

**THE YALE JOURNAL
OF INTERNATIONAL LAW**
Volume 35, Number 2, Summer 2010

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Abstracts

Articles

- Private Litigation in a Public Law Sphere:
The Standard of Review in Investor-State
Arbitrations *William W. Burke-White*
& *Andreas von Staden* 283

International arbitration and, particularly, investor-state arbitration is rapidly shifting to include disputes of a public law nature. Yet arbitral tribunals have continued to apply standards of review derived from the private law origins of international arbitration, have not recognized the new public law context of these disputes, and have failed to develop a coherent jurisprudence with regard to the applicable standard for reviewing a state's public regulatory activities. This problematic approach is evidenced by a recent series of cases brought by foreign investors against Argentina challenging the economic recovery program launched after a massive financial collapse and has called into question the legitimacy of investor-state arbitration more generally. A comparative analysis of both international courts and the domestic systems of the United States and Germany demonstrates that arbitral tribunals have a variety of standards of review from which they could borrow to develop a coherent jurisprudence. Any consistently applied public law standard of review that recognizes the competing public interests at stake in this new form of international arbitration would be preferable to the status quo. We argue, nevertheless, that for reasons of institutional capacity, expertise, and embeddedness, the margin of appreciation as developed by the European Court of Human Rights may offer the best path forward. The consistent application of a margin of appreciation when reviewing public law regulatory activities of states would allow arbitral tribunals to grant appropriate deference to national authorities while simultaneously protecting investors' rights, thereby helping to close the growing legitimacy gap in investor-state arbitration.

- Locating the International Interest in
Intranational Cultural Property Disputes *Joseph P. Fishman* 347

This Article considers the extent to which there may be an international interest in how intranational disputes over cultural property are settled. Drawing on the norms underlying recent global scrutiny of states' destruction of cultural objects located within their own territory, I identify two factors that justify internationalizing otherwise domestic conflicts over cultural property: discriminatory intent and injury to cultural diversity. Where neither of these concerns is implicated, I argue that the international community should pursue a policy of non-intervention, both because local authorities are likely to be more competent adjudicators and because eliciting a global referendum on cultural identity risks sapping that identity of any fluidity. At the same time, maintaining neutrality is inappropriate when one claimant's asserted right would actually undermine this legal regime's multiculturalist goals. The claim of group ownership over a cultural object acquired through persecution of minority communities abuses a property right the ostensible rationale of which is promotion of cultural diversity. This frustration of purpose ought to give the international community a significantly higher interest in ensuring that a claim does not untether the property right from the theory that justifies it. The Article concludes by calling for recognition of cultural property rights as a purposive legal scheme that is susceptible to exploitation, in domestic and international arenas alike.

There is an increasing global recognition that certain trademark laws may harm the free flow of information and ideas. Yet if a state reduces trademark rights to protect speech interests, it may raise concerns regarding that state's compliance with its international obligations to protect trademarks. This Article argues that the trademark provisions of the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contain sufficient flexibility to allow states parties to the Paris Convention and members of the World Trade Organization (WTO) to adequately protect expression in their domestic trademark laws. For example, member states can refuse to protect trademark rights in descriptive terms and implement a commercial use or trademark use requirement for trademark liability. If a state's speech-protective trademark laws are challenged before the WTO as violating the Paris Convention or TRIPS, WTO panels and the WTO Appellate Body should recognize that the trademark obligations in these international agreements are narrow and give members discretion to protect the right to freedom of expression. Moreover, WTO jurists should avoid an activist interpretation of ambiguous language in the text and instead defer to states attempting to strike the proper balance between trademark and free speech rights. Finally, member states should not amend the Paris Convention or TRIPS today to require mandatory exemptions from trademark liability for specific uses of marks. States should first enact speech-protective trademark laws at the domestic level, and evaluate the success of such rules, before creating specific exemptions to trademark rights that bind states at an international level.

Note

With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking

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The concept of the responsibility to protect attempts to answer the question of how the international community should react to the most serious human rights violations committed within a state. The concept has significantly influenced the political discourse, but its implications for international law are unclear. This Note rejects the prevailing understanding of the responsibility to protect as an emerging norm of customary international law and argues that any attempt to construct the responsibility to protect as an emerging legal norm is misleading. The concept of the responsibility to protect should rather be integrated into the existing international legal system of the use of force and collective security as it is defined and shaped primarily by the Charter of the United Nations and through the practice of international actors. An analysis of this international legal system in light of the responsibility to protect reveals that the concept is already deeply rooted in international law and does not entail significant changes for the international legal order.