

NAVIGATING INSTITUTIONAL DENSITY IN INTELLECTUAL PROPERTY REGIMES: THE STRATEGY OF REGIME SHIFTING

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The international intellectual property system is on the brink of a deepening crisis. In a widening array of international venues, government officials, civil society groups, and private parties are staking out opposing positions on issues ranging from patented medicines, to biodiversity and traditional knowledge, to digital content and webcasting, to the harmonization of procedural rules. The results are increasingly acrimonious and unresolved clashes over substantive rules and values, competition among international institutions for policy dominance, and a proliferation of fragmented and incoherent treaty obligations and nonbinding norms.

This ominous state of affairs has evolved fairly rapidly. The last decade has seen a dramatic expansion of intellectual property protection standards, both in their subject matter and in the scope of the economic interests they protect. Advances in technology have engendered demands for new forms of legal protection by businesses and content owners. And with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”),¹ nation states linked intellectual property rights to the world trading system, creating new and robust enforcement opportunities at the international and national levels. These interrelated developments have made intellectual property rights relevant to a broad range of value-laden economic, social, and political issues with important human rights implications, including public health, education, food and agriculture, privacy, and free expression.²

A recent wave of resistance to this rapid expansion of intellectual property rights has brought the work of the World Trade Organization (“WTO”) and the World Intellectual Property Organization (“WIPO”)—the two most prominent international intellectual property lawmaking venues—to a virtual standstill. In the WTO, issues relating to compulsory licenses for patented pharmaceuticals; the relationship among biodiversity, patents, and plant breeders’ rights; and the protection of geographical indications have remained unresolved for nearly four years.³ Negotiations in WIPO are faring little better. Industrialized nations are pressing for new treaties relating to substantive patent rules,

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS— RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs].

² For earlier analyses of these trends, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale Int’l L.J.1, 26-45 (2004).

³ See, e.g., *Scant Progress in GI Discussions*, Bridges Weekly Trade News Digest, vol. 9, No. 32 (Sept. 28, 2005); *TRIPs Council Meeting Suspended in Effort to Meet Public Health Deadline*, Bridges Weekly Trade News Digest, vol. 9, No. 9 (Mar. 16, 2005).

audiovisual works, and broadcasters rights. Developing countries and consumer groups have countered with a “development agenda” that calls for a moratorium on new treaty-making and instead demands that WIPO give greater attention to public access to knowledge and to non-proprietary systems of creativity and innovation. These conflicting forces have essentially neutralized each other. Each side has blocked or delayed its opponents’ proposals as debates over new rules and policies have become increasingly contentious and mired in procedural formalism.⁴

With forward motion in the WTO and WIPO effectively stalled, both proponents and opponents of intellectual property rights have sought out greener pastures. Developing countries and their like-minded NGO allies have decamped to more sympathetic multilateral venues—such as the World Health Organization, the Food and Agriculture Organization, and the conferences of the Convention on Biological Diversity—where they have found more fertile soil in which to grow proposals that seek to rollback intellectual property rights or at least eschew further expansions of the monopoly privileges they confer. Developed countries and intellectual property owners too are leaving the field, not for other multilateral organizations but for bilateral and regional trade and investment treaties. The price these countries demand for expanded market access and foreign investment is adherence to intellectual property rules that equal or exceed those found even in the most protective multilateral agreements.⁵

The theoretical consequences of these developments have yet to be fully explored. In this paper, I argue that the expansion of intellectual property issues into these diverse venues is the result of a strategy of “regime shifting,” a strategy in which countries and NGOs dissatisfied with existing principles, norms, rules, decision-making procedures of intellectual property law actively seek to alter the status quo by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another. The increased contestations and complexities of regime shifting herald a new mode of politics, one characterized by new dynamics of international rulemaking, negotiation, and dispute settlement.

I.

The substantive, institutional, and relational aspects of international regimes are all implicated by regime shifting. Substantively, regime shifting provides an opportunity to generate “counterregime norms”⁶—binding treaty rules and nonbinding soft law

⁴ See, e.g., Daniel Pruzin, *WIPO Members Reach Compromise on Advancing Patent Law Negotiations*, International Trade Reporter (BNA), vol. 22, No. 40 (Oct. 13, 2005) (“The United States and a group of mainly developed countries have been at loggerheads since May 2003 . . . over the future direction and scope of negotiations on WIPO’s proposed Substantive Patent Law Treaty.”).

⁵ See Brian Knowlton, *U.S. plays it tough on copyright rules*, Int’l Herald Trib., Oct. 3, 2005, available at <http://www.iht.com/articles/2005/10/03/business/iptrade.php>; GRAIN, *Bilateral agreements imposing TRIPS-plus intellectual property rights on biodiversity in developing countries*, http://www.grain.org/rights_files/TRIPS-plus%20table_September_2005.pdf.

⁶ David J. Puchala & Raymond F. Hopkins, *International Regimes: Lessons from Inductive Analysis* 61, 66, in INTERNATIONAL REGIMES, *supra* note __.

standards that seek to alter the prevailing legal landscape. Initially, these norms may “circulate in the realm of rhetoric or lie dormant as long as those who dominate the existing regime preserve their power.”⁷ But the move to a different negotiating forum provides new opportunities to contest established normative orthodoxies.⁸

How such challenges unfold depends in part on the degree of dissonance between established and emerging legal prescriptions. Disadvantaged actors may articulate counterregime norms that only incrementally modify existing rules but leave uncontested the broader principles from which those rules emanate. A state or an NGO might, for example, object to treaty obligations that require recognition of specific types of patentable subject matter or that narrow the exceptions to a patentee’s exclusive rights without questioning the broader innovation objectives that a patent system serves. In other instances, counterregime norms may be revolutionary rather than evolutionary, posing more fundamental challenges to underlying principles. Actors who question the economic and social benefits of granting intellectual property rights to foreign creators and inventors are asserting norms that fall into this latter category.

Once actors decide to contest existing legal prescriptions, critical questions of venue arise. Choosing among available alternative fora (or deciding to establish an entirely new forum) implicates the institutional dimension of regimes. In some regimes, powerful countries dominate negotiating agendas and shape outcomes to suit their interests. In others, hegemons may be absent or may play a more limited role, creating opportunities for weaker states. In addition to disparities in state membership and influence, international regimes differ in their lawmaking methods (for example, hard law treaty negotiations vs. soft law standard setting), their mechanisms for monitoring and dispute settlement (such as submitting disputes to an international tribunal as compared to voluntary reporting procedures), their institutional cultures (such as granting IO officials greater or lesser authority), and their permeability to outside influences (as exemplified by IOs in which only states have standing versus those in which NGOs may participate). These varied institutional characteristics provide states and non-state actors with an abundance of venues in which to generate counterregime norms.

Regime shifting also affects the relational aspect of international regimes, in particular the issue-area borders that separate one regime from another. During most of the latter half of the twentieth century, these boundaries were well defined, with each regime governing an issue area that was “‘decomposable’ from the rest of the system, in the sense that [it] operated without close links to other regimes in other issue-areas.”⁹ When regimes have discrete boundaries, states and NGOs seeking to generate counterregime norms can either shift to another lawmaking venue situated within the same regime (an *intra*-regime shift), or they can move to a venue located in an entirely different regime

⁷ *Id.*

⁸ See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 564-77 (2000)

⁹ Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 264, 266 (Roger B. Porter et al. eds., 2001).

(an *inter*-regime shift). A state that moves negotiations of new free trade obligations from a multilateral treaty to a regional trade pact or to a web of bilateral trade agreements is engaging in intra-regime shifting. A state that introduces rules to protect the global environment into an intergovernmental organization previously devoted to lowering trade barriers is attempting an inter-regime shift.

These examples illustrate the moves available when regimes are discrete and easily disaggregated. Recently, however, the boundaries between regimes have become less rigid as international governance efforts have expanded their reach and become more interdependent. Such interdependence promotes the formation of networks among formerly disparate state, intergovernmental, and non-state actors and linkages among formerly discrete issue areas. The result is a “conglomerate type of regime”¹⁰ or a “regime complex”¹¹ —a multi-issue, multi-venue mega regime in which states and NGOs shift negotiations from one venue to another within the conglomerate, “select[ing] the forum that best suit[s] their interests.”¹²

Regime shifting has a cross-pollinating function that facilitates the evolution from decomposable to conglomerate regimes. Where actors move lawmaking initiatives from one discrete regime to another, they often introduce new issues into venues that previously operated within tight subject-specific parameters. This issue-area incorporation spawns new relationships among different actors and institutions, redefines issue-area boundaries, and wears away at the distinctions among regimes. It may also increase competition among intergovernmental organizations and conflicts between competing principles, norms, and rules—both useful for actors seeking to contest or supplant existing legal prescriptions.

As this discussion makes clear, regime shifting encompasses a rich variety of moves among international lawmaking fora (both within and between discrete regimes and regime complexes) as well as expansions or shifts of issue area boundaries. So defined, regime shifting is a game that both strong and weak actors can play. On the one hand, a realist theory of international relations suggests that powerful nations are likely to be adroit regime shifters, and the empirical evidence supports this, including in the area of intellectual property rights. But weaker states and networks of states and NGOs can also engage in regime shifting, although the specific rationales and the strategies they employ may differ from those of well resourced nations.

¹⁰ David W. Leebron, *Linkages*, 96 AM. J. INT’L L. 5, 19 (2002).

¹¹ Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. ___ (2004).

¹² *Id.* at 34.

II.

Regime shifting also helps to answer to longstanding questions of interest to international relations theorists: why do regimes arise, and do regimes matter?¹³

The first question seeks to explain the causal factors—such as power, interests, or values—that lead states to create, alter, or dismantle regimes under conditions of relative anarchy. Viewed through this explanatory lens, the decision by particular governments and NGOs to develop certain principles, norms, and rules in one regime instead of—or in addition to—another is consequential. It implies a belief by those actors that such shifts will enhance their relative power or their prospects for achieving desired policy outcomes in ways that could not have been obtained in the absence of such moves.

The choice by states to pursue norm development in multiple regimes also raises a second question: whether regimes, once formed, alter state behavior. A functionalist understanding asserts that states create regimes to reduce the transaction costs and information problems that plague uncoordinated state interactions. It follows that regimes will only arise if the benefits they engender outweigh the organizational costs to the governments involved. Once formed, however, regimes are sticky. Their sunk costs and the benefits they generate allow regimes to persist even after the interests of states that advocated their adoption have changed. This persistence helps to explain why regimes are often viewed as “intervening variables” that modify interstate bargaining patterns and their resulting policy outcomes.¹⁴

Seen from this perspective, regime shifting presents a paradox. If states enjoy costs savings from established regimes, why would they abandon one regime in favor of its rival? And if regimes are relatively impervious to manipulation, how could states and NGOs so easily shift lawmaking initiatives from one regime to another? If such manipulations are indeed possible, they appear to challenge the claim that regimes exert independent influence on states.

Several features of the international legal landscape help to resolve this paradox and provide a more nuanced explanation of the relationship between regimes and state behavior. The most important factor is the significant increase in the “issue density” of intellectual property protection standards over the last decade.¹⁵ As intellectual property rights have expanded, especially in the wake of TRIPs, they have become a subject of increasing concern to government officials and NGOs active in other policy spaces—including the biodiversity, plant genetic resources, public health, and human rights regimes. This greater issue density, and the linkages it has spawned, have increased the “demand” for international regimes to help manage these complex policy interfaces.

¹³ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables* 1, 5, 11, in *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

¹⁴ *Id.* at 5.

¹⁵ Robert O. Keohane, *The Demand for International Regimes* 141, 155, in *INTERNATIONAL REGIMES*, *supra* note __.

What regime shifting reveals, however, is that this increased demand need not be met by the expansion or strengthening of any particular regime. Rather, the existence of multiple, discrete regimes, any one of which may plausibly serve as a site for future policy development, leaves considerable room for maneuvering by different clusters of states and NGOs seeking to maximize their respective interests.

A crowded regime environment also offers alternative venues—each with its own suite of institutional features, subject matter competencies, and decision-making procedures—within which actors can experiment to find the most effective way to reduce transaction costs and enhance information flows. But states and NGOs do not act on a clean slate, and the strategies they can employ are constrained by both the sunk costs and the benefits of extant regimes. For these reasons, regimes that increase the density of particular policy spaces do indeed influence state behavior, interacting with other regimes to create a distinctive politics that includes the phenomenon of regime shifting described in this paper.