individual-based piecemeal assessment. For this reason, it follows that an authority's claim to legitimacy, when it provides non-fungible services like solving coordination problems, is warranted, insofar as a community at first has a reason to coordinate its actions.[46] Put differently, the service that international authorities are supposed to deliver when they provide states with a framework for cooperation and coordination differs significantly from their other services such as curing volitional defects and alleviating the decision-making burden.[47] Hence it is necessary to discover the conditions under which international authority supplies states with coordination-based services and meets the standards of what Besson calls 'the coordination based justification of authority'.[48]

As this point bears significant importance for the global governance regimes whose main function is to solve collective action problems at the international level, it is not surprising that international lawyers have recently dwelled on this issue.[49] Adams, for instance, develops an institutional conception of legitimacy, suggesting that legitimate institutions have a right to *function* without interference because this is the only way to solve meta-coordination problems.[50] Besson, similarly, suggests reinterpreting the service conception of authority to

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[43] See Raz, *supra* note 30, at 80.
[44] Ibid., at 73.
[45] Ibid., at 73-74.
[46] Ibid., at 76.
[47] For some of the services provided by international authorities see Tasioulas, *supra* note 29, at 102. Viehoff's arbitration model presents another example of the cases where the piecemeal nature of authority's obligation is refuted, as he clearly notes: 'Arbitration offers a *genuine service* to the subjects'.See Vienhoff, *supra* note 42, at 257.
[48] See Besson, *supra* note 35, at 360.
[49] For a seminal study see, A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics & International Affairs* 405. Raz clearly states that his account of authority is applicable to international organizations. J. Raz, 'Why the State?', in N. Roughan and A. Halpin (eds.), *In Pursuit of Pluralist Jurisprudence* (2017), 136 at 161.
[50] See Adams, *supra* note 26, at 87-90.

'accommodate the way the law provides a whole class of subjects, and not each of them separately, with reasons for co-ordinated action over matters of justice and common concern'.[51] To this end, she argues that the NJT should contain 'our epistemic disagreements and the need for co-ordination by a public authority as its primary feature'[52] and should not be applied, at least under these circumstances, to the determination of authority in the first instance. In short, the existence of independent reasons for coordination among individuals narrows down the scope of the NJT and rules out its piece-meal effects on authority. Otherwise, an authority will fail to provide services when coordination is needed yet unachievable due to disagreement. The only condition introduced by Besson when there exist independent reasons for co-ordination between legal subjects is that it should be based on the basic principles of democratic political equality.[53] In brief, the legitimacy of coordinative legal authority derives from this democratic coordination justification, as well as the coordination service it provides.

As rightly argued by Besson, the international organizations (the IOs) enable states a platform where their dual role under international law is mostly terminated because of the separation of officials from legal subjects.[54] And they do so by creating permanent institutions entitled to improve law and accommodate it to new situations. Given the inherently co-ordination demanding nature of international law, the IOs may play a significant role in solving coordination problems between states by creating salient points over which they will seek to concert their behaviour. Owing to the predominantly horizontal nature of international law that lacks centralized law-making, law-applying, and law-enforcing institutions, the coordination-based justification of authority in international law is much more pressing than it is in domestic legal orders.[55]

What needs to be illuminated before moving on to the intellectual property regime is whether international law's claims to authority differ from the domestic and comprehensive ones. This is a question bound up with the problem of the subject of international law. States are accepted generally as the primary subject of international law, yet it is also admitted that they are acting on behalf of their citizens and represent their interests.[56] If individuals are accepted as the real beneficiaries of international law, then it should also be conceded that

[51] See Besson, *supra* note 35, at 355.
[52] See Besson, *supra* note 35, at 357.
[53] Ibid., at 354. For similar arguments see Buchanan and Keohane, *supra* note 49, at 415, and for additional standards depending on the density of political power wielded by different international authorities, see, A. Scherz, 'Tying Legitimacy to Political Power: Graded Legitimacy Standards for International Institutions', (2021) 20 *European Journal of Political Theory* 631.
[54] See Besson, *supra* note 35, at 362-3.
[55] Ibid., at 366-7.
[56] Ibid., at 363.

international law is most likely to claim limited authority. Because individuals, as the real subject of international law, are confronted with different authority claims emanating from various authoritative institutions (the WTO, the ICJ, the UN Security Council, the WIPO, the WHO), the claim to authority made by those authorities in the international realm cannot be comprehensive and unlimited. So, international law's claim to authority should be understood as a claim to 'relative authority', meaning that the claimed legitimate authority 'is relative to that of other authorities, including the state subjects themselves (qua authorities) as well as other competing and overlapping international regimes, rules or institutions'.[57] Roughan affirms further that 'whenever authority is shared or overlapping as a result of the subjects being shared or interactive, that authority is not independent and its legitimacy cannot be assessed as if it is'.[58]

Even though her account is illuminating and theoretically inspiring, it is over-demanding and makes it almost impossible to assess the legitimacy of an international regime.[59] For this reason, I will add two presumptions to make it applicable to current international regimes. First, though it is debatable whether states or individuals are the real legal subjects who benefit from the services of international authorities,[60] we may assume that states act as proxy subjects that represent their citizen's interests.[61] It should be kept in mind, however, that this is a rebuttable presumption accepted to make the analysis easier and thus is open to further necessary contextual analysis. So, I will take it at face value that states help their citizens to reach better their own objectives in the absence of any contrary evidence. One problem that comes with this view is that not all states are democratic and do not represent their citizen's interests. As this may require further discussions as to the role of democracy in vesting international institutions with legitimacy,[62] I will not deal with this question here and assume

[57] N. Roughan, 'Mind The Gaps: Authority and Legality in International Law', (2016) 27 *The European Journal of International Law* 329, at 340.
[58] Ibid., at 349.
[59] This is already admitted by Roughan: 'Justifying international authority is much more complicated than justifying state authority because of the overlap between subjects, domains and reasons, which place states and the institutions they create in awkward relationships with one another.' Ibid., at 347.
[60] See for the proponents who militate for accepting individuals as the real legal subject of international law, Besson, *supra* note 35; J. Waldron, 'The Rule of International Law', (2006) 30 *Harvard Journal of Law and Public Policy*15; and for those who are rather skeptical about the cosmopolitan direction of the former camp, see, G. Palombella, 'Non-arbitrariness, Rule of Law and the "Margin of Appreciation": Comments on Andreas Follesdal', (2021) 10 *Global Constitutionalism* 139.
[61] This gives rise to what Christiano calls 'the representativeness problem', which stems from three different factors: (i) not all states do really represent their citizens (Authoritarian states); (ii) even democratic states fail to represent desperate minorities; and (iii) not all democratic states are represented by parliaments. T. Christiano, 'Democratic Legitimacy and International Institutions', in Tasioulas and Besson, *supra* note 29, 119 at 124-5.
[62] See, e.g., Christiano, *supra* note 61.

that states are legitimate authorities that help their citizens attain their objectives better than they do by themselves.

Second, the legitimacy of international regimes can be assessed through the DT and from the perspective of an authority-subject relationship without much regard for inter-authority relationship. The latter is not, however, totally dismissed as irrelevant because states, as subjects of international law, have an authority-subject relationship with other regimes as well. The disregard of inter-authority relationship stems from a practical necessity because of the inherently complex nature of the IIPR. As the legitimacy of international authorities is conditional on and limited to their service-providing function, when their services extend beyond these legitimate boundaries (the DT) or cannot be delivered, then the main reason for deferring to authority does evaporate.

3. Evolutionary Trajectory of the IIPR

It is beyond the scope of this paper to present a comprehensive history of intellectual property which dates to the fifteenth century Venice when the first patent act specified the conditions of patentability, including innovation, social utility, and limited protection[63]. As with many rights, IP rights rest on a tension between private and public interests,[64] i.e., between the interests of IP holders in excluding public from the benefits of their innovation and the public interests to access the knowledge freely. This tension recurrently resurfaces under different historical, social, economic, and technological conditions.[65] Even though intellectual property is principally territorial,[66] the third industrial revolution coupled with the substantial increase in global trade volume prompted developed countries to find a way to prevent the distortion caused by the principle of territoriality.[67] Shaped primarily by the competing interests of IP importing and exporting countries,[68] the Berlin and Paris Conventions established three basic principles of the international IP regime[69] and prescribed the minimum standards of protection

[63] C. May and S.K. Sell, *Intellectual Property Rights: A Critical Introduction* (2006), at 58-65.
[64] Ibid., at 25-8.
[65] Ibid., at 108.
[66] See Dinwoodie and Dreyfuss, *supra* note 8, at 4.
[67] Ibid., at 3-4.
[68] See May and Sell, *supra* note 63, at 31-42. For the role of major companies, see, P. Drahos and J.Braithwaite, 'Hegemony Based on Knowledge: The Role of Intellectual Property', (2004) 21 *Law in Context* 204; see May and Sell, *supra* note 63, at 153-61; and for the intra-group conflicts within the developed and developing countries, see May and Sell, *supra* note 63, at 113-4, 133-45.
[69] The three basic principles are (i) principle of national treatment (non-discrimination based on national origin); (ii) principle of automatic protection; and (iii) principle of independence of protection. See www.wipo.int/treaties/en/ip/berne/summary_berne.html.

to be accorded to the IP rights.[70] Additionally, those treaties enshrined some exceptions for socio-economic rights (free uses of protected works) and allowed developing countries to enforce non-voluntary licensing.[71]This period, lasting roughly up until the ratification of the TRIPS agreement, witnessed also the institutionalization of the regime with the establishment of the WIPO (World Intellectual Property Regime).[72] The WIPO treaties (Berlin and Paris) were limited in scope as they are chiefly concerned with ensuring coordination between national IP systems through border measures and non-discrimination clauses.[73] The principle of national autonomy is, therefore, the governing principle of this pre-TRIPS era.[74]

3.1. The First Transformation: Institutionalization Under the Trade Regime

The first transformation came after the WIPO failed in establishing a regime for the international protection of the IP norms in the face of technological developments.[75] Following their disappointment, developed countries sought redress in the WTO by linking IP rights to the trade regime.[76] The linkage between IP rights and the WTO marks a watershed moment for the IP regime simply because the existence of a dispute settlement mechanism before which states may bring their cases in case of non-compliance gave teeth to the IP norms, provided the IIPR with interpretive coherence, and increased the regime's normative unity.[77] Second, the TRIPS goes beyond the mere coordination logic of the previous WIPO Conventions and requires nation states to reorganize their internal administrative and judicial mechanisms and ensure the effective enforcement of international IP norms (Articles 41-50). So, they lost the ability to pursue a national IP policy in accordance with their own priorities and developmental strategy.[78] Third, the TRIPS envisions 'an inbuilt mechanism towards ever-increasing standards of

[70] For instance, the protection accorded to the copyright holder is 50 years after the author's death. See for other minimum standards at www.wipo.int/treaties/en/ip/berne/summary_berne.html.
[71] See Arts. 9(2), 10, 10 bis, and 11bis (3) of the Berne Convention and appendix to the Paris Agreement.
[72] 1967 Convention Establishing the World Intellectual Property Organization, 828 UNTS 3.
[73] See May and Sell, *supra* note 63, at 120.
[74] See Yu, *supra* note 10, at 177. See Dinwoodie and Dreyfuss, *supra* note 8, at 24-6. The copyrights, trademarks, and patent rights have undergone slightly different development trajectories at the global level. The patent rights, for instance, were not as developed as the copyrights during this first phase. Ibid., 24.
[75] See May and Sell, *supra* note 63, at 32-33, 52; see Dinwoodie and Dreyfuss, *supra* note 8, at 29.
[76] L. R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', (2004) 29 *Yale Journal of International Law* 1. It was a push initiated by developed countries including the US, the EU, and Japan; D. Gervais, 'TRIPS and Development', in M. David and D. Halbert (eds.), *The Sage Handbook of Intellectual Property* (2015), 89, at 95. May calls this 'forum proliferation' rather than forum shifting by drawing attention to the residual role and relative importance of the WIPO after the establishment of the WTO. C. May, *World Intellectual Property Organization (WIPO): Resurgence and the Development Agenda* (2006), at 34-5.
[77] See Grosse Ruse-Khan, *supra* note 11, at 33-34; see Yu, *supra* note 10, at 178-179.
[78] See El Said, *supra* note 2, at 306-7.

protection'[79] because it sets the minimum international standards for the protection of IP rights yet leaves states to go beyond those limitations through bilateral agreements.

Linking IP rights to trade regime infused trade logic into the IIPR since trade-related principles are used as interpretive tools in filling the gaps within the regime.[80] The IP rights, once considered as a mere incentive in the service of public welfare, were then covered with rhetoric of right and treated as 'a tradable commodity' instead of 'a barrier to trade'.[81] This mirrors also the underlying compromise upon which the WTO and the TRIPS are founded, for the IP rights, being essentially a barrier to the free flow of goods and products, acquired the status of 'acceptable barriers'.[82] That also finds its expression in Article XX of the GATT, which considers 'the protection of patents, trademarks and copyrights, and the prevention of deceptive practices' as a necessary exception to the free flow of trade. As the protection of IP rights is conditional on whether it fosters innovation, expedites the global spread of scientific and intellectual knowledge and increases the volume of trade in the long term, it should be construed in a way that is consistent with trade logic.[83] That is to say that overprotecting IP rights may function as a deterrent to the free flow of trade and run counter to the main objective of the TRIPS-WTO compromise. So, IP rights should not be protected more than necessary for spurring creative minds to innovation by, say, compensating for the time, money, and energy invested in creating something innovative.

As alluded to before, the TRIPS-WTO is a compromise[84] that rests on diverging interests of the least developed (LDC), developing, and developed countries. To protect IP

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[79] See Grosse Ruse-Khan, *supra* note 11, at 27; H. Grosse Ruse-Khan and A. Kur, 'Enough Is Enough—The Notion of Binding Ceilings in International Intellectual Property Protection', (2009) *Max Planck Institute for Intellectual Property, Competition and Tax Law Research Paper Series No. 09-01*, available at www.ssrn.com/abstract=1326429.

[80] T. Mylly, 'The New Constitutional Architecture of Intellectual Property', in Griffiths and Mylly, *supra* note 10, 50 at 62; see Grosse Ruse-Khan, *supra* note 11, at 24. Here the main problem lies in the combination of *de facto* with *de jure* discrimination and the absence of a general exception clause in the IP regime. Ibid., at 27-31. For the seminal cases that permit the transfer of the concept of *de facto* discrimination to the IP regime see, Panel Report European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS174/R (2005) (EC-GIs); and Panel Report Canada—Patent Protection of Pharmaceutical Products, WT/ DS114/R (2000) (Canada-Patents).

[81] See Dreyfuss and Frankel, *supra* note 13, at 559.

[82] S. Frankel, 'The WTO's Application of "the Customary Rules of Interpretation of Public International Law" to Intellectual Property', (2006) 46 *Virginia Journal of International Law* 365, at 374–375. For how this tension between free trade and intellectual property informs the initial settlement of the IIPR with the Paris and Berne Conventions, see May and Sell, *supra* note 63, at 107-22.

[83] The trade-related rationale of the IP rights is apt to be considered as the logical limit of intellectual property rights, see Frankel, *supra* note 19, at 9-10. 'Art. 7 TRIPS prescribes a type of competition which should be able to integrate the objective of the broader competition type of the WTO.'See Rochel, *supra* note 19, at 28.

[84] There are different explanations concerning the birth of the WTO-TRIPS regime, among which three narratives hold the pride of place: (i) the exchange narrative; (ii) the coercion narrative; and (iii) the compromise narrative. See Dinwoodie and Dreyfuss, *supra* note 8, at 32-9. For an argument from compromise based on international competition and domestic justice, see Rochel, *supra* note 19, at 26-30.

rights at the global level, a demand backed by developed countries is detrimental to developing and least developed countries because it puts a price on innovation and knowledge for which they are in crying need. In return, the minimum expectations of the LDCs were as follows: (i) an exemption from the TRIPS obligations; (ii) technical assistance; and (iii) effective technology transfer.[85] In addition to being exempted from the obligations incurred by the TRIPS up until 2034,[86] the LDCs are promised to receive technological support by developing countries pursuant to Article 66(2) of the TRIPS agreement. It is not misleading, therefore, to conclude that the LDCs obtained what they initially asked for from the TRIPS, despite their limited participation and representation.

As regards developing countries, the TRIPS provide various possibilities depending on the relevant country's level of technological growth and legal expertise. Initially, the TRIPS was believed to bring development, prosperity, and technology because it would create an additional incentive for domestic innovation, attract foreign investments and galvanize the transfer of knowledge and innovation to developing countries.[87] However, there are different ways to benefit from the TRIPS. For example, developing countries at their initial stage of technological development are predisposed to use the TRIPS flexibilities due to their lack of innovative capacity. A subset of developing countries like India, China or Taiwan has benefited remarkably from the IIPR by using flexibilities and exceptions enshrined in the TRIPS, as they are capable of absorbing technological innovations and imitating them in a legally confident way.[88] Nevertheless, when they increase their technological innovation capacity, developing countries are not so much willing to exploit the TRIPS flexibilities as reaping the benefits of IP protection granted by the TRIPS.[89] For there is 'an inverted U-shaped relationship between TRIPS flexibilities and a country's innovative capability: initially rising as a country acquires

[85] J. Watal and L. Caminero, 'Least Developed Countries, Transfer of Technology, and the TRIPS Agreement', (2017) *WTO Staff Working Paper, No. ERSD-2018-01*, at 4.
[86] For the first extension see, Council for Trade-Related Aspects of Intellectual Property Rights, Extension of the Transition Period under Article 66.1 for Least Developed Country Members, Decision of the Council for TRIPS of 11 June 2013, WTO document IP/C/64 (2013); and for the second extension see, Council for Trade-Related Aspects of Intellectual Property Rights, Extension of the Transition Period under Article 66.1 for Least Developed Country Members, Decision of the Council for TRIPS of 29 June 2021,WTO document IP/C/88 (2021). For the exemption granted to the least developed countries with respect to the pharmaceuticals and article 70.8 and 9, see Decision of 30 November 2015, WTO document WT/L/971(2015).
[87] For the expectations of developing countries (India,Brazil, Argentina, Malaysia, and Hong Kong) during the negotiation process see, Watal et al. (eds.), *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations* (2015), at 209-292.
[88] N. Kumar, 'Intellectual Property Rights, Technological and Economic Development: Experiences of Asian Countries', (2003) 38 *Economic and Political Weekly* 209, at 210.
[89] '… as countries "move up" the ladder of innovation and economic success, they become more amenable to intellectual property rights for their own welfare…countries such as China and India possess some strong sectors clamoring for increased intellectual property rights.' See May and Sell, *supra* note 63, at 179.

the capability to reverse engineer, but eventually falling after the country starts innovating'.[90] The use of TRIPS' flexibilities depends also on the subject matter at stake and its importance to general public. When it comes to issues related to public-related reasons such as the prevention of AIDS or granting licences for generic drug production, developing countries are less reluctant to use the TRIPS flexibilities.[91] India, for instance, took advantage of the flexibility clauses, and excluded some inventions from patentability by narrowing down the interpretation of the term 'invention'.[92] In one of those cases that followed, the Indian Supreme Court upheld the rejection of the patent application made by Novartis in 2013 on the ground that it does not meet the invention step necessary for its patentability according to the Indian Patent Act, which was reformulated and amended in 2005 to render it compatible with the TRIPS Agreement.[93]

In short, the TRIPS-WTO compromise is not something bad in itself. It solved the coordination problem caused by the national protection of IP rights and gave states significant leeway in the implementation phase.[94] The TRIPS exempts the LDSs from IP-related obligations and contains many exceptions and flexibilities available for developing countries, though their use demands technical and legal expertise. Seen in this light, it is not far-fetched to claim that the TRIPS achieved an equitable balance between international protection of IP rights and the state's right to regulate, as well as, between developing and developed countries. The increase in the overall patent application made by developing countries in the last decade lends further credence to the view that the TRIPS package 'was much more balanced than some TRIPS commentators assume'.[95] The balanced nature of the TRIPS is also vindicated by those who participate as the representatives of developing countries in the treaty-making process.[96]

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[90] See Siew-Kuan Ng and Guangzhou Hu, *supra* note 7, at 149.
[91] 'there is a positive correlation between TRIPS flexibilities utilization and the prevalence of HIV infection. But we caution against reading too much into the results given the small sample size'. See Siew-Kuan Ng and Guangzhou Hu, *supra* note 7, at 149-150.
[92] R. Gabble and C. J. Kohler, 'To Patent or Not to Patent? The Case of Novartis' Cancer Drug Glivec in India', (2014) 10 *Globalization and Health* 1, at 1. For an exemplary case from India about the Copyright flexibilities where the Court interpreted broadly the concepts of fair use and educational use exception see, A. Banarjee, 'Copyright and Academic Photocopying: The Delhi University Case', in S. Balganesh, N. W. Loon and H. Sun (eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions* (2021), 304.
[93] *Novartis AG v. Union of India & Others*, Supreme Court of India, Judgment of 1 April 2013, available at www.main.sci.gov.in/jonew/judis/40212.pdf.
[94] S. Frankel, 'The Fusion of Intellectual Property and Trade', in Dreyfuss and Siew Kuan Ng, *supra* note 7, 89 at 93-96.
[95] J. Watal, 'Patents: An Indian Perspective', in Watal et al., *supra* note 87, 295 at 314. Today Russia, China, and India 'figure among the top ten in patent, trademark and design applications received'. J. Watal, 'North-South Perceptions of the TRIPs Agreement: Then and Now (1990 and 2020)', in G. Ghidini, H. Ullrich and P. Drahos(eds.), *Kritika: Essays on Intellectual Property* (2021), 152 at 166.
[96] See, e.g., Watal et.al., *supra* note 87.

For instance, Jayashree Watal, the Indian representative to the TRIPS agreement, expresses his satisfaction about being part of a balanced deal and securing the patent exceptions enshrined in the agreement.[97] To conclude, the TRIPS contains enough flexibilities for developing countries to exploit and find a balance between their domestic needs and international IP protection, not least when considered the interpretative potential of Articles 7 and 8 of the TRIPS, its Preamble and the Doha Declaration.[98] However, it does not hold for the TRIPS-plus, as noted by El Said: 'we have a considerable wealth of empirical research about the positive impact of TRIPS flexibilities use and the negative impact of TRIPS-Plus obligations.'[99]

3.2. The Second Tranformation: An Unhappy Marriage

Unlike the first transformation that presents a picture of consolidation and convergence under the aegis of the WTO jurisdictional bodies, the second transformation was marked by pluralism and bilateralism due to the ever-increasing use of the FTAs that include exceedingly detailed and comprehensive IP chapters.[100] It does, therefore, represent an example of regime shifting[101] because many developed countries dissatisfied with the performance of the WTO DSBs sought to remedy this by connecting the IIPR with IIR (international investment regime) to protect or increase the level of IP rights' protection (TRIPS-plus) and exploit the deficiencies of the investment state dispute settlement (ISDS) mechanism.[102] The FTAs tailored mostly to increase the international IP protection at the expense of developing and least developed countries include provisions on: (i) patent term extension (Article 33); (ii) prohibition of adopting the system of international exhaustion that allows parallel imports (Article 6); (iii) limiting the scope of compulsory licences (Article 31 TRIPS); and (iv) data exclusivity protections that prevent the use of limitations enshrined with the Doha Declaration[103]. As such,

[97] See Watal, 'North- South Perceptions', *supra* note 95, at 155-8.
[98] See Rochel, *supra* note 19.
[99] See El Said, *supra* note 2, at 315.
[100] See Grosse Ruse-Khan, *supra* note 11, at 24.
[101] J. Gathii and C. Ho, 'Regime shifting of IP lawmaking and enforcement from the WTO to the international investment regime' (2017) 18 *Minnesota Journal of Law, Science and Technology* 427.
[102] See Yu, *supra* note 10, at 180-181.
[103] See for the US-Jordan FTA, M. El Said, 'The Morning After: TRIPS-Plus, FTAs and Wikileaks - Fresh Insights on the Implementation and Enforcement of IP Protection in Developing Countries', (2012) *PIJIP Research Paper no. 2012-03*; for the US-Colombia FTA see, M. S. Jadon, 'Access to Medicines in The Developing World: The Curious Case of TRIPS, DOHA and Concerns Under US-Colombia FTA', (2020), available at SSRN: www.ssrn.com/abstract=3731603.

they curtail the TRIPS flexibilities and discount the possibility of them being used by developing countries.[104]

The frequent use of the BITs and FTAs at the expense of the multilateral TRIPS framework came as a response to what Gervail calls TRIPS 2.0, characterized by the idea that 'TRIPS should be resisted and new norms developed' either within or outside the IP regime.[105] The Marrakesh VIP Treaty, signed in 2013, illustrates how the external resistance to the IIPR may help states and NGOs to soften the strict interpretation of the flexibilities.[106] It was nothing more than one link in the chain, as developing countries use different regimes to soften the TRIPS requirements of IP rights, including human rights, biodiversity, public health, and plant genetic resources for food and agriculture.[107] As already well documented, the Marrakesh Treaty, constructing a partial 'ceiling on international IP law', marks a paradigm shift in the balance between copyrights and disability rights and renders the former pregnable when confronted with the latter.[108] As an example of the internal resistance to the strict interpretation of the flexibility clauses, we may give the WTO Doha Declaration on the TRIPS Agreement and Public Health.[109] Developed as a reaction to the WTO Panel's rather narrow interpretation of the TRIPS flexibilities,[110] the Doha Declaration laid the foundation of the interpretive turn. This interpretive turn in the regime, stimulated by the WTO Panel's increasing reference to Articles 7 and 8 of the TRIPs, became visible only around the 2010s first with *China—IPRs* and then *Australia—Plain Packaging*[111]. That, however, engendered a pushback and drove the

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[104] H. Grosse Ruse-Khan, 'Protecting Intellectual Property Rights under BITs, FTAs and TRIPS: Conflicting Regimes or Mutual Coherence?', in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011), 485 at 491-3.

[105] See Gervais, *supra* note 10, at 365.

[106] See A. Brown and C. Waelde, 'Human Rights, Persons with Disabilities and Copyright', in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (2015), 577; C. Sganga, 'Disability, Right to Culture and Copyright: Which Regulatory Option', (2015) 29 *International Review of Law, Computers & Technology* 88 (drawing attention to the role of Art. 15 of the ICESCR after the general comments to Art. 30 of the UN Convention on the Rights of Persons with Disabilities).

[107] See Helfer, *supra* note 76, at 27-52.

[108] P. Harpur and N. Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm', (2013) 36 *University of New South Wales Law Journal* 745, at 761. They consider this external resistance as an example of regime shifting. Ibid., at 767.

[109] See particularly Art. 5 of the Declaration, available at www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm. The declaration also laid the foundation of a formal amendment to Art. 31 of the TRIPS Agreement.

[110] The WTO Panel issued three important reports about the IP rights during the first period: *Canada—Patents* (2000), *US—Copyright* (2000), and *EC—GIs* (2005). Particularly the reports about patent and copyright present a very good example of the restrictive stance of the WTO Panel towards the IP exceptions and limitations.

[111] A wind of change is observable even with the EC-GIs, but most significantly with the following cases: Panel Report China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, adopted 26 January 2009, WT/DS362/R, (China—IPRs), and Panel Report Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, adopted 28 June 2018, WTO/DS435/P (Australia—Plain Packaging).

IP-demanding states to search for new ways to circumvent the multilateral framework of the TRIPS.[112] The FTAs have been the solution to these demands.

The more developed countries take advantage of FTAs to upgrade the IP right's protection, the more the IIPR is subject to the pressure of investment regime. That has placed further burden on the coherence of IP norms, based on various balances such as between IP holders and user's rights, private and public interests, and IP-exporting and -importing countries. Once married with trade gloss yet sustainable IP norms have now begun to be interpreted as investment rights before the ISDSs in a way that renders social and community-related aspects of the IP norms invisible. The second transformation has further resulted in the privatization/transnationalization of the IP regime, as multinational companies were entitled to bring their case against nation-states, mainly developing countries, before the ISDS without the support of their home countries.[113] The existence of an alternative court alongside the WTO DSBs has further contributed to the disintegration of the IIPR and complication of IP norms and brought in turn the possibility of adjudicative forum shopping in addition to regime shifting.[114]

It is rightly argued that the foregoing transformations rendered the 'evolving international IP norms *less consistent, less coherent, and less equitable*'[115] and pushed it further from its underlying rationale, namely using private rights to promote public welfare. However, what is seen at first sight as an incoherent and unsystematic order turns out to be a well-organized and delicately designed 'international IP system', that is, 'a combination of norms, institutions, and actors whose main aim it is to organise protection of IP rights in a cross-border context, primarily against infringements by third parties'.[116] The protection accorded to IP rights by different layers of norms morphed them into constitutional hedges[117] and made the success of any regulatory attempt initiated by developing countries highly unlikely. Because developing countries are subject to multiple obstacles in their fight against IP rights armed with trade and investment clauses, they are predisposed to eschew using flexibility clauses built in

[112] See Grosse Ruse-Khan, *supra* note 11, at 37.
[113] 'The grant of directly enforceable rights for investors is the key innovation of the regime'. See Griffiths and Mylly, *supra* note 10, at 2.
[114] See Dreyfuss and Frankel, *supra* note 13, at 574.
[115] See Yu, *supra* note 10, at 186.
[116] See Grosse Ruse-Khan, *supra* note 11, at 39.
[117] See Griffiths and Mylly, *supra* note 10, at 4. That is also portrayed as the second enclosure movement; J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', (2003) 66 *Law and Contemporary Problems* 33.

the IP regime.[118] As these multiple obstacles are operating collectively, any defence warranted in one regime does not *ipso facto* justify the infringement of IP rights and make the use of exceptions and limitations automatically legal.[119] The fact that states are struggling to fight an uphill battle on multiple fronts forces them to use their right to regulate cautiously 'in a manner that fits under the defence mechanisms in all applicable regimes'.[120] The cumulative negative effect of constitutional hedges on a state's right to regulate is explained by Mylly and Griffith as such:

> Investment treaty norms, property ownership as a fundamental right, and protective provisions of international IP treaties may be invoked complementarily even in a single case, as the recent disputes concerning cigarette plain packaging laws demonstrate. Overall, the identified constitutional hedges protect a strong form of IP exclusivity and could inhibit useful legislative renewals and court-created solutions.[121]

Consequently, states seeking to justify their regulation, which is likely to interfere with the IP rights, must design such rules that are justifiable in all applicable regimes. The threat of legal retaliation, when coupled with the lack of enough legal and regulatory expertise, has driven the IP-importing countries towards a conservative attitude and engendered a subsequent regulatory chill.[122] In short, they shy away from exploiting the full potential of the TRIPS flexibilities. The main feature of this process lies in the fact that IP rights entrenched at the global level are partially immunized from domestic legal orders thanks to the multilevel protection provided by IP and investment regimes. Hence, there is a discordance between the level of protection accorded to IP rights and their exceptions and limitations simply because the IIPR does function as a floor not ceiling, eroding gradually the latter while protecting the former in multiple for a.[123] We have global mandatory minimum standards for IP rights but not for a

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[118] See Mylly, *supra* note 80, at 64 (paying attention to the way in which constitutionalization of the IP norms at the global level does undercut the regulatory space accorded to domestic legal orders).
[119] See Grosse Ruse-Khan, *supra* note 11, at 47.
[120] Ibid., at 48.
[121] See Griffiths and Mylly, *supra* note 10, at 8.
[122] See Yu, *supra* note 10, at 185. It is also identified as a principle '"*in dubio pro* protection": if in doubt, it is a safer policy option to leave IP rights untouched, or at least to minimise interference with them'. See Grosse Ruse-Khan, *supra* note 11, at 49.
[123] It is suggested that the limitations and exceptions should be harmonized alongside copyright laws. C. Sganga, 'Right to Culture and Copyright: Participation and Access', in Geiger, *supra* note 106, 560 at 572. For a similar suggestion, at least for the effective implementation of the Marrakesh VIP Treaty, see L. R. Helfer, M. K. Land and R. L. Okediji, 'Copyright Exceptions Across Borders: Implementing the Marrakesh Treaty', (2020) 42 *European Intellectual Property Review 332. Another possibility is to replace the exceptions-driven logic of the TRIPS for an opt-in model of obligation based on special and differentiated treatment. See* May and Sell, *supra* note 63, at 176-7.

set of exceptions necessary for the protection and promotion of some public goods.[124] This *de facto* constitutionalization of IP rights at the international level is thought to be an example of what is called new constitutionalism or constitutionalism 3.0.[125] Mylly argues, for instance, that the relationship between IP rights and human rights is reversed under the Constitutional 3.0 because today's constitutions are deprived of the power to tame IP rights and maintain a sustainable balance between IP and human rights.[126]

4. Legitimacy of the IIPR

The first thing to underline before moving on to the legitimacy analysis of the IIPR is that any legitimacy assessment is based on a comparative analysis, be it between authority and individuals or between different authorities. So, the comparison between feasible alternatives is a precondition for any legitimacy assessment[127], even if that does not suffice to ground an authority's legitimacy. The IIPR should, therefore, be read against the backdrop of the collapse of the WTO Doha Development Agenda where a common ground between the opposing interests of developing and developed countries could not be found[128]. In this light, the article follows in the footstep of the foregoing classification made between the first and second transformation in analysing the legitimacy of the IIPR. Thus, it will first zoom in on the birth of the TRIPS-WTO compromise, then consider whether it preserves the balance between developed and developing countries before and after the second transformation.

4.1. The Birth of Coordinative International Authority and Its Democratic Foundation

Let us first explain some of the important features of the IIPR. The IIPR presents a typical example of the coordinative legal authority, for it converges states under an international legal framework and sets basic standards to be complied with. As may be recalled, the IP rights are initially domestic. The pressure put by globalization does, however, make domestic protection of IP rights unrewarding. In response, states look for ways to ensure that domestically

[124] This statement is to be taken with a pinch of salt, as there are some studies showing how some dormant clauses enshrined in the Bern Convention may be interpreted as global exceptions to copyrights. T. Aplin and L. Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (2020).
[125] See Griffiths and Mylly, *supra* note 10, at 5-7.
[126] See Mylly, *supra* note 80, at 56.
[127] See, e.g., Scherz, *supra* note 53, at 644-646.
[128] See, e.g., S.B. Şahin, 'A Neo Gramscian Analysis of the Incomplete Doha Development Trade Round', (2019) 74 *Ankara Üniversitesi SBF* 237.

protected IP rights are recognized by other legal orders. This demand was first met with the Bern and Paris Agreements in the form of loose cooperation and later brought about the WTO-TRIPS compromise, which gives the IPPR 'a relatively self-contained, sui generis status in the WTO'[129] regime.

Recall that the IIPR's justification as a coordinative legal authority, given the essentially horizontal nature of international law, is easier than its domestic equivalents. Further, it is also stated that the scope of coordinative legal authority is wider than the service conception of authority. So, it is not piecemeal and fragmented. The first condition necessary for the justification of coordinative authority is it being originated through a process consistent with the basic principles of equal democratic participation. Democratic political equality among states bears particular importance to the coordinative authorities because they are designed to render authoritative decision-making possible even when states have diverging conceptions of justice, insofar as they share a common interest in shaping the world in which they are living by establishing rules and institutions.[130]

Democratic legitimacy echoes the idea that the rulings or decisions of an authority is legitimate as long as they flow from a fair and legitimate decision-making procedure.[131] Christiano introduces two conditions necessary for authority's justification through democratic participation: (i) the principle of equal advancement of interests; and (ii) the requirement of publicity.[132] Even though it goes beyond the scope of this article what it takes to comport with those conditions, we may still imagine cases where they are seriously violated. One of those

[129] Appellate Body Report India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, adopted 5 September 1997, WT/DS50/R, para. 7.19. The distinctive logic of TRIPS within the broader the WTO regime is portrayed as 'TRIPS difference'. D. Gervais, 'TRIPS Pluralism', (2022) 21 *World Trade Review* 185, at 196-197.

[130] See Christiano, *supra* note 61, at 121.

[131] Ibid., at 120.

[132] Ibid., at 121. There are a couple of ways to explain the legitimacy of democratic authority and corresponding obligations of individuals (and states in our case). First, this obligation may spring from the principle of fairness understood as treating everyone equally in the sense that if I avoid complying with the requirements of democratic authority, I give more weight to my own judgements than others. D. Viehoff, 'Democratic Equality and Political Authority', (2014) 42 *Philosophy & Public Affairs* 337, at 342-346. Second, it may arise from the idea, as suggested by Christiano, that democracy requires showing public equal respect and treating each other as co-equal rulers. Viehoff, finding insufficient Christiano's account whose focus is on showing equal respect to the democratic voters, notes that democratic authority is better to be based on protecting 'another's capacity for judgement from being stifled', enabling the conditions for the 'free exercise and development' of everyone's judgment. Ibid., at 348. He calls it relational equality, as the democratic authority is based on a sort of relationship that requires us 'to set aside, and not act on, unequal power advantages in shaping our interactions and the norm expectations governing them'. Ibid., at 352. He further puts forward three conditions of relational equality: (i) relating to others as equals; (ii) the requirement of non-subjection; and (iii) excluding unequal power. Ibid. at 351-361. It is apparent that Viehoff's argument lends further support to my following arguments, yet even Christiano's rather formal understanding of democracy as showing public equal respect suffices to do justificatory work.

cases is what Christiano calls the asymmetrical (hard) bargaining condition.[133] It denotes a situation where some states enjoy disproportionate bargaining power over others to such an extent that the reached agreement, though based on the consent of all the parties, appears intuitively problematic, at least from the perspective of morality.[134] For it seriously undercuts the assumption that consent is given freely without any coercion and represents the interests of the parties.

One example given by Christiano in that regard is the process in which the world trade regime is constructed under the threat of US economic sanctions and through the marginalization of the interests of developing countries.[135] Braithwaite and Drahos similarly contend that the legitimacy of authority through democratic participation requires that 'all relevant interests must be represented'[136] under the conditions where parties have equal access to information about the negative and positive consequences of the agreement. That is in addition to the requirement that no party is allowed to coerce the others. The TRIPS, even though seems like a treaty based on equal participation and representation, was in fact prepared by the Intellectual Property Committee (the IPC) composed of 13 major US corporations, and thereby primarily 'the output of a sophisticated form of private network governance'.[137] Even though developing countries salvaged to make some allowances for their regulatory autonomy, they were pursuing a defensive strategy aimed at carving out exceptions to the document initially designed by the IPC.[138] So many developing countries did not have much chance to probe the provisions and understand their possible ramifications.[139] Put sharply, their

[133] The other is the problem of representation. See Christiano, *supra* note 61, at 124-5. It requires exploring whether states are really representing the interests of their citizens. However, it is one of the limitations of this study that it is irrelevant whether states are governed by democratic or non-democratic regimes. So, I will disregard those situations. Viehoff also pays attention to the importance of seeking coordination by observing the principle of non-subjection in the legitimacy of democratic authority, see Viehoff, *supra* note 42, at 256-7. For Viehoff, the authority of democratic decision-making flows from the idea that it requires 'excluding from our relationship (with others) certain considerations – in particular- unequal power advantages – that would threaten our equal control over common life'. See Viehoff, *supra* note 132, at 353. What matters to us is not coordination *simpliciter* but *coordination without subjection* in the sense that solving coordination problems do not suffice to ensure the principle of non-subjection, and thereby is not sufficient to constitute an obligation to obey democratic authority. It requires considering how coordination is achieved and observing whether parties exploit their bargaining power by bribing and threatening others to converge on a coordinative solution. Ibid., at 367-368.

[134] See Christiano, *supra* note 61, at 125-6.

[135] Ibid., at 126. For a comprehensive analysis of what it takes to have a fair bargaining process between states see, T. Christiano, 'Legitimacy and the International Trade Regime', (2015) 52 *San Diego Law Review* 981. For a different take on whose focus is placed not so much on states as on the citizens who are affected by the WTO law indirectly, see, S. Besson, 'The Democratic Legitimacy of the WTO Law – On the Dangers of Fast-Food Democracy', (2011) *HAL Working Paper No: 2011/72*, available at www.hal.science/hal-02516236/document.

[136] P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (2002), at 190.

[137] See Drahos and Braithwaite, *supra* note 68, at 206-11.

[138] See Watal, 'North- South Perceptions', *supra* note 95, at 162.

[139] 'India became isolated in its opposition to limiting the grounds for compulsory licences to remedy a declared national emergency or adjudicated cases of anti-competitive practices'. See Watal, 'Patents', *supra* note 95, at 304.

information about the TRIPS was filtered by 'a veil of ignorance'.[140] While the IPC was pursuing an agenda of informal diplomacy by establishing ties with the companies having similar interests in other developed countries, it was also backed by the coercive economic power of the US through what is known as the '301 process'.[141] Against this backdrop, it is clear that the TRIPS falls woefully short of meeting the demands of democratic participation, as the negotiation process 'were non-representative, based on misinformation and domination'.[142]

One further issue related to the birth of the IIPR regime and its problems with legitimacy concerns is the controversy around the technology transfer to the LDCs *via* major technology companies. The promised technology transfer remains to be materialized, as there is no monitoring mechanism to oversee whether developed countries discharge their responsibilities concerning this issue.[143] Having said that, to argue that it poses a challenge to the legitimacy of the IIPR sounds somehow misleading as the LDCs are exempted from the obligations incurred by the regime and not benefiting from the services provided by international coordinative authority. One may still argue, likening the IIPR's relationship with the LDCs to parental authority, that it is under the responsibility of facilitating technology transfer at least until the LDCs reach the level when they may exploit the TRIPS' flexibilities. However, this argument brings up further questions about states' regulatory autonomy and authority-autonomy relationship. Hence, I will brush aside this possibility.

It follows from the foregoing that the TRIPS deviates from the principle of political equality and fails to meet the democratic condition necessary for the justification of the coordinative legal authority. Yet, that is only one of the factors, though a very important one, that plays a role in the justification of coordinative authority. For this reason, we may look at other aspects of the IIPR to observe whether it achieved the requirements of democratic legitimacy (the principle of equal advancement of interests and publicity) in time, even though it lacked those in the beginning. In other words, it is also a question worthy of investigation

[140] See Drahos and Braithwaite, *supra* note 136, at 191.
[141] See Drahos and Braithwaite, *supra* note 68, at 211-14. For the failure of developing countries in constructing a unified front, see Watal, 'Patents', *supra* note 95, at 300.
[142] See Drahos and Braithwaite, *supra* note 136, at 192. Likewise, May and Sell underlines the following facts: (i) the use of bilateral sanctions by the US as a threat to convince developed countries; (ii) that in contrast to developing countries, developed countries succeeded in defending a somehow uniform policy thanks to the active lobbying of the US' companies; and (iii) the difference in the level of expertise between developed and developing countries. See May and Sell, *supra* note 63, at 107-122.
[143] S. Moon, 'Meaningful Technology Transfer to the LDCs: A Proposal for a Monitoring Mechanism for TRIPS Article 66.2', (2011) *Policy Brief Number9.*

whether the regime has succeeded in finding a balance between the interests of developed and developing countries and achieved a reasonable balance in furthering the interests of different stakeholders. To explore whether authority is faithful to the reasons on which it is founded, it is necessary to have a look at the DT and its implications for the regime.

4.2. Legitimacy of the IIPR Before the Second Transformation

The legitimacy of coordinative legal authority relies on its success in ensuring coordination in its functionally defined policy area and preserving the initial balance struck between different constituencies having diverging interests in establishing an international authority. The IIPR as a coordinative authority is believed to ensure coordination between states over the governance of the IP rights without prejudice to international trade (the DT). Thus, the TRIPS must be thought together with the WTO for they are part of a compromise which echoes the reason why states created an international legal authority and delegated some of their competence. The DT, however, does not necessitate a perfect match between the reasons held by states and authority's reasons. Rather, it is sufficient for authority to conform mostly (enhanced conformity) with the objective reasons that states already have. Because the IIPR is dependent on contested reasons that developed and developing countries have, it should observe the initial balance and preserve it at least to a significant extent. That is to say that it should respect the equilibrium between international free trade and international protection of IP rights and avoid imposing undue burden on developing countries and harming the free flow of international trade.

That developed and developing countries have contested reasons for creating the TRIPS finds its way to the flexibilities and exceptions enshrined in the IIPR. The flexibility clauses endow states with enough regulatory space in aligning their domestic policies with the IIPR norms, as well as putting a lid on the level of protection granted to IP rights and blocking their excessive and unjustified protection.[144]That also mirrors the compromise that undergirds the TRIPS in that the protection of IP rights will have a positive impact on the overall international trade volume and contribute to global welfare.[145] Hence, the protection of IP rights should be

[144] When it comes to COVID-19 and using flexibilities, the 'TRIPS difference' results in an ambiguous situation, as developing countries militate for weakening of TRIPS rules while pushing at the same time for a strengthening of trade liberalization rules. See Gervais, *supra* note 129, at 200.
[145] R. C. Dreyfuss, 'In Praise of an Incentive-Based Theory of Intellectual Property Protection', in Dreyfuss and Siew -Kuan Ng, *supra* note 7, 1.

based on an economically efficient balance between rewarding innovation and diffusing knowledge.[146] Here, the WTO, as a primary organ, has played a crucial role.[147]

As argued by many scholars, the WTO judicial system has succeeded in finding a delicate balance between the competing interests between, say, trade and environment or public health, distancing itself from political controversies plaguing the WTO regime and even expressing its concerns about the neoliberal deep integration in its rulings.[148] That is also visible in the WTO's interpretive turn away from strict to the wide construction of the IP rights within the IIPR. Additionally, the Marrakesh VIP Treaty and the WTO Doha Declaration on the TRIPS Agreement and Public Health have contributed to the interpretive turn of the WTO by providing an additional normative support for its interpretive turn. Even though its previous judgements are subject to many criticisms due to its strict interpretation of the flexibilities, it is not far-fetched to claim that it managed to strike a better balance in its subsequent rulings. Correa, for instance, notes that 'the most recent panel report in Australia—Tobacco Plain Packaging shows the explicit acceptance of the concept of TRIPS flexibilities in WTO case law and their role in preserving the required policy space to pursue public policies such as public health'.[149] However, it should be noted that not many cases came before the WTO DSBs,many of which are related to disputes between developed countries.[150] It remains to be seen how the WTO judicial bodies will respond to the demands of developing countries. All in all, if we put aside the problematic democratic base on which the IIPR is founded, it is probable to note that the WTO has so far fared well in preserving the balance between trade and IP rights.[151]

4.3. Legitimacy of the IIPR After the Second Transformation

In the TRIPS-plus era, The IIPR has been subject to various criticism for, say, its failure to support developing countries and bowing to the interests of big companies and developed

[146] The WTO-TRIPS compromise mirrors the idea that it 'can ensure that it avoids the Charybdis of rent-seeking and the Scylla of free-riding'. D. Gervais, 'Human Rights and the Philosophical Foundations of Intellectual Property', in Geiger, *supra* note 106, 89 at 93.
[147] See Dinwoodie and Dreyfuss, *supra* note 8, at 50.
[148] For a comprehensive analysis of the legitimacy of the WTO judicial system see, R. Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', (2016) 27 *European Journal of International Law* 9.
[149] The term flexibilities may refer to different meanings. See for detailed explanations, C. M. Correa, 'Interpreting the Flexibilities Under the TRIPS Agreement', in Correa and Hilty, *supra* note 2, 1 at 26. See also Rochel, *supra* note 19, at 33-35.
[150] Out of 10 awards, three cases include developing countries. For the cases see Ibid., at 10-11.
[151] See Howse, *supra* note 148. S. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (2015), at 315-80. According to his standard of thin justice (promotion of peace and protection of human rights), both the trade and investment regimes are deemed by Ratner as just regimes.

countries. Developed countries, it is argued, are unlikely to use the flexibility clauses that allow them to shield socio-economic and cultural rights because of the regulatory chilling effect of the multi-layered protection of IP rights.[152] It goes without saying that those developments have ramifications for the IIPR, yet it is still dubious whether they virtually work against the legitimacy of the regime. For this, it is necessary to explore whether the initial compromise between trade and IP rights are maintained (the DT).

Let us recall the TRIPS-WTO compromise. The TRIPS already runs counter to the main rationale of the trade regime as it prohibits states from making discrimination among products and services at their borders.[153] In brief, the protection of IP rights is thought to be as 'necessary but temporary evil that would incentivise innovation'.[154] Even though the investment regime is mostly held to accord with the objectives of international trade, it creates another exception to the trade regime by endowing foreign investors with additional protections and contracting the regulatory space of nation states.[155] It does so because the principle of non-discrimination in which the WTO-TRIPS compromise is grounded provides no guarantee for the effective protection of foreign investors.[156] For this reason, the investment regime requires nation state to treat all foreign investors in a fair and equitable manner and compensate for their losses when their rights are infringed.[157] In short, because it adds a further dimension to the TRIPS-WTO compromise by bestowing foreign investors with additional protection, we need to examine whether it runs afoul of the DT. The recent cases awarded before the ISDS Tribunals, including *Philip Morris* v. *Uruguay*, *Eli Lilly* v. *Canada* and *Bridgestone* v. *Panama*, may help us to observe whether the TRIPS-plus does undermine the overall coherence of the IIPR.

As alluded above, many expressed their concerns about the TRIPS-plus era in which IP rights are prioritized over the limitations and exceptions in a way as to morph the former into properties or investment assets.[158] No matter how warranted those critics are, it seems hard, from the perspective of legitimacy, to conclude that they pose a significant challenge to the unity and coherence of the IIPR. In *Philip Morris* v. *Uruguay*[159], for example, the Tribunal held

[152] See e.g., K. Liddell and M. Waibel, 'Fair and Equitable Treatment and Judicial Patent Decisions', (2016) 19 *Journal of International Economic Law* 145, at 146.
[153] See Ratner, *supra* note 151, at 323-325.
[154] See Watal, 'North-South Perceptions, *supra* note 95, at 166.
[155] J. Bonnitcha, L. N. Skovgaard Poulsen and M. Waibel, *The Political Economy of The Investment Treaty Regime* (2017), at 252.
[156] See Ratner, *supra* note 151, at 349.
[157] Ibid.
[158] See Dreyfuss and Frankel, *supra* note 13, at 559, 563.
[159] *Philip Morris Brands Sarl, Philip Morris Products S.A and Abal Hermanos S.A v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016.

that Uruguay's regulation restricting the use of trademarks for protecting public health falls under the purview of the state's right to regulate and does neither amount to expropriation nor contradicts the principle of fair and equitable treatment according to international investment law. Similarly in *Eli Lilly* v. *Canada*,[160] the invalidation of patent rights by the Canadian Supreme Court due to its failure to meet the innovation step is found acceptable. Most strikingly, in *Bridgestone* v. *Panama*, the tribunal found reasonable the rulings of the Panamanian Supreme Court, holding that Bridgestone exercised its right to oppose the trademark (Riverstone) registration in bad faith, even though it 'identified defects in that reasoning'.[161] Though the critics are right to claim that IP rights should not be treated as investment rights because of their negative impact on the private-public balance on which IP rights are founded. Yet, the rulings awarded by the ISDS tribunals appear to align with the previous judgements of the WTO. Hence, further evidence is needed to vindicate the claim that the TRIPS-plus era further undermines the regulatory autonomy of nation-states.[162] The risk posed by the TRIPS-plus is yet to be realized despite the chilling effects it created on domestic legal orders.

5. Latent Challenges to the Legitimacy of the IIPR

Even when we assume that the IIPR remains responsive to the initial balance founded between developed and developing countries as well as between trade and IP rights, the investment regime does still risk undermining the coherence and consistency of the IIPR. A quick glance at the institutional features of the investment regime is likely to reveal how different it is when compared to the trade regime. The first thing to underline about the WTO regime is that it is the most advanced and integrated regime in the international sphere. It has a 'unified dispute settlement system' converged under the authority of a second order court (the Appellate Body) with a compulsory jurisdiction, which differentiates it from its international counterparts, 'since virtually all international tribunals are the equivalent of municipal courts of original jurisdiction'.[163] In contrast, the investment regime is neither converged around a set of leading institutional bodies nor created by a multilateral treaty.[164] Second, the investment

[160] *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award of 16 March 2017.
[161] *Bridgestone Licensing Services, Inc. And Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award of 14 August 2020, para. 547.
[162] For a very similar argument about how the WTO and investment regimes, though from the perspective of justice, see Ratner, *supra* note 151, at 315-379.
[163] D. Palmeter, 'The WTO As a Legal System', (2000) 24 *Fordham International Law Journal* 444, at 469- 470.
[164] See Ratner, *supra* note 151, at 349.

regime creates a relationship of asymmetrical obligation between host states and foreign investors for the latter are conferred upon rights whereas the former are put under obligations.[165] Third, unlike the exceptions and limitations enshrined in the TRIPS and GATT (Article XX), it does not contain a clause for the protection of human rights.[166] Another point as important as those institutional features, is the way in which investment disputes are decided by the arbitrators. The investment arbitrators are steeped 'in the arbitral legal culture' and perceive their profession as a form of private dispute settlement controlled by the demands of the disputed parties.[167] According to this legal culture, they need not to consider the public dimension of the dispute-settlement process such as the interest of the third parties, transparency requirements, and the further development of law.[168] Equally they need not to incorporate into their judgments norms not directly related to investment such as environmental and human rights norms.[169] Even though this legal culture has weakened in the last decades, the foregoing explanations do still pose significant problems concerning consistency and coherence of the investment regime.[170]

The foregoing clarifications reveal a concern about the IIPR's capacity to protect the interest of developing countries *vis a vis* multinational companies and to preserve the flexibility clauses built in the IP regime that shield socio-economic and cultural rights within IP-lacking countries.[171] This concern pertains to both the authority and the legitimacy of the IIPR as a coordinative authority. Let us first focus on the authority aspect. Because *de facto* authority is an essential component of legitimate authority, we may easily conclude, if authority is wanting in effectiveness, that there is no authority to be legitimated.[172] Even though it is very hard to find a tipping point beyond which the subject's non-compliance undermines authority's effectiveness, Roughan proposes two cases that impair *de facto* authority irreversibly: failure in its (i) coordination function; and (ii) collectivization function (the role authority is supposed to play in subjecting individual desires to collective needs, such as *the resolution of a dispute* or a remedy for a common problem that cannot be remedied by individual actors alone).[173]

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[165] Ibid., at 350.
[166] Ibid., at 359.
[167] Ibid., at 370.
[168] See Bonnitcha, Skovgaard Poulsen and Waibel, *supra* note 155, at 246.
[169] See Ratner, *supra* note 151, at 370.
[170] See Bonnitcha, Skovgaard Poulsen and Waibel, *supra* note 155, at 249-50.
[171] See Liddell and Waibel, *supra* note 152, at 146.
[172] Cf. M. Brinkmann, 'Legitimate Power without Authority: The Transmission Model', (2020) 39 *Law and Philosophy* 119.
[173] See Roughan, *supra* note 57, at 344 (emphasis added).

First, the recurrent regime shifting activities seemingly pose a challenge to the coordination function of the IIPR. The regime shifting would undermine the authority's effectiveness, if it passes a certain threshold beyond which the service provided by the IIPR renders meaningless. In other words, its authority may be replaced by another international coordinative authority. As of now, it seems that states take advantage of regime shifting not to create a new international authority but to modify the interpretation of norms. Moreover, the recurrent practices of regime shifting make it explicit that some of the constituencies of the regime are not satisfied with the level of services offered by the IIPR. Nevertheless, the fact that an alternative coordinative authority has so far remained to be established is a testament to the resilience of the IIPR. Against this backdrop, it seems fair to conclude that the IIPR is still superior to its feasible institutional alternatives in providing states with authoritative guidance through its normative and institutional structure.

5.1. Legitimate Authority and the Rule of Law

In respect to the collectivization function, which is associated with authority's role in settling disputes finally and promoting coherence, the IIPR has suffered difficulties not least in the post-TRIPS period when IP rights are treated as investment rights. Circumventing the multilateral IP regime through the ISDS was instrumental in the disintegration of the IIPR and complication of IP norms.[174] The presence of two different courts leaves open the possibility that the ISDS tribunals may award rulings and decide cases that escape the jurisdiction of the WTO jurisdictional bodies.[175] Availability of multiple fora before which any state or company can bring its case may yield adjudicative forum shopping and weaken authority's effectiveness in securing coordination.[176]

The possibility of adjudicative forum shopping has further implications for authority's function of providing authoritative guidance to states. Those states and companies may raise their legal claims before different jurisdictional bodies that have no organizational connection risks undermining the effectiveness and interpretive coherence of the IIPR. This clearly impairs the basic principles of the RoL such as equality before the law, predictability, relative stability, and foreseeability. Even though it is a matter of dispute whether the RoL as a moral ideal can

[174] That is depicted as the new strategy used by hegemonic states to pursue their parochial interests. E. Benvenisti and G.W. Downs, 'The Empire's New Clothes: Political Economy and The Fragmentation of International Law', (2007) 60 *Stanford Law Review*595.
[175] See Dreyfuss and Frankel, *supra* note 13, at 574.
[176] See Yu, *supra* note 10, at 183.

be relocated to non-systemic legal orders and may extend beyond its domestic habitat,[177] we may still assume that bringing diverse interests under the governance of law help us curb arbitrary power of the stronger sides (dominant states) and protecting the interests of the weaker sides (non-dominant states).[178] So, the principle of non-arbitrariness that lies at the core of the RoL has further implications for the legitimacy of a legal regime or an international authority. That is to say that when an international authority provides a framework for coordination, it also creates a legal regime that is somehow stable, predictable and foreseeable. Tasouilas summarizes this linkage between the principles of the RoL and legitimacy of an authority as follows:

> There is a broad category of reasons bearing on the NJC that are formal or procedural in nature, many of which are captured by the familiar requirements of the Rule of Law: laws must be clear, publicly accessible, stable, non-retrospective in content and application, and official behaviour must be congruent with pre-existing legal norms. All these requirements reflect the idea that those subject to the law should be able to identify the law and conform with it. Other procedural norms include requirements of transparency, responsiveness, and even democratic accountability in law-making.[179]

In other words, for an international authority to be legitimate, it should be effective and capable of playing a role in states' practical reasoning and guiding their behaviors. Yet to do so, it must increase its capacity to guide states' behavior by observing the principles of the RoL, the details of which are beyond scope of this article. It is clear, nevertheless, that the relative determinacy of rules and systemic coherence of a legal regime is vital for authority's capacity to provide states with guidance and its overall effectiveness. Franck, for instance, draws attention to the connection between authority's legitimacy and its capacity to generate 'compliance pull' and counts determinacy and coherence as the indicators of the legitimacy of an authority and its rulings.[180] Hence, systemic coherence of norms, their consistent application

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[177] Raz ackowledges that the RoL is applicable to non-coercive legal orders and voluntary associations and that its specific formulation varies among different cultures. See J. Raz, 'The Law's Own Virtue', (2019) 39 *Oxford Journal of Legal Studies* 1, at 13.

[178] See, e.g., G. Palombella, 'The Rule of Law as an Institutional Ideal', in L. Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (2010), 3. At the heart of the ROL ideal lies in the principle of non-domination that rules out the monopolistic relationship between different legal orders, see, G. Palombella, 'The Rule of Law at Home and Abroad', (2016) 8 *Hague Journal of Rule of Law* 1.

[179] See Tasioulas, *supra* note 29, at 115. For a similar argument based on the view that certain procedural standards are of constitutive importance for the legitimacy of an authority even though how demanding they are depends on further factors such as the density of political power enjoyed and the ensuing risks it generates, see Scherz, *supra* note 53, 631-653.

[180] See Franck, *supra* note 21, at 712.

and harmonious interpretation are all relevant to the legitimacy and authority of an international coordinative authority. The lack of a second order court under the investment regime and the possibility of adjudicative forum shopping remains a potent threat to the coherence of the IIPR, as it gets harder for the WTO jurisdictional bodies to correct misguided judgments and set precedents.[181]

The importance of the last instance court is well-established in legal theory, as some called them primary organs whereas others draw attention to their function of the second order observation.[182] It is, therefore, telling to observe some suggestions aimed at overcoming the institutional and interpretive problems conducive to afflicting the coherence of the IIPR regime. Yu, for instance, underlines the need for establishing a dispute settlement mechanism composed of experts both from the IP and trade areas with a view to lubricating 'the cross-fertilisation of international IP and investment norms'.[183] He suggests that the arbitral panel should include 'at least one arbitrator who has specialised expertise regarding TRIPS obligations'[184] in the cases where the IP and investment rights interact. Further, this should be supported by an Appeal Tribunal that provides stability within the IIPR and promotes its coherence with the ISDS.[185] Moreover, when seen from the perspective of the DT, the IIPR still overlaps with the reasons that states have at the outset even though it is still a matter of concern whether it will remain so in the TRIPS-plus environment. In other words, the IIPR, as a functionally limited coordinative authority, should observe these functional boundaries if it is to preserve its legitimacy.[186] However, the investment regime that lacks a primary organ to ensure predictability and legal security may jeopardize the coherence and legitimacy of the IIPR as it is dubious whether the

[181] This problem is also raised by international lawyers, see, J. Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus', (2015) 109 *American Journal of International Law* 761. It is also telling to observe how one of the basic arguments on which defenders of strong patent rights during the 1980s in the US relied was the arbitrariness and lack of predictability because multiple district courts were allowed to settle the patent-related disputes. That later culminated in the establishment of the Court of Appeals for the Federal Circuit, a district court responsible for seeing patent-related disputes. See May and Sell, *supra* note 63, at 141-43.

[182] For the explanations about primary organs see, see Raz, *supra* note 28, at 108. Here I refer to the institutions that have the competence to make final and binding determinations. See also the court's role in second-order observation, N. Luhmann, *Law as a Social System* (2004), at 274-305.

[183] See Yu, *supra* note 10, at 191.

[184] Ibid., at 192.

[185] Ibid. The Appellate Tribunal will be composed of eight seats, the six of which are distributed equally to least developed, developing and developed countries and the remaining two seats are reserved for the experts of the regime.

[186] 'questions about the legitimacy of international organisations began to surface especially when these started to interpret and act beyond their functional settings'. K. Traisbach, 'Judicial Authority, Legitimacy and the (International) Rule of Law as Essentially Contested and Interpretive Concepts: Introduction to the Special Issue', (2021) 10 *Global Constitutionalism* 75, at 85.

regime remains faithful to its functional boundaries and respectful to the state's legitimate regulatory autonomy.

5.2. Adjudicative Autonomy, Interlegality, and Legitimacy

As the IIPR is under the pressure of investment logic, it is prone to lose its interpretive autonomy and protect its initial compromise between IP and trade rights, as well as between the IIPR and domestic regulatory autonomy.[187] Against this backdrop, Yu suggests decoupling IP from investment rights and abandoning treating them as investment rights.[188] Even so, that does not mean that IP norms are to be read in clinical isolation from other legal regimes,[189] but means that its foundational rationale is to be protected from the domination of other regimes. Further, it is also crucial to develop interpretive strategies for overcoming the investment bias besetting the IIPR and providing coherence between the IP and investment regimes. One way of solving the norm conflicts likely to surface between those interacting regimes is to view the FTAs as contract-like treaties supposed to operate within a public law framework.[190] It is apparent that they derive their legitimacy from states' right to enter into a contract, yet it is doubtful whether they may violate the TRIPS agreement by hollowing out its limitations and exceptions. It is possible here to invoke the provisions of the Vienna Convention on the Law of Treaties and other principles used to resolve conflicts of norms such as *lex specialis*.[191]

Another way of solving interpretive incoherence is to invoke external norms by benefiting from the rapports of epistemic authorities such as the WHO, the WIPO, and the UN Treaty Bodies General Comments.[192] *Australia Plain Packaging* is a case in point,[193] yet the

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[187] For how market-driven conceptualization of IP rights threatens to cannibalize cultural rights see, G. Teubner and A. Fischer-Lescano, 'Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions', in C. B. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008), 17.

[188] See Yu, *supra* note 10, at 187-189. 'the time has come for a trial separation, not a divorce. J. H. Reichman, 'Reframing Intellectual Property Rights with Fewer Distortions of the Trade Paradigm', in Dreyfuss and Siew-Kuan Ng, *supra* note 7, 62 at 88.

[189] As noted by the WTO DSB in the *US-Standards*, para. III. B.

[190] J. Weiler, 'The Geology of International Law: Governance, Democracy, and Legitimacy', (2004) 64 *ZaöRV* 547, at 554.

[191] See Grosse Ruse-Khan, *supra* note 104, at 508-514.

[192] Sometimes the WTO DSB may consult the WIPO, WHO or other external sources with respect to the interpretation of the IP norms and their exceptions. The *Shrimp-turtle* case awarded by the WTO AP is a case in point. See Dreyfuss and Frankel, *supra* note 13, at 594. See also, G. Dinwoodie and R. Dreyfuss, 'Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond', (2009) 46 *Houston Law Review* 1187, and for the importance of using general comments to ground the legal obligations of states under international human rights law, see Sganga, *supra* note 123, at 560; and for an analysis of the WTO DSB's pluralistic decisions that refer to external legal norms, see Gervais, *supra* note 129, at 193-195.

[193] N. Devillier and T. Gleason, 'Consistent and Recurring Use of External Legal! Norms: Examining Normative Integration of the FCTC post-Australia–Tobacco Plain Packaging', (2019) 53 *Journal of World Trade* 533 (arguing

success of relying on external or peripheral norms is limited and contingent on many factors including how popular the case is and how it is advertised strategically by plaintiffs.[194] However, as pointed out by Gervais, we are on the verge of a shift towards pluralist adjudicative approach, as the WTO DSBs are much more open to taking external norms seriously, not only as a fact or evidence in support of IP norms, but also as a norm having equal weight as the former.[195]

Here, the theory of interlegality, developed initially to explain the cases where norms originating from different legal orders come before a court, may prove highly useful, not only for managing conflicting norms emanating from the IIPR and other regimes, but also for the latter to maintain its legitimacy.[196] Interlegality suggests, at its core, that when norms come into contact and conflict with each other in a concrete case, the courts should not disregard the external norms as mere facts and assign them normative weight, insofar as they are relevant to the case.[197] For interlegal adjudication, it is of crucial importance that the law in interlegal cases is 'composed of more than one system-sourced positive law' and that 'the law of one single legal regime might not have unconditional primacy'.[198] It requires a case-based analysis and approaching the dispute from the perspective of the case, rather than of the relevant legal systems.[199] Only then we may see the *composite law*[200] that emerges from the interconnection between legal regimes. Similarly, the IP scholars invite us to develop 'rules of engagement'

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that the WHO's Framework Convention on Tobacco Control is integrated into the international economic and investment laws and that those norms are treated not only as an evidentiary fact but as part of a substantive legal analysis). See seminal cases awarded respectively by the WTO and the ISDS *Australia-Plain Packaging* and *Philip Morris*. Human rights norms played an important role also in the case against Uruguay's tobacco regulation before the ISDS' tribunals. For its comparison with Eli Lilly-Canada see, D. Gervais, 'Intellectual Property: A Beacon for Reform of Investor-State Dispute Settlement', (2019) 40 *Michigan Journal of International Law* 289. It is striking that the Panel Report in the Australia Plain Packaging case made more than 1000 references to the WHO Framework Convention on Tobacco Control (FCTC), as an external norm to the IIPR, see Gervais, *supra* note 129, at 201.

[194] See Grosse Ruse-Khan, *supra* note 11, at 48-49.

[195] Here Australia-Plain Packaging marks a watershed moment. Yet, unlike the Panel's Report, the Appellate Body 'referred to Article 11 and 13 of the FCTC Guidelines as additional factual support to its previous conclusion that the complainants failed to establish that Australia acted inconsistently with Article 20 of the TRIPS Agreement'. See Gervais, *supra* note 129, at 202.

[196] See for interlegality in general, G. Palombella, 'Exploring the Rationale of Inter-Legality', (2022) XI *Rivista di Filosofia del Diritto* 9; for how it relates to legitimate authority see, G. Çapar, '(Relative) Authority and Inter-legality', (2022) XI *Rivista di Filosofia del Diritto* 43.

[197] See Palombella, *supra* note 40, at 370.

[198] J. Klabbers and G. Palombella, 'Introduction: Situating Inter-Legality', in Klabbers and Palombella (eds.), *supra* note 40, 1 at 2.

[199] A. Di Martino, 'The Importance of Being a Case: Collapsing of the Law upon the Case in the Interlegal Situations', (2021) 7 *Italian Law Journal* 961.

[200] See Palombella, *supra* note 40, at 375.

that govern the interaction of norms originating from the investment and IP regimes[201] by invoking international rules of interpretation, guidelines, and resolutions.[202]

Seen from the perspective of interlegality, the problem lies not in the scarcity of interaction; on the contrary, IP rights, through their interaction with the investment norms, gained the status of constitutional hedges. Instead, the problem arises from the unidimensional nature of the interaction under the investment regime that disregards IP rights' public dimension and prioritizes them over socio-economic reasons, not least through the frequent use of FTAs. Even though the ISDS tribunals have so far fared well in responding to the demands of IP rights, we should be vigilant against the cannibalizing pressure of the IP-cum-investment rights.[203] Against this backdrop, the interlegal reasoning may assist us in solving many conflicts between IP rights and socio-economic and cultural rights and guide the states in using the flexibility clauses enshrined in the TRIPS without the fear of reprisal.

Similarly, Raz has suggested that international authorities be 'responsive to local needs and interests, to diversity in tastes and preferences, and to local traditions, ways of life, and ways of doing things'[204] when interpreting universal standards or international human rights norms. The necessity to protect the value pluralism serves as a reason for limiting the authority of international institutions even when they can discharge their services and providing states and individuals with the services. For this reason, he suggests an interpretive approach that permits the legal coexistence of incompatible interpretations 'at the same time and in the hands of the same court'.[205] At the core of what he calls *simultaneous interpretive pluralism* lies the idea that international authorities should be attentive to their local traditions and respectful to their own way of living when responding to the contested and conflicting reasons of its constituencies. That requires going beyond the instrumental and functional justification of international coordinative authorities and examining how they interact with domestic legal orders. Here, the use of flexibilities and exceptions to the international IP rights is vital for the legitimacy of international coordinative authorities, for they have multiple functions such as balancing the interests of developing and developed countries, balancing IP rights with socio-

[201] See Yu, *supra* note 10, at 189. This involves interaction of norms within the existing the IPPR, rather than its relationship with other legal regimes; see Gervais, *supra* note 129.
[202] See Yu, *supra* note 10, at 190-191.
[203] See Teubner and Fischer-Lescano, *supra* note 187.
[204] Ibid., at 80.
[205] J. Raz, 'The Future of State Sovereignty', in W. Sadurski, M. Sevel and K. Walton (eds.), *Legitimacy: The State and Beyond* (2019), 69 at 81.

economic and cultural rights and leaving states enough regulatory space necessary for protecting value pluralism and addressing the public and collective interests.[206]

Even if it had met the democratic requirements of the international coordinative authority, the IIPR would still have faced various challenges, among which the recurrent regime shifting activities and the recently forged link between the IIPR and investment regime loom large. They seem to undermine the effectiveness of the regime by impairing its normative coherence and interpretive autonomy, as well as distorting the initial balance in which the IIPR is rooted. Whereas the former is prone to weaken the authority of the IIPR, the latter poses a challenge to its legitimacy. The principles of the RoL seem relevant to the legitimacy of an authority, as it plays a role in improving its function of providing states with authoritative guidance, as well as, in legitimizing the regime by contributing to the regime's coherence and interpretive autonomy. Lastly, adjudicative theories such as interlegality and simultaneous interpretive pluralism seem highly crucial for the legitimacy of international authorities operating within a functionally delineated sphere.[207]

6. Conclusion

The article made an assessment on the legitimacy of the IIPR, as an international coordinative authority that lays claim to legitimacy within a functionally delineated domain and concluded that it has difficulties satisfying the conditions of being a legitimate authority. First, it does not meet the democratic requirements necessary for international coordinative authority's legitimacy. When its undemocratic base is brushed aside though, the IIPR, as a coordinative authority, has been doing well in providing states with services, even though it is subject to significant pressure from the regime shifting activities and the IP-relevant FTAs. Even though the IIPR's linkage with the investment regime is pregnant to undermining its authority and legitimacy, it was shown that the concerns raised by many scholars are yet to be realized. Hence, it seems that the investment regime did not yet pose a significant challenge to the legitimacy of the IIPR. The article however uncovered also the dormant challenges to the IIPR's authority and legitimacy that the investment regime's institutional structure presents. In

[206] See Rochel, *supra* note 19, at 33-5 (taking Arts. 7 and 8 of TRIPS as interface norms serving to bridge the gap between the IIPR and other legal regimes and domestic legal orders); Cf. Shanker, *supra* note 19.
[207] Interlegality has further implications for the rule-making activities of any authority that has enough power and competence to regulate unilaterally, see G. Çapar, 'Global Regulatory Competition on Digital Rights and Data Protection: A novel and Contractive form of Eurocentrism?', (2022) 11 *Global Constitutionalism* 465; from the perspective of global administrative law see, E. Chiti, 'Administrative Interlegality', (2021) 7 *Italian Law Journal* 985.

this regard, it showed that the investment regime risks undermining the interpretive autonomy and coherence of the IIPR and weakens its authority and legitimacy. In response to these latent challenges, the article offered some institutional and adjudicative suggestions, which are already developed by the IP scholars, underscored their importance for the authority and legitimacy of the IIPR.

From the perspective of justice, the IIPR is subject to many criticisms for it being blind to socio-economic and cultural rights and its inherent incentive-based utilitarian logic. Yet, it is misleading to expect everything from one international institution. The IIPR, founded to coordinate national IP regulations, promotes innovation and enables the global circulation of scientific knowledge without prejudice to trade, seems to fare well even though it is lacking a democratic foundation and is faced with various challenges after its linkage with the investment regime. How fast the vaccines are developed in response to the COVID-19 virus reveals how important it is to allocate resources to research, development, and innovation, as well as, how effective the IIPR is as an international coordinative authority.[208] Though, the problem of distribution of vaccines and access to medicine still haunts the IIPR. It is also shown that one of the most important challenges to the IIPR's legitimacy is regime shifting in that states dissatisfied with the services provided by the IPPR search for other fora that enable them to further their initial reasons. How important it is for a legitimate authority to preserve its *de facto* authority is vindicated by the phenomenon of regime shifting. The article also revealed that the institutional coordinative authorities should pay careful attention to the states' underlying, initial reasons and strive for protecting and furthering their interests.

One innovative aspect of the study is that it examined the legitimacy of an international regime without directly analysing how it interacts with other legal regimes. However, it does so implicitly by exploiting the potential of the DT. An international coordinative authority should be responsive to other legal regimes because they are also authorities empowered by the same legal subjects for different reasons. The IIPR presents an informative example, as it requires an investigation into how it interacts with regimes such as human rights, trade, cultural heritage, environment and climate change, public health, etc. For this reason, the article looks at the IIPR's legitimacy from an internal perspective that focuses less on inter-authority relationship than authority-subject relationship within the regime. The fact that the global realm is composed of multiple functional authorities responsible for providing services mostly to the

[208] P. Ball, 'The Lightning-Fast Quest for COVID Vaccines - And What it Means for Other Diseases', *Nature*, 18 December 2020, available at: www.nature.com/articles/d41586-020-03626-1.

same legal subjects (states as the representative of individuals) invites authorities to be respectful to other authorities if only because of the demands of the DT.