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Article Abstracts

Regime Shifting:
The TRIPs Agreement and
New Dynamics of International
Intellectual Property Lawmaking

Laurence R. Helfer 1

This Article draws upon the international relations theory of regimes to analyze the growing chorus of challenges to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and to the expansion of intellectual property rights more generally. The few years since TRIPs entered into force have seen nothing less than an explosion of interest in intellectual property issues in a broad array of international venues. In some of these venues, intellectual property lawmaking has led to the negotiation of new treaties; in others, intellectual property issues are framed through the reinterpretation of existing agreements or the creation of nonbinding declarations, recommendations, and other forms of soft law.

The theoretical and practical consequences of these new developments have yet to be fully explored. This Article argues that the expansion of intellectual property lawmaking into these diverse international fora is the result of a strategy of "regime shifting" by developing countries and NGOs that are dissatisfied with many of the provisions in TRIPs and are actively seeking ways to recalibrate, revise, or supplement them. In particular, developing countries and their allies have shifted hard and soft lawmaking initiatives to four international regimes—those governing biodiversity, plant genetic resources, public health, and human rights—whose institutions, actors, and subject matter mandates are more closely aligned with these countries' interests. Within these four regimes, developing countries are questioning established legal prescriptions and generating new principles, norms, and rules of intellectual property protection for states and private parties to follow. Intellectual property regime shifting thus heralds the rise of a more complex international environment in which seemingly settled treaty bargains are contested and new dynamics of lawmaking and dispute settlement must be considered.

A Theory of Crimes Against Humanity

David Luban 85

This Article reconstructs the law of crimes against humanity in international criminal law and provides a theory—rooted in moral and political philosophy—to explain its significance. The term "crimes against humanity" contains an important ambiguity. "Humanity" may refer to the basic value these crimes damage, or, alternatively, to the party in interest, signifying that all humankind has an interest in repressing these crimes. The theory developed in this Article holds that the aspect of humanness these crimes assault is our nature as political animals. Human beings are essentially social beings, but at the same time human societies are rife with conflict. Politics is the name we give to our attempt to manage the threat we pose to one another. Crimes against humanity represent politics gone cancerous—politics turned from a means of protecting individuals against the threat posed in social living to an even more intense form of the threat.

The question of why all humankind has an interest in repressing these crimes concerns jurisdiction over crimes against humanity. This Article defends the familiar proposal that crimes against humanity should be treated as universal jurisdiction offenses, but grounds that claim not in the argument that all states have an interest in repressing

crimes against humanity, but in the claim that all individual persons do. The role of tribunals is to ensure “natural justice,” not to vindicate state interests. The Article illustrates its theory through an analysis of the International Court of Justice decision in *Congo v. Belgium*.

Nonprofit Organizations as Investor Protection: Economic Theory and Evidence from East Asia

Curtis J. Milhaupt 169

Enforcement problems plague shareholder activism and investor protection in many parts of the world. The importance of solving this problem has led scholars to consider a range of partial alternatives to weak domestic corporate law enforcement regimes. The recent experience of the three largest capitalist market economies of East Asia suggests that there is another partial solution to the problem of weak investor protection—one that has received no theoretical or empirical attention: the nonprofit organization (NPO). NPOs have emerged as arguably the most important corporate law enforcement agents in Korea, Japan, and Taiwan. In numerous instances, these organizations have won significant court victories or settlements against management, changing the investor protection climate.

This Article analyzes the role of NPOs in East Asian corporate governance, and applies economic theory on the existence of nonprofits as suppliers of public goods (along with several complementary theories) to explain the rise of NPOs as suppliers of investor protection in the region. In addition, each NPO displays its own unique structure and strategy—differences that can be tied directly to the distinct domestic legal and political structures in which they operate. The Article examines the academic and policy implications of the East Asian experience, as well as the potential application of the NPO model in transition economies.

Smokescreens and State Responsibility: Using Human Rights Strategies To Promote Global Tobacco Control

Melissa E. Crow 209

In May 2003, the Member States of the World Health Assembly adopted a Framework Convention on Tobacco Control (FCTC) that recommends a variety of national initiatives targeted to help States Parties reduce the demand for and supply of tobacco products within their territories. By failing to undertake such initiatives, governments give tobacco companies license to expand their base of consumers, who incur the risks of nicotine addiction, illness, and untimely death and subject those around them to the life-threatening risks of exposure to secondhand smoke. In cases where these risks become realities, governments violate their citizens' internationally recognized rights to life, health, and freedom of information. This Article elaborates on the rights implications of tobacco control and argues that existing international human rights institutions could be used to hold governments accountable for tobacco-related human rights violations and to promote tobacco control at the national level.

After discussing the genesis of the FCTC and highlighting the weaknesses of its existing implementation mechanisms, the Article proposes that international human rights institutions offer a supplemental strategy for promoting the FCTC's objectives. The Article explores opportunities to advance the tobacco control agenda through recourse to the U.N. Committee on Economic, Social and Cultural Rights, the U.N. Human Rights Committee, the European Court of Human Rights, and the Inter-American Commission and Court of Human Rights. Notwithstanding these opportunities, the Article acknowledges that the effectiveness of these institutions ultimately depends on the willingness of national legislatures and courts to implement and enforce their decisions. The Article provides examples of encouraging decisions from courts in India, Bangladesh, and Uganda that have construed domestic human rights norms to require governments to undertake far-reaching tobacco control measures. The Article concludes that the promulgation of the FCTC, the increased use of international human rights institutions, and strategic human rights litigation in national courts will create substantial momentum for governments to promote tobacco control.