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THREE WAYS OF LOOKING AT A BLACKBIRD

POLITICAL, LEGAL, AND INSTITUTIONAL PERSPECTIVES ON PHARMACEUTICAL PATENTS AND ACCESS TO MEDICINES

TOMMASO SOAVE*

Since the negotiations leading to the adoption of the TRIPS Agreement and throughout the recent proliferation of TRIPS-Plus provisions, scholars, policymakers, and activists alike have been sharply divided between those who saw pharmaceutical patents as a tool for promoting technological progress and those who denounced their adverse impact on access to affordable medicines worldwide. This article seeks to reconstruct that debate by focusing on three of its interlocking dimensions and the narratives built around them. First, the opposition between intellectual property and public health may be seen as part of a political and diplomatic struggle between developed and developing countries. Second, it may be construed as a normative conflict between two policy objectives equally recognized and protected under international law (in particular under trade rules and human rights rules, respectively). Third, it may reflect a clash between the discourses and the deeply ingrained rationalities of different international institutions, such as the WTO, the WHO, and the UN human rights bodies. Focusing on any of these three dimensions frames our understanding of a crucial global issue and shapes our vocabulary to address it. However, each narrative also has its own blind spots and obscures as much as it reveals.

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I. INTRODUCTION

On January 23, 2017, the Director-General of the World Trade Organization (WTO) proudly announced that the amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) had entered into force upon receiving the required ratification by two thirds of the WTO member states. The amendment, originally adopted in December 2005, is the last of a series of WTO legal instruments aimed at relaxing certain patent protection obligations set out in the TRIPS Agreement in order to facilitate access to medicines at an affordable cost. One would expect the announcement to make big news: after all, this is the first substantive modification to the text of a WTO agreement since the organisation’s inception in 1995. More importantly, however, the entry into force of the TRIPS amendment offers a welcome opportunity to look back, with some perspective, at one of the most heated global policy debates at the turn of the century.

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1 Wallace Stevens, Thirteen Ways of Looking at a Blackbird, in HARMONIUM (1923).
For many scholars exploring the relationship between pharmaceutical patents and access to affordable medicines has been quite a revelation. Those who dared venturing into this field discovered a wealth of compelling materials spanning across multiple disciplines—from policy proposals to legal articles, from economic papers to activist manifestos. The last two decades “have seen nothing less than an explosion of interest” in the issue,4 which has been the subject of discussion in myriad venues including national and international government bodies, think tanks, academic conferences, and the like. Many hailed the progressive strengthening of global intellectual property (IP) standards as an indispensable incentive to research and development (R&D) and technological innovation. Many others retorted that the availability of low-priced generic medicines is indispensable for access to affordable healthcare and therefore constitutes a fundamental socio-economic entitlement that trumps market-driven logics. This opposition did not merely reflect divergent policy stances but engaged competing worldviews, stirred ardent passions, and prompted “inflammatory words” that divided commentators “into two opposite camps, with the campers talking past, rather than to, each other”.5

Besides the extreme degree of polarization perhaps the most intriguing aspect of the debate was the sheer variety of narratives and perspectives built around it. In fact, one can think of at least three directions that scholarly discussions have taken throughout the years.

First, many observers have considered the ongoing regulatory struggle as part of a political and diplomatic conflict between developed and developing countries. Accordingly, this narrative focuses on the negotiating strategies that a handful of wealthy nations deployed to pursue a “global intellectual property ratchet”6 allegedly at the expense of the rest of the world. Equally relevant is the question of why developing countries have agreed to such a bargain and how they have organised their resistance.

A second approach breaks from the North-South divide and instead conceives of pharmaceutical patents and access to medicines as two policy objectives equally recognized and protected under international law (in particular under trade rules and human rights rules respectively). As many states are bound by simultaneous international obligations in respect of both goals, this narrative addresses the question of how to reconcile the pursuit of such objectives when a normative conflict occurs.

Finally, some authors have stressed that the opposing claims in favour of pharmaceutical patents and access to affordable medicines reflect a struggle for institutional hegemony between the WTO and other international agencies such as the World Health Organization (WHO), the United Nations (UN) human rights bodies, and the World Intellectual Property Organization (WIPO). As each institution caters to the needs of a specific transnational constituency and develops its own agenda, preoccupations, and priorities, this third approach explores ways to improve the interface among these overlapping institutional regimes.

Hence, one may tell the story of the relationship between pharmaceutical patents and access to medicines as a conflict of sovereign nations, a conflict of norms or a conflict of institutions. The purpose of this article is to disentangle these interlocking and overlapping narratives and to assess how each shaped scholarly perception of the issue at hand. As Wallace Stevens wrote a century ago—there are many ways to look at a blackbird, and each glance offers a fresh and different insight into the ineffable essence of the animal. Likewise, focusing on any dimension of the global debate around IP and public health frames our understanding of the issue and shapes our vocabulary to address it. Each approach differs in its identification of the salient facts, its mobilization of specific actors, and its definition of the appropriate space for action and agency. At the same time each narrative has its own biases and blind spots and obscures as much as it reveals. Indeed, one might say that the conflict between pharmaceutical patents and access to medicines constitutes an ideal case study for the current mushrooming of theoretical approaches to global law and politics.

The article consists of three sections, each exploring a different narrative of the issue at hand. As will be seen, these accounts are not meant to be mutually exclusive. Instead, each of them captures certain dimensions of the conflict while neglecting others. By its nature, this tripartite analysis makes no pretense of exhaustiveness with regard to the economic and distributive rationales affecting pharmaceutical production and access, both of which have been explored at length elsewhere. Nor does it seek to have the last say as to the normative outcomes of the debate. Much more modestly, the following analysis aims to sketch three pictures that, once superimposed, will hopefully reveal the multifaceted theoretical underpinnings of a most fascinating global issue.

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II. THE POLITICAL NARRATIVE: GRAND BARGAINS, THE NEW IMPERIALISM, AND THE NORTH-SOUTH DEVELOPMENT DIVIDE

Like any other conflict, armed or otherwise, the conflict between pharmaceutical patents and access to medicines calls for the identification of its fault lines. The first narrative sees it as yet another incarnation of the political struggle between developed and developing countries—the former being ‘patent makers’ imposing high levels of IP protection and the latter ‘patent takers’ striving for greater access to medicines and other technological advances. This view is not only the most common among early commentators, it also provides an excellent introduction to the debate for it helps map the recent evolution of international patent rules and the underlying policy arguments.


Recent figures show that the total worldwide R&D spending of pharmaceutical companies increased from USD 108 billion in 2006 to USD 141 billion in 2015. See Alexander Schuhmacher, Oliver Gassmann & Markus Hinder, Changing R&D Models in Research-Based Pharmaceutical Companies, 14(105) J. OF TRANSLATIONAL MED. 1 (2016) [hereinafter Schumacher et al.].

administrative or legislative regulations that require long periods of testing in order to assess their safety and/or efficacy prior to commercialization. Once on the market new molecular entities are generally easy to copy through so-called reverse engineering, thus making their commercial value particularly volatile and dependent on IP protection. These factors help explain why pharmaceutical companies tend to direct their investments towards those jurisdictions that provide robust patent protection and avoid those that do not: as of 2013, pharmaceutical supply in the United States, Western Europe and Japan accounted for about two thirds of the global market.

At the same time, affordable drugs remain largely out of reach in many parts of the world. The WHO estimated that in 2011 one third of the planet’s population lacked access to essential medicines. For instance, in 2014 lifesaving antiretroviral therapy for HIV was available to less than 14 million affected people against 34 million in need of treatment. The price of patented drugs plays a significant role in the equation. Experts differ onto the exact impact of IP protection on the sales

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15 See Sudip Chaudhuri, *Can Foreign Firms Promote Local Production of Pharmaceuticals in Africa? in Making Medicines in Africa: The Political Economy of Industrializing for Local Health* 103, 104 (Maureen Mackintosh et al. eds., 2016). Data were similar in the early 2000s, when 38.6% of global pharmaceutical production was concentrated in North America, 29.2% in Europe, and 14.2% in Japan. See ONORI, *supra* note 10, at 29-30.


price of pharmaceuticals in different markets as well as on the incidence of pricing on access to cures.\(^{18}\) However, there is substantial agreement that patented pharmaceuticals come at significantly higher retail prices than generics.\(^{19}\) Suffice it to say that in the early 2000s the average annual cost of a generic HIV antiretroviral cocktail treatment in India was estimated at less than USD 200, while the same treatment based on patented drugs would cost over USD 12,000 in the United States.\(^{20}\) In turn, healthcare in most low-income countries largely relies on out-of-the-pocket expenditures from households, as governments do not have the financial resources and infrastructure necessary to provide for an effective public health system.\(^{21}\) In light of the above many have argued that the higher sales prices of drugs stemming from the adoption of rigid patent protection may result in decreased access to affordable healthcare for the poor.\(^ {22}\)

Moreover, some consider that the economic rationale behind pharmaceutical patents simply does not hold when it comes to diseases that typically affect the least developed countries (LDCs). Given the modest or negligible size of those markets there is relatively little incentive for pharmaceutical companies to engage in long and costly R&D investments targeting such diseases.\(^{23}\) In the early 2000s research


\(^{20}\) See, e.g., Editorial, *India’s Choice*, N.Y. TIMES, Jan. 18, 2005, at A2; Mfuka, supra note 11, at 192.


\(^{22}\) Sykes, supra note 10, at 59.

towards the specific health needs of least developed countries “ha[d] almost come to a standstill”\textsuperscript{27}. In 2002 less than 5\% of total pharmaceutical R\&D was concerned with pandemics such as HIV/AIDS, tuberculosis, and malaria. Two of the sector leaders, Pfizer and Glaxo-SmithKlein-Beecham, devoted less than 1\% of their R\&D expenditure to this end.\textsuperscript{28} As for so-called neglected tropical diseases\textsuperscript{29}, pharmaceutical R\&D investments were virtually nil.\textsuperscript{30} The situation has somewhat improved in recent years, as product development partnerships between pharmaceutical companies, academic centres, and public interest organisations redressed some of these R\&D inequities.\textsuperscript{31} Still, according to 2012 sources, only 10 per cent of global pharmaceutical research is applied to diseases that affect the poorest 90 per cent of the world’s population.\textsuperscript{32} On this basis, it has been argued that


\textsuperscript{25} ONORI, supra note 10, at 28. \textit{See also} Ganslandt et al., supra note 23, at 207. However, GlaxoSmithKline was later responsible for developing the first malaria vaccine, which is currently at the rollout stage in three Sub-Saharan countries. \textit{See Questions and Answers on RTS,S/AS01 Malaria Vaccine}, \textit{WORLD HEALTH Org.}, \url{http://www.who.int/neglected_diseases/diseases/en/} (last visited Apr. 10, 2017).

\textsuperscript{26} This term designates certain diseases circumscribed to tropical and subtropical conditions, and includes rabies, leishmaniosis, and leprosy. A full list of neglected tropical diseases is available on the WHO website at \url{Neglected Tropical Diseases}, \textit{WORLD HEALTH Org.}, \url{http://www.who.int/neglected_diseases/diseases/en/} (last visited Apr. 10, 2017).


\textsuperscript{29} \textit{DEUTSCHE STIFTUNG WELTBEVOELKERUNG, INNOVATIONS IN GLOBAL HEALTH RESEARCH AND DEVELOPMENT (R&D): AN AGENDA FOR THE SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (SRHR) COMMUNITY} 7 (2012), available at
a wholesale import of patent regulations from the global North would fail to provide an efficient stimulus to medical innovation targeting the specific health needs of the global South.\textsuperscript{30}

Against this backdrop the last thirty years have witnessed a rapid evolution of international legal rules governing pharmaceutical patents. Prior to the establishment of the WTO a handful of multilateral and regional conventions existed which regulated discrete aspects of IP protection.\textsuperscript{31} The WIPO, created in the late 1960s, was in charge of administering those treaties in order to “promote the protection of intellectual property throughout the world”.\textsuperscript{32} Few of these instruments, however, set substantive standards as to the subject matter or the duration of protection, and virtually none contemplated strict enforcement mechanisms.\textsuperscript{33} Therefore, states were largely free to choose the level of IP protection that best suited their policy preferences, taking into account factors such as their development stage, the relative weight of IP-related imports and exports, the degree of technological innovation, and the socio-economic stakes in the areas of health and education.\textsuperscript{34} For a long time governments viewed the pharmaceutical sector as a particularly sensitive industry operating in permanent equilibrium between profit-maximization and social-benefit logics, and many domestic legislations provided for weak, if any, patent protection on pharmaceuticals.\textsuperscript{35}


\textsuperscript{35} See Ana María Pacón, *What Will TRIPS Do for Developing Countries?, in FROM GATT TO TRIPS: THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS* 356 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996); Vadi, supra note 8, at 198; Cullet, supra note 13, at 141. For instance, the United Kingdom, the first European state to protect pharmaceutical patents, has adopted the relevant legislation in 1949, *Patents Act, 1949*, Act No. 89/1949; France in 1959, *Loi fédérale sur les brevets d’invention*, RS. 232.14, Rec. 1955, at 893; Germany in 1968, see PATENTGESETZ UND GEBRAUCHSMUSTERGESETZ...
number of large emerging economies such as India, Brazil, and Argentina were home to thriving generic drug industries which ensured a steady supply of cheap medicines to the rest of the developing world.\textsuperscript{36}

The situation started changing in the 1980s when a number of private stakeholders, including large pharmaceutical multinationals in developed countries, started a campaign for stronger protection of their IP rights at the national and international level.\textsuperscript{37} An early result of this lobbying, the Omnibus Trade and Competitiveness Act, was adopted by the US Congress in 1988 with the aim of bolstering the United States’ leverage in trade negotiations. The statute, which amended Section 301 of the 1974 Trade Act (Section 301), enabled the US Trade Representative (USTR) to identify foreign countries lacking adequate IP protection and to impose unilateral trade sanctions against them.\textsuperscript{38} Internationally, the United States joined forces with other industrialized countries to include IP-related issues in the agenda of the Uruguay Round of negotiations which eventually led to the establishment of the WTO.\textsuperscript{39} This attempt to merge IP and trade concerns met with resistance from a group of large developing countries, in particular India and Brazil, which worked to stall the negotiations and to defend their policy autonomy.\textsuperscript{40} In the end,
however, the TRIPS Agreement made its way to the final package of WTO covered agreements.41

Commentators have offered differing views as to why the recalcitrant states capitulated. For some, developing countries and LDCs were coerced into the deal through economic and diplomatic pressure—especially by the threat of trade retaliation under Section 301.42 For others, most such states lacked the capacity and expertise necessary to appraise fully the consequences of the adoption of stringent IP protection and to build solid counterclaims.43 The most credited explanation is that developing countries simply acquiesced to the adoption of the TRIPS Agreement as part of a grand (albeit unequal) bargain which included

41 For a detailed account of the final stages of the negotiations, see, for example, Daniel J. Gervais, Intellectual Property, Trade and Development: The State of Play, 74(2) FORDHAM L. REV. 505, 505-08 (2005).

42 See, e.g., Benvenisti & Downs, supra note 19, at 27; Ley, supra note 21, at 132; Mfuka, supra note 11, at 203; Vadi, supra note 8, at 202; Drahos, supra note 6, at 792; Benjamin Coriat, Du ‘Super 301’ aux TRIPS: La ‘Vocation Impériale’ du Nouveau Droit Américain de la Propriété Intellectuelle, 99 REVUE D’ÉCONOMIE INDUSTRIELLE 179, 183-85 (2002); Carlos M. Correa, Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines, 36(1) CASE W. R. J. INT’L L. 79 (2004); Justin Malbon, TRIPS-Plus Treaty Terms: Dealing with Coercion, in INTERPRETING AND IMPLEMENTING THE TRIPS AGREEMENT: IS IT FAIR? 159, 167 (Justin Malbon & Charles Lawson eds., 2008). For instance, an Indian and a Brazilian top-level negotiators recently recalled how, during the Uruguay Round, their delegations keenly felt the pressure exerted by the United States through Section 301. In their recollection, both India and Brazil chose to be tactical and bargain for better IP rules, rather than fighting a battle already lost. See Ganesan, supra note 40, at 219-20; Piragibe dos Santos Tarragô, Negotiating for Brazil, in THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS 259, at 242, 254 (Jayashree Watal & Antony Taubman eds., 2015).

concessions for increased market access in the textile and agricultural sectors.44 A final account rejects the notion of capitulation altogether. Rather, the reinforcement of IP standards at the global level may well have been in the self-interest of states such as Brazil or India based on the expectation that they would soon join the club of technology innovators and IP-exporters.45

Be it as it may, the entry into force of the TRIPS Agreement on January 1, 1995, marked a significant milestone in the history of global IP regulations.46 As sought by its developed-country proponents, the Agreement establishes minimum standards of legal protection that all WTO member states are required to implement in their domestic legislations in areas such as trademarks, patents, copyrights, geographical indications, and industrial designs. In particular, the TRIPS Agreement stipulates that “patents shall be available for any inventions, whether products or processes, in all fields of technology”, thus covering pharmaceutical products.47 The term of patent protection must not be less than “a period of twenty years counted from the filing date”.48 In light of these provisions WTO member states are no longer entitled to exclude pharmaceutical products from the range of patentable inventions, but rather they are required to implement stringent and prolonged patent protection for such products.49 Furthermore, the standards contained in the TRIPS Agreement provide a minimum baseline of IP protection in domestic jurisdictions and do not prevent WTO member states from implementing “more extensive protection” consistent with the provisions of the Agreement.50

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46 Cullet, supra note 13, at 144; Yu, supra note 5, at 3.
47 TRIPS Agreement, supra note 2, art. 27.1.
48 TRIPS Agreement, supra note 2, art. 33.
49 On the twenty-year duration of patents, some have argued that a similar term is usually found in the domestic legislations of most developed countries and “is thought to strike a sensible balance” between the reward to the inventor and the dissemination of the invention. Sykes, supra note 10, at 58. Others retort that, far from being grounded in solid economic evidence, this lengthy term results in the “over-protection of important domestic industries” and directly reflects their concerted lobbying efforts. Benvenisti & Downs supra note 19, at 24.
50 TRIPS Agreement, supra note 2, art. 1.1.
on a most favoured nation (MFN) basis.\(^{51}\) The fact that the TRIPS Agreement comes under the WTO umbrella means that the disputes arising from its interpretation and application are enforceable through the pervasive and effective WTO dispute settlement mechanism.\(^{52}\)

Together with these standards and procedures the TRIPS Agreement sets out certain flexibilities aimed at achieving socio-economic goals including the protection of public health.\(^{53}\) These ‘escape valves’ include, among other things, varying transitional periods for implementation in favour of developing and least-developed countries (the longest of which were initially set to elapse in 2005)\(^{54}\), the possibility of parallel imports, i.e., the importation, with or without the consent of the patent holder, of a product legally marketed in another country by the patent holder\(^{55}\), and the granting of compulsory licenses, i.e., non-exclusive licenses granted to third parties by an act of government, irrespective of the will of the patent owner.\(^{56}\)

The diplomatic tensions surrounding the TRIPS Agreement did not cease with the entry into force of the treaty. Throughout the first years of its application, the Agreement “became a symbol of the vulnerability of developing countries (...) and galvanized critics regarding the influence of multinational corporations on global economic rules”.\(^{57}\) In particular, scholars from developing countries maintained that the imposition of global IP rules as a pre-requisite to participation in international trade\(^{58}\) was a tool for developed states to assert their supremacy, pull up the ladder of access to technology, and extort undeserved “ rents on behalf of multinational corporations”.\(^{59}\) Meanwhile, an increasingly tight network of NGOs,

\(^{51}\) TRIPS Agreement, supra note 2, art. 4.


\(^{53}\) For a comprehensive analysis of each of these flexibilities, see CARLOS M. CORREA, INTEGRATING PUBLIC HEALTH CONCERNS INTO PATENT LEGISLATION IN DEVELOPING COUNTRIES (2000); SISULE F. MUSUNGU & CECILIA OH, WORLD HEALTH ORG., THE USE OF FLEXIBILITIES IN TRIPS BY DEVELOPING COUNTRIES: CAN THEY PROMOTE ACCESS TO MEDICINES? 68 (2005); Ley, supra note 21.

\(^{54}\) TRIPS Agreement, supra note 2, art. 65, 66.

\(^{55}\) Article 6 of the TRIPS Agreement leaves the rules governing the geographical exhaustion of IP rights to the discretion of WTO member states.

\(^{56}\) TRIPS Agreement, supra note 2, art. 31.

\(^{57}\) Deere, supra note 33, at 2.

\(^{58}\) Ullrich, supra note 43, at 98.

academics, and political figures helped raise public awareness of the impact of IP protection on issues such as public health and policy autonomy and organized the resistance. For instance, some commentators blasted a WTO panel ruling providing a restrictive interpretation of the TRIPS flexibilities as failing to preserve the delicate balance of social and economic interests reflected in the stated purposes of the Agreement and unduly curbing the regulatory autonomy of WTO member states. Another panel decision, which limited the United States’ indiscriminate use of Section 301, was hailed as reducing diplomatic tensions by removing the credibility of threats of unilateral sanctions against non-TRIPS-compliant states. More famously, a 1998 lawsuit initiated by a coalition of large multinational companies against the government of South Africa over a compulsory licensing system for HIV/AIDS medicines incurred such a public backlash that the complainants eventually dropped the action.


63 See, e.g., MATTHEW KENNEDY, WTO DISPUTE SETTLEMENT AND THE TRIPS AGREEMENT: APPLYING INTELLECTUAL PROPERTY STANDARDS IN A TRADE LAW FRAMEWORK 84-86 (2016).


on the TRIPS Agreement and Public Health (Doha Declaration),\textsuperscript{66} unanimously considered as a “significant milestone” in the legal and diplomatic relations within the WTO.\textsuperscript{67} The Declaration stipulated, among other things, that “the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all”. To this end, the Declaration reaffirmed the importance of the TRIPS flexibilities and, in some cases, broadened their scope. For instance, it extended the transitional period for the implementation of TRIPS-compliant patent regimes by least developed countries to 2016 and gave WTO members substantial leeway to define the circumstances for granting compulsory licenses.\textsuperscript{68} In August 2003, the Declaration was complemented by the so-called ‘Paragraph 6 Solution’,\textsuperscript{69} a decision of the WTO General Council that temporarily permitted the export of generic drugs produced through compulsory licenses to countries lacking adequate manufacturing capacity.\textsuperscript{70} Finally, in December 2005 the General Council adopted a formal amendment to the TRIPS Agreement which made the Paragraph 6 Solution a permanent feature of the treaty. As mentioned in the introduction, the amendment entered into force in January 2017. Despite attracting some criticism for doing too little\textsuperscript{71} or too much\textsuperscript{72}, these instruments were saluted as an important victory for needs of the global South in the WTO\textsuperscript{73} as they allowed at least the largest developing countries to effectively promote affordable healthcare policies.\textsuperscript{74}

\begin{thebibliography}{99}
\bibitem{67} Haochen Sun, *Reshaping the TRIPs Agreement Concerning Public Health: Two Critical Issues*, 37(1) J. WORLD TRADE 163, 168 (2003).
\bibitem{70} See Vadi, supra note 8, at 211; Musungu & Oh, supra note 53, at 68; Yu, supra note 44, at 319-21.
\bibitem{72} See Sykes, supra note 10, at 49, 66.
\bibitem{73} German Velásquez, *Bilateral Trade Agreements and Access to Essential Drugs, in INTELLECTUAL PROPERTY IN THE CONTEXT OF THE WTO TRIPS AGREEMENT: CHALLENGES FOR PUBLIC HEALTH* 63 (Jorge A. Bermudez & Maria A. Oliveira eds., 2004); Vadi, *supra* note 8, at 208.
\bibitem{74} See Yu, *supra* note 44, at 323-25.
\end{thebibliography}
Yet, the struggle was far from over. Around the same time as the adoption of the Doha Declaration, some developed nations, spearheaded by the United States and the European Union, started including IP-related clauses in their bilateral and regional FTAs with developing countries. These clauses, commonly referred to as ‘TRIPS-plus provisions’, require signatories to implement higher standards of IP protection than those set out in the TRIPS Agreement. These provisions may mandate the inclusion of new areas of IP rights, for instance by protecting inventors’ exclusive rights to the pharmaceutical test data made available a


76 See INT’L INTELLECTUAL PROP. INST., PATENT PROTECTION AND ACCESS TO HIV/AIDS PHARMACEUTICALS IN SUB-SAHARAN AFRICA 30 (2000); MUSUNGU & OH, supra note 53, at 47; Sell, supra note 68, at 60-63; Correa, supra note 12; Correa, supra note 42, at 83-91; Mercurio, supra note 75, at 224-34.

77 See Susy Frankel, Challenging TRIPS-Plus Agreements: The Potential Utility of Non-violation Complaint, 12(4) J. OF INT’L ECON. L. 1023, 1033 (2009); Drahos, supra note 6, at 802; Mercurio, supra note 75, at 223.


81 United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026.


Dominican Republic\textsuperscript{86}, High standards of IP protection also appear in the (now defunct) Trans-Pacific Partnership as well as in the Transatlantic Trade and Investment Partnership, and the EU-Canada Comprehensive Economic and Trade Agreement.\textsuperscript{87}

Predictably, most development-oriented scholars have condemned the proliferation of TRIPS-plus provisions. According to many, the global IP ratchet, astutely pursued by developed countries in alternating cycles of “bilateralism, regionalism and multilateralism”\textsuperscript{88}, aims to continuously “shift the standard-setting agenda from fora in which they are encountering difficulties to those fora where they are likely to succeed”\textsuperscript{89}. This process threatens to tilt the delicate balance between the conflicting policy goals of patent protection and access to affordable medicines struck with the adoption of the Doha Declaration and the subsequent instruments, therefore bypassing the WTO arena and further threatening public health in developing countries.\textsuperscript{90} It may also undermine the legal predictability of WTO multilateral dispute settlement in favour of a “maze” of \textit{ad hoc} adjudicatory regimes where developed-country litigants have greater political clout.\textsuperscript{91} For some commentators this forum-shifting strategy amounts to nothing short of imperialism in disguise as it allows powerful states to “break the coordinated resistance of the weaker parties” and curtail their ability to engage in the “logrolling” necessary for them to bargain more effectively.\textsuperscript{92} In the same vein, some see the new turn to IP-bilateralism as an act of bad faith on the part of

\begin{footnotesize}
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\item \textsuperscript{86} Dominican Republic-Central America Free trade Agreement, May 28, 2004, 43 I.L.M. 514.
\item \textsuperscript{88} Mercurio, \textit{supra} note 75, at 216-24.
\item \textsuperscript{89} Drahos, \textit{supra} note 6, at 798-99. \textit{See also} Joost Pauwelyn, \textit{Legal Avenues to “Multilateralising Regionalism”: Beyond Article XXIV, in Multilateralizing Regionalism: Challenges for the Global Trading System} 368, 386 (Richard Baldwin & Patrick Low eds., 2009); Yu, \textit{supra} note 38, at 409; Correa, \textit{supra} note 42, at 81; Mercurio, \textit{supra} note 75, at 222; Collins-Chase, \textit{supra} note 87, at 780; John Braithwaite & Peter Drahos, \textit{Global Business Regulation} 564-577 (2000); Helfer, \textit{supra} note 44, at 42.
\item \textsuperscript{90} See, \textit{e.g.}, Correa, \textit{supra} note 42.
\item \textsuperscript{91} Pauwelyn, \textit{supra} note 89, at 386. \textit{See also} Yu, \textit{supra} note 38, at 409.
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developed states. In particular, at the time they accepted the TRIPS Agreement, developing countries expected that the upward spiraling of IP standards would stop there. Therefore, it is said that the subsequent regulatory developments stripped them of their freedom from excessive IP protection and put them in perpetual “negotiating fatigue”.

Quoi faire? For all their poignant critiques, these authors acknowledge, from a diplomatic standpoint, governments from the global South can do quite little to shield themselves from the global IP ratchet. A common reflex is to recommend that developing countries resist economic and diplomatic pressure when negotiating new trade deals with their developed counterparts. For instance, in a typical pro-Third World move, some have advocated the creation of a “veto coalition” of states, possibly guided by like-minded NGOs, against the further ratcheting up of IP standards. Others have gone as far as to revisit the doctrine of coercion under international treaty law to include economic and diplomatic pressure in the types of conduct that fit that label.

What these proposals share, in one way or another, is the conviction that a structural rebalancing of global IP regulations depends on the political empowerment of the “net losers of globalization” and on a more fruitful use of

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93 See Drahos, supra note 6, at 791-92.
94 See Frankel, supra note 77, at 1028.
95 Drahos, supra note 6, at 804.
96 Id. at 800.
97 Collins-Chase, supra note 87, at 801; Sell, supra note 68, at 64-65. See also South Centre, Intellectual Property In Investment Agreements: The TRIPS-Plus Implications For Developing Countries, at 21, SC/TADP/AN/INV/2 (May 2005); Lisa Forman, Trade Rules, Intellectual Property, and the Right to Health, 21(3) ETHICS & INT’L AFF. 337, 345 (2007).
99 For example, Eyal Benvenisti and George Downs place particular emphasis on Article 2.7 of the UN Charter, which prohibits member States from intervening “in matters which are essentially within the domestic jurisdiction of any [other] State.” Benvenisti &Downs, supra note 19, at 31. Similarly, Justin Malbon envisions redress through Article 52 of the Vienna Convention on the Law of Treaties of 1969, according to which a treaty is void if its conclusion has been procured “by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations”. Malbon, supra note 42, at 167.
100 The expression is borrowed from Sykes, supra note 10, at 59.
the bargaining tools at their disposal. International institutions such as the WIPO, the WTO, and bilateral treaty commissions are seen as little more than battlegrounds for a perpetual struggle between the dominant and the oppressed. This ‘antagonistic’ posture certainly has some merit: for one thing, it reaffirms that the form and content of international lawmakers are hardly neutral but rather stem from highly contested processes and rest on carefully designed negotiating strategies. As such, the political narrative serves as a forceful reminder that the ‘universalist’ aspirations of international law are often used as a discursive technique to obscure the underlying struggles and to naturalize the position of the winners.¹⁰¹

However, this narrative also has its limitations. First, focusing on the ‘North vs. South’ dichotomy neglects the sharp differences in bargaining power that exist within each of the two camps. For instance, recent literature has shown that while large and robust developing countries such as India, Brazil and Argentina have been largely able to resist the lure of TRIPS-plus and to implement affordable healthcare policies, smaller and lower-income states quickly abdicated the fight and adopted TRIPS-plus levels of patent protection without hesitation.¹⁰² Second, insisting on a continued pro-North bias in the current negotiating processes is an easy target for rebuttal. For instance, some ‘orthodox’ international relations scholars have pointed out that developing countries are in a better bargaining position today than they were at the time of the Uruguay Round. For one thing, some coercive tools that powerful countries used during the TRIPS Agreement negotiations, such as Section 301, have lost their threat as a result of WTO adjudication. Moreover, the transnational mobilization of the late 1990s and the early 2000s has raised awareness of the impact of patent protection on public health such that today few governments may legitimately invoke their ignorance on this matter.¹⁰³ Absent these justifications the decision by many developing and least-developed countries to enter TRIPS-plus agreements would be an expression of their contractual freedom as sovereign states and “critics have the burden of explaining how these countries are not thereby made better off”.¹⁰⁴

This sheds light on the third and perhaps most salient blind spot of the political narrative based on a North vs. South divide: namely, its tendency to cast the issue in simplistic binary terms. As it appears from the account provided thus far, this narrative hinges on a quite traditional conception of national interest. Treating negotiating countries as free, informed, and rational actors implies that each state is

¹⁰² DEERE, supra note 33, at 2, 163-65.
¹⁰³ Turk, supra note 43, at 1007-09.
able to bring to the table an unambiguous and pre-determined position, “to aggregate collective wishes”, and “to translate them into acts.”105 This unitary state actor model has long been questioned in international relations and international law theories and proves of limited value when it comes to analyzing IP regime complexity. As some constructivist and critical scholars have pointed out, interests “are not just ‘out there’ waiting to be discovered; they are constructed through social interaction”.106 Moreover, and crucially, the state “is not a unified self” but rather “encompasses a variety of groups and performs a variety of functions”, whose outcomes do not necessarily serve everyone’s interests.107 Applying this line of inquiry to the issue at hand one may well expect that the strengthening of pharmaceutical patents through successive waves of bilateral and multilateral treaties would make some sectors of society better off and some other sectors worse off in developed and developing countries alike. For instance, besides providing an immediate gain to pharmaceutical patent holders in industrialized economies, entering into such agreements may enhance the position of the ruling elites in low-income states by bolstering their international standing. Conversely, the rise in the sales of medicines may adversely affect impoverished healthcare-seekers in both the North and the South albeit to different degrees.108

Disentangling the concept of state interest enables us to see that national governments are pluralistic entities that comprise a wide array of institutions, each pursuing a specific agenda and drawing legitimacy from a specific domestic constituency.109 Non-governmental actors such as private interest and civil society

105 Robert Malley, Jean Manas & Crystal Nix, Constructing the State Extra-Territorially: Jurisdictional Discourse, the National Interest, and Transnational Norms, 103(6) HARV. L. REV. 1273, 1285 (1990) [hereinafter Malley et al.].
107 Karen Knop, Feminism and State Sovereignty in International Law, 3(2) TRANSNAT’L LAW & CONTEMP. PROBS. 293, 333 (1993).
108 Far from being a purely academic hypothesis, a solid case can be made that the price of essential medicines in the United States has become unsustainable for most consumers. For instance, the average price of cancer drugs exceeded USD 120,000 per patient per year in 2014, and the cost of other pharmaceutical treatments was as high as USD 300,000. See, e.g., Carlos M. Correa, Mitigating the Regulatory Constraints Imposed by Intellectual Property Rules under Free Trade Agreements, 74 S. CENTRE 5-6 (2017).
groups play a pivotal role in channeling social preferences and expressing competing policy claims to influence the behavior of government agencies.\(^{110}\)

According to traditional public choice analysis the relative weight of the positions on the table will depend on the size, concentration, level of expertise, and economic power of each faction\(^{111}\): well-organized groups with high economic stakes and specialized knowledge will usually have greater impact on legislative outcomes than dispersed, loosely coordinated masses.\(^{112}\) Thus, some have pointed out that purely state-centric accounts of recent IP negotiations “are at best incomplete and at worst misleading” as they obscure how private actors pursue their interests in a wide variety of fora, “at all possible levels and in multiple venues”, in order to translate complex IP issues into political and diplomatic discourse.\(^{113}\)

On the other side of the fence, those discontent with pharmaceutical patents, such as NGOs and advocacy groups, have also engaged in a complex game of principled lobbying in order to empower developing states in future negotiations and foster the creation of “counter-regime norms”.\(^{114}\)

As will be seen, the competing constituencies at play do not operate solely within the boundaries of the national political space but also tend to create transnational solidarities and networks beyond national borders.\(^{115}\) Global law and governance today seem to stem as much from inter-state lawmaking as from the activities of a host of non-territorial networks.\(^{116}\) Each networked constituency seeks to assert its

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\(^{110}\) Helfer, supra note 4, at 19. Malley et al., supra note 105, at 1284.


\(^{113}\) Sell, supra note 43 at 8. While pharmaceutical companies helped shape the United States’ stance in respect of patents, other domestic industries contributed to the United States’ negotiating position in respect of other IP fields. For instance, before the inception of the Uruguay Round, the Levi Strauss Corporation, together with other firms such as the International Anti-Counterfeiting Coalition, requested and obtained the USTR’s backing for an international anti-counterfeiting code. The code constituted the initial core of what would eventually become the TRIPS Agreement. Id. at 40. See also Matthews, supra note 37, at 8-9.

\(^{114}\) Helfer, supra note 4, at 58-61.


influence at the global level and resorts to a whole host of strategies and techniques to this end. The most obvious result of this activity has been the progressive emergence over the last decades of informal bodies of rules, standards, principles, and practices to govern certain areas of global affairs more or less independently from state enforcement. However, even the establishment of formal intergovernmental organisations embodies, to some degree, the coordinated efforts of specific transnational constituencies and ‘crystalizes’ their interests into an institutionalized regime. In fact, the traditional functionalist view, which sees international organisations simply as agents tasked by their member states to carry out functions of common interest, is giving way to new conceptions whereby institutional regimes are a means to transpose political differentiation from the domestic sphere onto the international plane.

Inevitably, this shift in focus from national sovereigns to transnational political constituencies changes our perception of the fault lines in the conflict between pharmaceutical patents and access to medicines. The two narratives explored in the following sections partake in this ‘remapping’ of the debate along social sectors rather than territorial lines. As we will see, however, the proponents of the two approaches differ on one major point: namely, the possibility to reconcile or otherwise resolve the conflict at issue through recourse to rules and principles currently available under international law. Far from being a mere variance between optimists and pessimists, this difference lies at the core of the worldviews of the two camps and reflects deeply ingrained, if seldom expressed, instincts about the deep architecture of the global order.

III. THE INTERNATIONAL LAW NARRATIVE: NORMATIVE CONFLICTS, THE TURN TO INTERPRETATION, AND THE LURE OF CONSTITUTIONALISM

As anticipated in the previous Part, the second and third narratives of the conflict between pharmaceutical patents and access to medicines break from the idea of a North vs. South diplomatic standoff and instead redraw the issue along transnational lines. The second perspective, on which I focus here, emphasizes that the policy goals of IP protection and access to affordable healthcare are both

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117 One such example is the lex mercatoria developed to settle transnational commercial disputes. See, e.g., Hans-Joachim Mertens, Lex Mercatoria: A Self-applying System Beyond National Law?, in GLOBAL LAW WITHOUT A STATE 31 (Gunther Teubner ed., 1997).


recognized under international law and explores ways to reconcile normative conflicts when they arise. As such, this narrative abandons the vernacular of imperialism, domination, and resistance and instead embraces the traditional concepts of ‘fragmentation’ and ‘coherence’ in international law.\(^\text{120}\) In scholarly parlance, fragmentation designates the phenomenon whereby the same conduct by an international law actor is simultaneously regulated by a plurality of specialized bodies of rules (such as trade law, human rights law, environmental law, law of the sea, and so forth), enforced and promoted by sectoral courts and institutions with discrete mandates and limited spheres of jurisdiction.\(^\text{121}\) Some see fragmentation as a natural by-product of the growing density and complexity of the international legal order. At the same time, many fear that the emergence of specialized and autonomous rules, legal institutions and areas of legal practice could threaten the coherence and harmonious development of public international law.\(^\text{122}\) Referring to fragmentation as a ‘traditional’ concept may sound unorthodox as the preoccupations stemming from this phenomenon are relatively recent. Yet, this issue has occupied such vast swathes of scholarly reflection that it has come to constitute a field of study in and of itself.

For those who decry the perils of fragmentation, the relationship between pharmaceutical patents and access to medicines is a good case in point. In fact, the set of international rules on IP protection discussed in the previous section may occasionally clash with other overlapping sets of specialized rules. Most notably, access to affordable drugs is regulated as part of the human right to health protected under a number of regional and universal treaties. The early roots of this right can be traced back to the Universal Declaration of Human Rights of 1948, which stipulates, albeit in non-binding terms, that everyone has “the right to a standard of living adequate for the health and well-being of himself and his family, including … medical care”.\(^\text{123}\) Building on this premise numerous global and regional treaties as well as many domestic constitutions progressively recognized


healthcare as a fundamental human entitlement. At the international level the most accomplished effort was the adoption the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 12 of which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, including the “prevention, treatment and control of epidemic, endemic, occupational and other diseases”. Like other international treaties protecting socio-economic rights, the ICESCR was inspired by socialist ideals born in the years of the industrial revolution. As such, it was designed to garner the support of communist and Third-World countries (occasional allies in the international arena) while it encountered some skepticism from Western liberal democracies (traditionally more focused on civil and political rights). In order to attract ratifications, the rights enshrined in the Covenant, including the right to health, were drafted in rather vague and programmatic terms. In particular, pursuant to Article 2 of the ICESCR, a member state is not required to ensure the immediate and unconditional fulfillment of such rights129 but rather to “take steps, (...) to the maximum of its available resources, with a view to achieving progressively the[ir] full realization (...) by all appropriate means, including particularly the adoption of legislative measures”.

124 See, e.g., Constitution of the World Health Organization, preambular recital 2, 14 U.N.T.S. 185 (July 22, 1946) (stating that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”). For a comprehensive overview, see Holger P. Hestermeyer, Access to Medication as a Human Right, 8 MAX PLANCK Y.B. U.N. L.101 (2004).


126 Id. art. 12.

127 Hestermeyer, supra note 124, at 109.

128 Concerning the debate on the ideological roots of the different categories of human rights, see, for example, Marc Bossuyt, La Distinction Entre les Droits Civils et Politiques et les Droits Économiques, Sociaux et Culturaux, 8(4) REVUE DES DROITS DE L’HOMME 780 (1975); Michael Bothe, Les Concepts Fondamentaux du Droit à la Sante: Le Point de Vue Juridique, in LE DROIT À LA SANTE EN TANT QUE DROIT DE L’HOMME 14, 16-17 (René-Jean Dupuy ed., 1978); Asbjorn Eide & Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 3 (Asbjorn Eide, Catarina Krause & Allan Rosas eds., 2d ed. 2001); Hestermeyer, supra note 124, at 109; Helfer, supra note 37, at 317.

129 In this regard, see Hestermeyer, supra note 124, at 132.

130 ICESCR, supra note 125, art. 2.1.
Unlike the WTO agreements, the ICESCR lacks robust adjudicatory and enforcement mechanisms.\textsuperscript{131} Yet, over time, the Committee on Economic, Social and Cultural Rights (ESCR Committee), a group of experts tasked with reviewing state compliance with the Covenant, has issued a series of ‘general comments’ to interpret, clarify and, occasionally, expand the scope of the protected rights.\textsuperscript{132} Among other things, the Committee has developed the doctrine of “core obligations” for each protected right, i.e., minimum essential levels that ICESCR member states are required to fulfill irrespective of any limitations on the resources available.\textsuperscript{133} In 2001, the Committee held that member states’ duties to respect, protect, and fulfill the right to health hinge in no negligible part on the economic availability of medicines\textsuperscript{134} and identified the provision of essential drugs, as defined by the WHO, as one of the “core obligations” in respect of such a right.\textsuperscript{135} Further, the Committee took the view that states may violate Article 12 of the ICESCR through the adoption of “any retrogressive measures incompatible with the core obligations under the right to health”, including “the formal repeal or suspension” of the necessary legislation or “the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health”.\textsuperscript{136} Similarly, a breach may stem from a state’s failure to “take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements”.\textsuperscript{137} Through its quasi-judicial activity, the ESCR Committee has acquired considerable influence as a “focal point” in the normative development in the field of socioeconomic human rights.\textsuperscript{138} As a result, the current position of the UN human rights bodies is that

\textsuperscript{131} However, the Optional Protocol to the ICESCR, which entered into force in 2013, has established a complaint and inquiry system for social, economic and cultural rights, similar to the preexisting system in place for civil and political rights. See generally OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY (Malcolm Langford et al. eds., 2016).


\textsuperscript{134} General Comment No. 3, \textit{supra} note 133, ¶¶ 33-38. See also Helfer, \textit{supra} note 37, at 327.


\textsuperscript{136} Id. ¶ 48.

\textsuperscript{137} Id. ¶ 50.

\textsuperscript{138} Helfer, \textit{supra} note 37, at 318.
access to affordable medicines constitutes “one of the fundamental elements” of the right to health.139

For the numerous states that are parties to both IP and human rights treaties140 it might at times prove difficult to comply with both sets of obligations simultaneously. As discussed in the previous section, the adoption of the stringent patent protection standards mandated by TRIPS and TRIPS-plus provisions is likely to result in higher retail prices of drugs in domestic markets. Therefore, according to some, implementing such patent standards may create a situation less favourable to the enjoyment of the right to health than there would be otherwise, thereby constituting a “retrogressive measure” inconsistent with Articles 2 and 12 of the ICESCR.141

Faced with the threat of a normative conflict between specialized bodies of rules, many international law scholars adopted a defensive posture and invoked a return to the unity and coherence of the international legal order. While the proposed solutions vary considerably, they all share one essential element: namely, the belief that the solution to legal fragmentation is to be found in international law itself. In particular, according to this narrative, adjudicators can resort to several interpretive techniques to reduce or eliminate the tensions between conflicting obligations. The most exhaustive exploration of such techniques is contained in the International Law Commission’s 2006 Report on the Fragmentation of International Law (ILC Report)142, which had been issued with the intent to address the “postmodern

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140 As of 2012, 121 state parties to the ICESCR were also members of the WTO, thus being subject to the disciplines of the TRIPS Agreement. Ping Xiong, An INTERNATIONAL LAW PERSPECTIVE ON THE PROTECTION OF HUMAN RIGHTS IN THE TRIPS AGREEMENT 255 (2012).
anxieties” of international law professionals. The Report did not seek to dictate a definitive solution to the issue of fragmentation. Rather, it provided resources for courts to use on a case-by-case basis thereby according “considerable flexibility in how to approach each repair job”.

One major avenue for harmonization explored in the ILC Report is the so-called principle of systemic interpretation which stems from a “strong presumption against normative conflict” in international law. According to this principle a treaty must be interpreted taking into account the normative environment that surrounds it, that is, with due cognizance of other rules and principles that might have bearing upon the case. This approach finds confirmation in Article 31.3(c) of the Vienna Convention on the Law of Treaties (VCLT) which stipulates that the interpreter must take into account, together with the context of the treaty, “[a]ny relevant rules of international law applicable in the relations between the parties”. The underlying assumption is that states will make efforts to the maximum extent possible to reconcile their various international obligations and to comply with all of them. As applied to the case of IP and human rights obligations, it has been suggested, for instance, that TRIPS and TRIPS-plus signatories adopt non IP-related measures to ensure access to affordable healthcare. Such measures include the imposition of price caps on essential drugs, government purchase and subsequent distribution of patented pharmaceuticals at affordable costs, the adoption of public health insurance plans, etc. Some authors have expressed confidence in the potential of the principle of systemic integration thanks to which courts will be able to “interpret away” most conflicts.

144 Sean D. Murphy, Deconstructing Fragmentation: Koskenniemi’s 2006 ILC Project, 27(2) TEMP. INT’L & COMP. L.J. 293, 297 (2013).
145 ILC Report 2006, supra note 142, ¶ 37. In turn, this presumption rests on the International Court of Justice’s statement that a treaty must be interpreted “as producing and intended to produce effects in accordance with existing law and not in violation of it”. Case Concerning the Right of Passage over Indian Territory (Port. v. India), Preliminary Objection, 1957 I.C.J. 125, at 142 (Nov. 26, 1957). See also Marko Milanović, Norm Conflict in International Law: Whither Human Rights?, 20(1) DUKE J. COMP. & INT’L L. 69, 73 (2009).
147 See, e.g., Cullet, supra note 13, at 157; Helfer, supra note 52, at 997; Pauwelyn, supra note 89, at 375.
148 See, e.g., Joseph, supra note 141, at 439; Ley, supra note 21, at132; Hestermeyer, supra note 124, at 136; Mercurio, supra note 75, at 236.
Yet, one may think of situations where a state cannot simultaneously comply with its TRIPS and TRIPS-plus obligations on the one hand and its obligations under human rights law on the other. For example, LDCs suffering from severe budget constraints may not be able to adopt adequate corrective measures to soften the impact of pharmaceutical patents on access to affordable drugs for the poor. In such situations “genuine” normative conflicts may arise that do not lend themselves to simple harmonization. What to do, then? Once again, international law provides a wide array of interpretive techniques such as the principles of lex posterior and lex specialis for disentangling the puzzle. According to authors such as Joost Pauwelyn, the rigorous and principled application of those techniques would allow the interpreter (whether a national tribunal, a WTO panel, a human rights court, or the International Court of Justice (ICJ)) to achieve legal coherence by applying the prevailing rule and ‘disapplying’ all others. Other scholars have taken a more nuanced position. Instead of focusing on the application/disapplication dichotomy, they have called on courts to balance human rights and trade concerns on a case-by-case basis.

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150 See Hestermeyer, supra note 124, at 136.
151 ILC Report 2006, supra note 142, ¶ 42. For the purposes of this article, “normative conflict” is defined in the narrow sense, i.e., as the situation in which “a party to the two treaties cannot simultaneously comply with its obligations under the two treaties”. Wilfred Jenks, The Conflict of Law-Making Treaties, 30 BRIT. Y. B. INT’L L. 401, 426 (1953). In recent years some have challenged this definition as being too restrictive, and have argued that a conflict of norms may also exist between a ‘permissive’ rule that expressly allows a certain conduct and a ‘prohibitive’ rule that expressly forbids it. See, e.g., Pauwelyn, supra note 149, at 551; Erich Vranes, The Definition of “Norm Conflict” in International Law and Legal Theory, 17(2) EUR. J. OF INT’L L. 395 (2006). The ILC itself has adopted “a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem”. ILC Report 2006, supra note 142, ¶ 25.
152 See ILC Report 2006, supra note 142, ¶¶ 223-323. See also Pauwelyn, supra note 149, at 545; JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 327-436 (2003).
153 See ILC Report 2006, supra note 142, ¶¶ 46-222. See also PAUWELYN, supra note 152, pp. 327-436.
154 Pauwelyn, supra note 149, at 542, 566, 573.
This focus on the role of adjudicators betrays a common reflex in much of international legal scholarship which tends to perceive the interpretation and application of legal rules as the “functional equivalent of truth, helping to curb power”.\(^{156}\) Indeed, the proliferation of specialised legal regimes and adjudicative mechanisms has been accompanied by an explosion of treatises devoted to the VCLT, dissecting the interpretive devices contained therein and suggesting ways in which courts may ensure an acceptable level of consistency in deriving meaning from legal texts. Legal interpretation has become, so to speak, a scientific exercise whereby the ‘true’, ‘objective’ meaning of the law can be “excavated” from the relevant legal texts.\(^{157}\) Arguably, this enthusiasm goes beyond even the aims of the ILC Report which expressly acknowledges that the relationship between specialized regime rules “cannot be justifiably attained by what is merely an elucidation of the process of legal reasoning”.\(^{158}\) Such a technical approach to fragmentation\(^ {159}\) may appear attractive as it allows the tackling of most issues within the formal confines of the international legal order with minimal disturbance to its current operation. At most, should it be found that the system has lacunae, lawmakers and courts may develop more satisfying conflict rules so as to provide new ways to solve conflicts.\(^ {160}\) Specifically in the context of the relationship between pharmaceutical patents and access to medicines multiple authors have observed that several TRIPS-plus provisions leave intact, and explicitly refer to, the general principles and flexibilities enshrined in the TRIPS Agreement. This may enable a reading of such provisions in a manner that is supportive of domestic healthcare policy space. In order to do so, it has been said, one may invoke the preamble to the TRIPS Agreement which stipulates, among other things, that the treaty is intended to promote “developmental and technological objectives”\(^ {161}\) and to prevent IP protection from itself becoming a “barrier to legitimate trade”.\(^ {162}\) Alternatively, one may refer to the objectives and


\(^{161}\) TRIPS Agreement, *supra* note 2, preambular recital 5.

\(^{162}\) TRIPS Agreement, *supra* note 2, preambular recital 1.
principles embodied in Articles 7 and 8 of the Agreement which include the “dissemination of technology ... in a manner conducive to social and economic welfare”\(^{163}\) and the protection of “public health”.\(^ {164}\) Finally, and obviously, the Doha Declaration and the subsequent WTO instruments may add weight to a pro-health interpretation of TRIPS-plus provisions.\(^ {165}\) According to some, these and other elements of the TRIPS Agreement reveal that the treaty does not only lay down minimum thresholds but indeed imposes maximum ceilings on IP protection.\(^ {166}\) However, from a human rights perspective, this focus on formal textualism may become a shackle when (and as it often happens) TRIPS-plus provisions do not refer to the principles and flexibilities contained in the TRIPS Agreement. Absent any explicit textual connection between the two sets of norms, an interpreter following the standard conflict-resolution rules would likely conclude that TRIPS-plus provisions “prevail either as the later in time ... or as the more specific provision”.\(^ {167}\) Such an outcome would clearly prove unsatisfactory to those advocating for policy space that may adequately resolve the problem of access to medicines.

Faced with this conundrum, several scholars have pushed their views one step further and have asserted the legal primacy of human rights over trade and economic concerns. For instance, they have argued that the provision of basic

\(^{163}\) TRIPS Agreement, supra note 2, art. 7.

\(^{164}\) TRIPS Agreement, supra note 2, art. 8.1.

\(^{165}\) For a comprehen­sive overview of these interpretive elements, see Carlos M. Correa, supra note 108, at 10-14.

\(^{166}\) See, e.g., Henning Grosse Ruse-Khan, Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection, 1(1) TRADE L. & DEV. 56 (2009); Annette Kur & Henning Grosse Ruse-Khan, Enough is Enough: The Notion of Binding Ceilings in International Intellectual Property Protection, in INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS 359 (Annette Kur & Marianne Levin eds., 2011); MAX PLANCK INST. FOR INTEL­LECTUAL PROP. & COMPETITION LAW, PRINCIPLES FOR INTEL­LECTUAL PROPERTY PROVISIONS IN BILATERAL AND REGIONAL AGREEMENTS, part I, § II, available at http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/06_principles_for_intellectua/principles_for_ip_provisions_in_bilateral_and_regional_agreements_final1.pdf (last visited May 17, 2017). Some of these proposals have been endorsed by certain WTO member states in committee discussions. For instance, in 2010 China requested the TRIPS Council to establish a general principle that TRIPS-plus provisions shall not breach the TRIPS Agreement and that the enforcement of IP rights shall not create distortive effects on legitimate international trade. Similarly, India maintained that Article 1 of the TRIPS Agreement should be interpreted as prohibiting WTO member states from implementing more extensive IP protection if that entails contravening the Agreement. See TRIPS Council, Minutes of the Meeting Held on 8-9 June 2010, ¶¶ 248-73, IP/C/M/63 (Oct. 4, 2010). See also Yu, supra note 44, at 330-31.

\(^{167}\) Pauwelyn, supra note 89, at 384.
healthcare “must be prioritized over the provision of intermediate public goods such as legal regimes that facilitate innovation through the grant of [IP] rights”; after all, “basic education and adequate health status are prerequisites to any capacity-building for the technological progress”. Similarly, since “human rights necessarily claim priority over all other considerations”, governments must “marshal all the resources needed for their satisfaction, up to the point that this would infringe upon the satisfaction of other human rights”. Therefore, according to these authors, should a conflict arise between an IP and a human rights obligation, “it is likely that human rights would generally take precedence”. Some UN human rights bodies have adopted a similar stance and have reminded states of “the primacy of human rights obligations over economic policies and agreements”. Far from reflecting mere ethical preferences these attempts pursue a specific agenda: namely, to overcome the traditional absence of a formal hierarchy of norms in international law—whereby “neither trade nor non-trade related principles can be considered, from a legal point of view, as unconditionally preeminent”—in favour of a progressive verticalization of the system. The arguments deployed in support of this view are well known and need not be restated in full. Some see the signs of a burgeoning hierarchy between international legal rules in the emergence of peremptory norms, _orga omnes_ obligations, and non-derogable rights (i.e., human rights that cannot be subject to any limitations even in the presence of countervailing public interests). Others have put the emphasis on the role of Article 103 of the UN Charter which stipulates that in the event of a conflict between an obligation under the Charter and one under any other international agreement, the former shall prevail. Yet others have re-imagined the system of international courts and tribunals as a pyramid with the ICJ at the

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170 Cullet, _supra_ note 13, at 159.


172 Mads Andenas & Stefan Zlepntig, _supra_ note 155, at 377.


top\textsuperscript{175}, or have at least predicted the emergence of a “global community of courts”\textsuperscript{176} engaged in an “integrated and interconnected system”.\textsuperscript{177}

Despite variations, all these efforts share a belief in an “international constitutional order” consisting of “an international community, an international value system and rudimentary structures for its enforcement”.\textsuperscript{178} It should come as no surprise that human rights and fundamental freedoms constitute the moral cornerstone of this imagined edifice. For instance, on the pages of this journal, Ernst-Ulrich Petersmann once wrote that the “constitutional foundation” of international law in the 21st century requires “justifying, interpreting, designing and developing [international economic law] in conformity with human rights and ‘principles of justice’”.\textsuperscript{179} In a similar vein, the proponents of a global community of courts see the progressive affirmation of a “global jurisprudence”\textsuperscript{180} centred around a set of “common fundamental values” such as “checks and balances”, “due process”\textsuperscript{181}, and “the spread and enhanced protection of universal human rights”.\textsuperscript{182}

A thorough discussion of these constitutional ambitions and the odds of their success would far exceed the scope of this article. What they bring to the table is a


\textsuperscript{177} Burke-White, supra note 161, at 971.


\textsuperscript{180} Slaughter, A Global Community of Courts, supra note 176, at 202.

\textsuperscript{181} Slaughter, A Global Community of Courts, supra note 176, at 217.

desire for clarity which could be achieved by establishing an order of priorities amid the myriad artifacts of international law. As Jan Klabbers put it, “constitutionalism carries the promise that there is some system in all the madness, some way in which the whole system hangs together and is not merely the aggregate of isolated and often contradictory movements”. Seen through a constitutional lens, conflicts such as that between IP and public health might appear manageable thanks to the existence of “some values which simply cannot be affected”\(^\text{183}\).

However, for all their high-minded cosmopolitanism these ambitions do not seem to reflect the current dynamics of global lawmaking in the fields of IP and socio-economic human rights\(^\text{184}\). First, the two legal regimes both assert their ‘absolute’ nature and struggle for primacy over each other. Consider, for instance, the conflict rules contained in the relevant treaties. On the one hand, Article 4 of the ICESCR provides that states may subject the enjoyment of the protected rights to limitations “only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.\(^\text{185}\) On the other hand, Article 8 of the TRIPS Agreement, mentioned above, stipulates that states may “adopt measures necessary to protect public health … and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement”.\(^\text{186}\) More broadly, the IP and the human rights regimes share a similar, symmetrical structure. The sweeping provisions of the TRIPS Agreement and their oversight by an international dispute settlement system have “brought the international economic system much closer to the conceptual foundations and assumptions of the human rights framework”.\(^\text{187}\) Even the enactment of the global IP ratchet through the mechanisms of minimum baselines and MFN mirrors the “accumulation only” principle of the human rights doctrine.


\(^{184}\) For the sake of brevity, I will not address one important critique levied against ‘universal constitutionalism’, namely the allegations of disguised Western imperialism. For a discussion of these arguments, see, for example, Stephen Gill, *Power and Resistance in the New World Order* (2003).

\(^{185}\) Emphasis added.

\(^{186}\) Emphasis added. For discussion, see Ley, supra note 21, at104; Cullet, *supra* note 13, at 145; Bartelt, *supra* note 65, at 286; Olivier Cattaneo, The Interpretation of the TRIPS Agreement, 3(5) J. OF WORLD INTELL. PROP. 627, 644 (2000).

according to which a successive agreement or national legislation can only grant individuals stronger protection.\textsuperscript{188}

While the Doha Declaration and the WTO decision and amendment that followed helped bridge the gap between the two regimes by recognizing health-related objectives in the disciplines of the TRIPS Agreement, the spread of TRIPS-plus provisions pushed in the opposite direction and accentuated centripetal tendencies. Indeed, the return to IP bilateralism has marked a shift from a normative center to an intentionally incoherent maze of peripheral agreements inspired by highly particular logics\textsuperscript{189} which “are impossible to monitor at the global level and therefore to respond to in a systematic way.”\textsuperscript{190} Against this backdrop, any comprehensive effort to establish a legally certain order of priority between IP and human rights concerns, or at least to bring them under within the scope of the same regime, seems doomed to fail. The more flexible doctrine of a judicial balancing of IP and human rights principles does not hold great promise either. Absent a ‘meta-court’ capable of weighing such competing commands in an impartial way, the balancing exercise is necessarily left to regime-specific institutions (such as the ESCR Committee, WTO panels, or FTA-based tribunals) that do not share the same “normative roots”\textsuperscript{191} and may be prone to privilege the preoccupations and assumptions of their respective regimes.

Ultimately, a strict adherence to the formal techniques and categories of international law essentially downplays the role of fragmentation to the fruits of hazard or a mere ‘technical glitch’ of the system. In doing so it obscures the socio-political struggles brewing beneath the smooth surface of the law. In the previous Part, I have offered an account of such struggles in terms of a diplomatic standoff between developed and developing countries. But one may think about other fault lines which I explore in the next and final Part: in particular, one may construe the conflict between IP and public health as part of a confrontation between different international organisations and their underlying constituencies.\textsuperscript{192} As will be seen, there is much to be said about the role of institutions with their embedded policy preferences, their specialized knowledge, and their technical vocabularies, in the level of fragmentation or cohesion of the global order. Neglecting their role is, at best, a truncated attempt at making sense of the deep essence of normative

\textsuperscript{188} See Kur & Ruse-Khan, \textit{supra} note 169, at 363; Pauwelyn, \textit{supra} note 149 149, at 551.

\textsuperscript{189} See Correa, \textit{supra} note 42, at 81; Mercurio, \textit{supra} note 75, at 222; Collins-Chase, \textit{supra} note 87, at 780; Braithwaite & Drahos, \textit{supra} note 89, at 564-77; Helfer, \textit{supra} note 4, at 42.

\textsuperscript{190} Liberman & Mitchell, \textit{supra} note 109, at 158.

\textsuperscript{191} Ruth L. Okediji, \textit{supra} note 190, at 367.

conflicts and at worst a deliberate strategy to close off the debate rather than opening it.  

IV. THE INSTITUTIONAL NARRATIVE: SPECIALIZED EXPERTISE, TUNNEL VISIONS, AND THE QUEST FOR INSTITUTIONAL HEGEMONY

The third and final narrative describes the conflict between pharmaceutical patents and access to medicines as part of a contest for supremacy between the international institutions involved (such as the WTO, the UN human rights bodies, the WHO, and the WIPO) and the socio-political systems they represent. One may think of this approach as a response to the analytical blind spots of the accounts explored thus far. On the one hand it maintains the focus on the transnational dimensions of the conflict, thus avoiding the state-centric outlook inherent in the North vs. South dichotomy. On the other hand it digs deeper into the intricacies of normative conflicts than a simple technical analysis would, thereby resisting the pitfalls of legal reductionism and the obsession for formal coherence.

The institutional narrative draws inspiration from neither traditional international relations nor formalistic legal thought but rather from social theory. The core idea, expressed most notably by Gunther Teubner and Andreas Fischer-Lescano, is that the fragmentation of international law and the normative conflicts it generates are nothing but an epiphenomenon of deep contradictions between colliding sectors of a global society which crystallize into “institutionalized rationalities”. Instead of promoting social uniformity, globalization has accelerated the emergence of autonomous social systems in fields such as economics, science, culture, technology, and politics. Each such sectoral system is operationally closed, meaning that its structures, priorities, and preoccupations “condense and are confirmed as a result of the system’s own operations”, with little cognizance of other systems or of the broader social environment. Social and professional practices within each system are patterned over time and space, in the sense that they respond to specific assumptions and expectations and tend to reproduce them.

194 See supra notes 105-106 and accompanying text.
195 See supra notes 184-193 and accompanying text.
197 Id. At 1006.
through communication and transmission of knowledge. Progressively, each system develops its own logics and priorities but also a distinct professional style, a technical vocabulary, and foundational mythologies that all contribute to differentiating it from its environment.

As anticipated in Part 1, these autonomous systems do not operate solely within national borders but rather create transnational networks to better pursue their agendas and maximize their rationalities at the global level. One tangible result of this activity is the establishment of sectoral international organisations with partial mandates and limited spheres of jurisdiction. For instance, it is often said that the creation of both the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), rested on the belief, typical of mercatores from industrialized countries, that the liberalization of international commerce is a crucial component of welfare and prosperity. In a similar vein, the progressive institutionalization of socio-economic human rights is regarded as a means to protect the world’s poor and marginalized—with a socialist flavor to it.

Rather than pursuing an abstract, universal idea of the common good, each institutional regime deploys a specific discourse and a distinct “repertoire of categories and concepts with which to make sense of the world” while at the same time promoting certain types of interests and suppressing others. Thus, as Martti Koskenniemi put it, what once was the international world has been sliced into myriad “institutional projects”, i.e., special regimes of knowledge and expertise catering to specific audiences, pursuing particular interests, and suffering from epistemic and structural biases. Given the irreducible pluralism of the global (dis)order, attempts at achieving harmony and coherence through mainstream international law have dim chances of success. In a world where most issues stand

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200 It has been argued that limiting the analysis to formal international organisations tells only part of the story, in that transnational networks often engage in normative production entirely divorced from the formalities of state and inter-state lawmaking. See, e.g., Teubner & Fischer-Lescano, supra note 196, at 1009-12; Robert Wai, The Interlegality of Transnational Private Law, 71(3) L. & CONTEMP. PROBS. 107 (2008); Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, 30(3) SYDNEY L. REV. 375 (2008).

201 For a critical discussion of this political premise, see Anne Orford, Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice, 18 LEIDEN J. OF INT’L L. 179 (2005).

202 See supra notes 127-128 and accompanying text.

203 Lang, supra note 193, at 357-58.


at the crossroads of multiple regimes different institutions will inevitably compete to attract them under their sphere of operation and will “collide with their respective institutionally ingrained problem definitions and their respective strategies for solution”.

Seen through this lens fragmentation ceases to be a contingent flaw of the legal system and becomes the vehicle of a struggle for institutional hegemony whereby conflict “is waged on the description and re-description of aspects of the world so as to make them fall under the jurisdiction of particular institutions”.

These theoretical premises seem to capture well the processes and interactions that gave rise to the conflict between pharmaceutical patents and access to medicines. For many decades the IP and the health discourses developed and evolved within different social systems with minimal points of contact with one another. Both systems were mostly concerned with consolidating and expanding their respective rationalities through the progressive establishment of dedicated rules, policies, and institutions and devoted little or no attention to what was happening on the other side of the fence. Those involved in public health largely considered economic concerns from the perspective of healthcare and population effects with the objective of “maximising health indicators such as life expectancy”; conversely, those involved in the trade arena considered health concerns as “a potential barrier to trade, with the objective of maximizing economic indicators, such as gross domestic product”. This, of course, does not mean that the processes of discursive definition of the respective spheres were internally pacified or homogenous. For instance, the inclusion of IP concerns in the Uruguay Round

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208 Strikingly, however, the protection of the moral and material interests of scientific creators is recognized as a fundamental right under Article 27 of the Universal Declaration of Human Rights and Article 15(1) of the ICESCR. See Helfer, *supra* note 52, at 979-82.


agenda raised more than an eyebrow in the trade community (including some developed countries as well). Indeed, the intrinsic logics of IP protection, with their focus on temporary restrictions on public access to the protected goods, seemed at odds with longstanding assumptions about trade liberalization. 211 Similarly, as mentioned in Part 2, the human rights community saw a deep divide between the supporters of civil and political vs. social, economic and cultural rights. 212

Despite these internal conflicts, the expansion of the respective spheres of influence was externally unencumbered with little environmental barriers standing in the way. This is how, according to some, IP protection standards have progressively been “elevated from servants [of public welfare] to masters–crucial for their own sake” 213. But at the same time this is also how the human rights movement has sanctified a conception of society based on individual entitlements without pausing to consider the analytical and practical limitations of its doctrine. 214 Absent meaningful cross-fertilization, both spheres showed a preference for one-size-fits-all solutions and did not contemplate the spillover effects of their proposals. This splendid isolation came to an end in the mid-1990s when the adoption of the TRIPS Agreement marked the sudden expansion of the trade/IP system and its trespassing into the field of the health/human rights system. The WHO, it is said, was the “main victim” of this sudden shift, as it found itself “removed from power and deprived from planning and controlling the world health strategies in favour of the WTO”. 215 But other international agencies such as the WIPO and the UN human rights bodies also saw their influence over the definition of IP and public health matters decrease significantly. 216 Seen from this angle, the entry into force of the TRIPS Agreement was less a victory of developed over developing countries than the opening salvo of a turf war between two institutionalized epistemes. More

211 See, e.g., Jagdish Bhagwati, Don’t Cry for Cancún, 83 FOREIGN AFF. 52, 56-57 (Jan./Feb. 2004) (stating that IP protection “is a matter of collecting royalties” and that including it in the WTO “seriously distorted what the organization should accomplish.”).

212 See supra notes 130 and 131 and accompanying text.

213 Sell, supra note 68, at 58. See also Chon, supra note 168, at 2815.

214 See Okediji, supra note 190, at 367-72.

215 ONORI, supra note 10, at 28.

216 The WTO disciplines on IP protection were not meant to supplant the WIPO. Indeed, the TRIPS Agreement speaks to the establishment of “a mutually supportive relationship” between the two institutions, TRIPS Agreement, supra note 2, preambular recital 7, which was formalized in 1995 with the adoption of an Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996). Yet, the entry into force of the TRIPS Agreement fundamentally redesigned the role of the WIPO in the IP arena: no longer the enforcer of traditional IP rules, the WIPO has turned into a forum for the elaboration of new IP standards in areas such as the Internet and digital copyright. See, e.g., Helfer, supra note 4, at 25-26.
precisely, the issues arising from pharmaceutical patents and access to medicines created a conflict between two “fragmented and operationally closed functional systems”, which, in their expansionist fervor, “made use of global law in order normatively to secure their own highly refined sphere logics”.217

At the same time, however, this initial clash established a relationship between the two systems in the form of “mutual observation”.218 Given the absence of a legal hierarchy or a centralized site of collective decision-making neither discourse could prevail unconditionally. However, the two could at least attempt to influence, control, and provoke one another through non-hierarchical, decentralized network interactions.219 Indeed, the health/ human rights system was quick to respond to the adoption of the TRIPS Agreement. As discussed in Part 2, the ESCR Committee has intensified its practice of issuing general comments and has included access to essential medicines in the list of “core obligations” pertaining to the human right to health.220 Starting in the early 2000s numerous other UN bodies have issued statements and resolutions urging states to make sure that stronger IP standards do not “negatively impact … international human rights instruments by which they are bound”.221 For instance, the UN Human Rights Council recommended that WTO members use, to the full, the provisions of the TRIPS Agreement that provide flexibility for this purpose.222 In a more recent report, the UN Secretary General’s High-Level Panel on Access to Medicines has voiced similar concerns with regard to TRIPS-plus provisions and stated that agreeing to such provisions without a robust assessment of public health consequences “is

217 Teubner & Fischer-Lescano, supra note 196, at 1007.
218 Teubner & Fischer-Lescano, supra note 196, at 1018.
219 Among the numerous works dealing with the impact of network logics upon public governance, see Yochai Benkler, The Wealth of Networks 212-72 (2006); François Ost & Michel van de Kerchove, De la pyramide au réseau? Pour une théorie dialectique du droit 14 (2002).
220 See supra note 135 and accompanying text.
tantamount to a neglect of state duties to safeguard the right to health". This framing of pharmaceutical patents as a human rights issue “influenced the dynamic of that debate in powerful ways,” in that it added weight to the awareness campaigns led by NGOs and advocacy groups discussed in Part 1.

This transnational backlash against the spiraling of IP protection of pharmaceuticals gained enough momentum to eventually push the WTO members to adopt the Doha Declaration and the subsequent decisions to reaffirm and broaden the scope of TRIPS flexibilities in favour of access to medicines. Seen from this perspective such instruments were not so much a victory of developing countries against the hegemony of their developed counterparts. Rather, they provided the arena in which “the fundamental principles of two global operational spheres, economy and health” could interact and confront each other. Importantly, the external pressures applied to the boundaries of the WTO regime did not impinge upon its prerogatives through the imposition of overriding principles nor did they cause its collapse. Instead, the WTO regime reacted to such pressures by internally incorporating public health concerns into its IP framework as a sort of “limitation on its own logic”.

In a polycentric, non-hierarchical social and institutional world, this form of bringing about piecemeal compatibility through mutual irritation is the best result that the champions of legal and political harmony can hope for. Incidentally, the broadening of the contact surface between the IP and the health spheres also fostered cooperation between the international organisations involved in the conflict. In 2009 for instance, the WHO, the WIPO, and the WTO commenced a trilateral cooperation programme for “strengthened capacity for informed policy-making in areas of intersection between health, trade and IP, focusing on access to and innovation of medicines and other medical technologies”.

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224 See Lang, supra note 193, at 396.
225 For a comprehensive account, see Helfer, supra note 37, at 325-30.
226 Teubner & Fischer-Lescano, supra note 196, at 1029.
227 Teubner & Fischer-Lescano, supra note 196, at 1030.
If these multilateral developments showed the possibility of constructive dialogue and epistemic cross-fertilization between institutionalized rationalities, the proliferation of TRIPS-plus provisions marked yet another morphing of the IP regime-complex and dislocated the modes of inter-systemic interaction. From the perspective of the dominant actors the maze of highly particular regulatory frameworks created through the spread of IP bilateralism constitutes an ideal tool to prevent a systemic solution equivalent or similar to the Doha Declaration.\textsuperscript{230} At the same time, this new configuration may foster the emergence of fresh and unexpected solidarities among the oppressed and lead to the consolidation of countervailing claims.\textsuperscript{231} One thing is certain: in a TRIPS-plus era the sites of regime interaction, inter-institutional dialogue, domination, and resistance have been dislocated once again. The fault lines of the longstanding struggle between pharmaceutical patents and access to medicines have been reshuffled.

From an institutional and epistemic perspective, the path forward is unclear. On the one hand, the UN human rights bodies, transnational advocacy networks, and numerous scholars are continuing to apply pressure on treaty negotiators for them to internalize healthcare concerns in the texts of new bilateral agreements.\textsuperscript{232} In this sense, the post-Doha WTO is no longer the boogeyman of the human rights movement; rather, it has become a platform for the convergence of the IP and health discourses.\textsuperscript{233} On the other hand, a number of proposals seek to expand the cognitive horizon of the professionals and experts operating within each relevant governance node—from foreign ministries to international institutions, from NGOs to domestic and international courts and tribunals—in order to promote mutual

\textsuperscript{230} See supra notes 189 & 190 and accompanying text.

\textsuperscript{231} Consider, for instance, the transnational mobilization that halted the adoption of the Anti-Counterfeiting Trade Agreement (ACTA) by the European Union. The anti-ACTA movement saw an unprecedented alliance between heterogenous and loosely organized social groups, from the Anonymous collective to civil rights activists, from academic centres to private internet users. For discussion, see, for example, Andreas Dür & Gemma Mateo, Public Opinion and Interest Group Influence: How Citizen Groups Derailed the Anti-Counterfeiting Trade Agreement, 21(8) J. OF EUR. PUB. POL’Y 1199 (2014); James Losey, The Anti-Counterfeiting Trade Agreement and European Civil Society: A Case Study on Networked Advocacy, 4 J. OF INFO. POL’Y 205 (2014).


\textsuperscript{233} Indeed, the post-Doha WTO has called for an evaluation of the potential health effects of TRIPS-plus. Trilateral Report, supra note 229, at 190.
observation and enable the exercise of “responsible discretion.” One way to do so may be staffing the trade agencies of key developed countries, such as the Office of the USTR and the European Commission’s DG Trade, in a manner more reflective of the broad range of policy areas that may be affected by trade negotiations. Placing officials with diverse backgrounds side-by-side within the same institutional structure may foster dialectical interaction and common engagement. Existing practices in some developing countries may provide useful guidance. For instance, the government of Thailand has established an “intergovernmental committee on Trade in Health and Social Services” composed of representatives from the ministries of public health, commerce, food and agriculture, as well as members of the Private Hospitals’ Association and other professional bodies. The committee is tasked with analyzing the impact of trade liberalization on national healthcare services, assisting negotiators in including health-related policies into bilateral and multilateral trade agreements, and coordinating the governmental institutions involved in the process. At the international level, similar efforts are reflected in Resolution 59.26 of the World Health Assembly, the plenary organ of the WHO, which expressly called for greater integration between domestic institutions—such as finance, trade, health, and foreign affairs ministries—to foster the inclusion of health-related principles in trade negotiations.

Whether these proposals will succeed in promoting further communication between the IP and the health systems—and, ultimately, to ease the frictions between the two discourses—remains to be seen. What matters here is that, according to their proponents, the solution to the conflict between pharmaceutical patents and public health resides neither in diplomatic standoffs between developed and developing countries nor in the mechanistic application of existing international legal rules. The best chances of success, if they exist at all, lie with greater inter-professional and inter-institutional communication, the reinforcement of horizontal and heterarchical connections between competing rationalities, and ultimately the ability of the actors concerned to contemplate the moral and political consequences of their action. Crucially, an institutional and epistemic approach


235 See Smith et al., supra note 210, at 771.

236 See Smith et al., supra note 210, at 770. See also Cha-aim Pachanee & Suwit Wibulpolprasert, Policy Coherence Between Health-related Trade and Health System Development: Case Study of Thailand, in TRADE AND HEALTH: COMPILATION OF PRESENTATIONS MADE AT THE INTER-REGIONAL WORKSHOP NEW DELHI 113 (2004); David P. Fidler, Achieving Coherence in Anarchy: Foreign Policy, Trade and Health, in TRADE AND HEALTH: SEEKING A COMMON GROUND (Chantal Blouin et al. eds., 2007).

must reject the idea that the preferences ingrained in the competing systems are predetermined, static, and immutable, for that would essentially reduce the competing rationalities to “billiard balls” endlessly clashing with one another.\textsuperscript{238} Instead, further research may usefully focus on the “myriad of everyday practices”\textsuperscript{239}–the recursive operations, the professional debates, and the processes of reinforcement and contestation–by which certain preferences and implicit assumptions come to be embedded in a given system at a particular moment of its “historical trajectory”.\textsuperscript{240} Such a micro-level examination would help shed light on the concrete ways in which the politics of regime definition play out in a world of specialized experts, and would enhance our understanding of how projects of convergence and divergence, domination and resistance trickle down through “the capillaries of social and economic life”.\textsuperscript{241}

\section{V. CONCLUSION}

After more than twenty years of heated debates the precise contours of the conflict between pharmaceutical patents and access to medicines remain somewhat elusive. Throughout this article, I have sought to disentangle the maze of scholarly narratives built around this issue. The political, legal, and institutional accounts each reflect a valuable effort to reduce the complexity of the debate and to set out a tentative agenda for action. Yet, precisely because of this complexity, each approach has its blind spots and analytical fallacies and seems inadequate to fully grasp the nuances of the problem. Indeed, it is very likely that my selection of the relevant narratives itself suffers from biases and undue simplifications. For one thing, describing the relationship between pharmaceutical patents and access to medicines in terms of ‘conflict’ deliberately puts the emphasis on the elements of divergence and clash between these two policy objectives and ignores the many ways in which they may mutually support and strengthen each other. If it is true that “global convergence and divergence … are two sides of the same coin”,\textsuperscript{242} I chose to look at one side only.

Moreover, my focus on academic discussions may sound anodyne at best and cynical at worst. After all, while we fiddle with theory tens of thousands of people are dying every day out of neglected epidemics, and many more remain without access to essential drugs. Yet, there is great practical value in unearthing the hidden

\textsuperscript{239} Adler & Pouliot, \textit{supra} note 199, at 2.
\textsuperscript{240} Lang, \textit{supra} note 207, at 113.
\textsuperscript{241} Kennedy, \textit{supra} note 234, at 3.
\textsuperscript{242} Philip G. Cerny, \emph{Competition State}, in \textit{ROUTLEDGE ENCYCLOPEDIA OF INTERNATIONAL POLITICAL ECONOMY}298, 301 (R.J. Barry Jones ed., 2001).
reflexes of scholarly thought. Whether we realize it or not our perception of the deep structures of the global order guides our actions, defines the boundaries of our imagination, and ultimately determines our ability to push for change. Through an exercise in self-reflexivity we may become more aware of our agency in shaping the direction of future debates—knowing that, whatever we do, our blackbird will remain very, very difficult to catch.