

**The Power Politics of Regime Complexity:
Human Rights Trade Conditionality in Europe¹**

Emilie M. Hafner-Burton
Princeton University
ehafner@princeton.edu

Abstract

This article argues that international regime complexity has shaped Europe’s politics of human rights trade conditionality by creating opportunities for various types of “forum shopping,” and, consequently, that some of the most significant politics of human rights enforcement have occurred in an entirely separate issue area – trade – which are being worked out partly during lawmaking and partly during implementation. The presence of nested and overlapping institutions creates incentives for rival political actors – whether states, institutions, or policymakers – to (1) forum shop for more power, (2) advantage themselves in the context of a parallel or overlapping regime, and (3) invoke institutions ‘a la carte’ to govern a specific issue but not others. Each tactic creates competition between institutions and actors for authority over the rules, setting hurdles for IO performance. Even so, (4) regime complexity can make enforcement of rules that are impossible to implement in one area possible in another area.

¹ The author is grateful to the participants of this symposium for their helpful comments, and to Nuffield College at Oxford University and Princeton University for financial support during the completion of this project.

The European Union (EU) is transforming the politics of repression worldwide by pushing its human rights agenda one state at a time in an entirely separate issue area – through the use of preferential trade agreements (PTAs) with overlapping commitments to protect human rights. The EU’s Partnership Agreement with members of the African, Caribbean and Pacific group of states (ACP), for instance, makes respect for human rights “essential elements” of the trade agreement; so does their Partnership and Cooperation Agreement with Kazakhstan, and a considerable number of other countries. More agreements are in the process of negotiation (Hafner-Burton 2009; Kelly 2004). This article argues that international regime complexity has shaped Europe’s politics of human rights trade conditionality by creating opportunities for various types of “forum shopping,” and, consequently, that some of the most significant politics of human rights enforcement have occurred in an entirely separate issue area – trade – which are being worked out partly during lawmaking and partly during implementation. It is not entirely a rosy account. The presence of nested and overlapping institutions creates incentives for rival political actors – whether states, institutions, or policymakers – to (1) forum shop for more power, (2) advantage themselves in the context of a parallel or overlapping regime, and (3) invoke institutions ‘a la carte’ to govern a specific issue but not others. Each tactic creates competition between institutions and actors for authority over the rules, setting hurdles for IO performance. Even so, (4) regime complexity can make enforcement of rules that are impossible to implement in one area possible in another area.

The Architecture of Conditionality

Europe negotiates trade rules in an institutional environment populated by many international agreements. Human rights conditions are also made, contested, and implemented in an atmosphere characterized by nested and partially overlapping institutions, including both

international organizations and treaties (Figure 1). The European Community creates and belongs to PTAs that are nested inside the World Trade Organization (WTO) and which place commercial restrictions on cooperation that are enforceable through various types of sanctions.² EU Member States also belong to an overlapping regional treaty regime governed by the European Convention on Human Rights (ECHR),³ as well as a global human rights treaty regime governed by the United Nations (UN); both are comparatively weak on enforcement.⁴ The EU, WTO and UN also operate within the Vienna Convention on the Law of Treaties (VCLT) which places normative restrictions on breach of contracts, trade and otherwise.⁵ The Community and its Member States have thus made overlapping commitments to these various institutions, allowing them to choose among venues to manage problems that arise, for instance, when another country commits human rights violations. Some of their obligations are ostensibly

² GATT/WTO members participating in PTAs are required to meet a set of preferential trading conditions defined in the text of GATT.

³ All Council of Europe member states are party to the Convention, which establishes the European Court of Human Rights.

⁴ In addition to the Universal Declaration of Human Rights there are seven core international human rights treaties currently in force.

⁵ The VCLT and its partner treaty codify international customary law on treaties between states or between states and international organizations or between international organizations. A party can withdraw from a treaty only when confronting a permanent “impossibility of performance” (Article 61). Suspension of a treaty is only permissible in the face of a “material breach” of its provisions (Article 60). While only 108 states have ratified the VCLT, most provisions of the treaty are accepted as customary international law.

incompatible, and there is no universally accepted hierarchy of norms for resolving conflicts among them. What lessons can be learned about the politics of international regime complexity?

Figure 1: The Institutional Architecture of Human Rights Conditionality

INSERT FIGURE HERE

Forum Shopping

Europe has a problem: they want to protect their citizens from the ills associated with globalization, and they have long been pushing for the protection of human rights worldwide as a solution (Alston 1999). Despite best intentions, existing human rights institutions — whether global or regional — are not able to sufficiently protect human rights, most failing to enforce the norms they proffer (Hafner-Burton and Tsutsui 2005; Hathaway 2002). So politicians have turned elsewhere for a solution – to the overlapping institutions in a separate issue area that might be able to do something about it, the trade regime.

The WTO is the focal point for trade. The EU wants trade conditionality in the WTO to enforce the protection of certain human rights, but most other states do not and mobilization against the idea has been considerable.⁶ The EU cannot override the majority of WTO members on this issue; however, they can avoid the institution in favor of another set of institutions that could give them what they want. Nested inside the WTO, PTAs offer many of the same benefits: They promise wealth and are reasonably enforceable. But they offer the added advantage of more influence, giving Europe greater power to set the rules with developing countries (Hafner-Burton 2009). European policymakers thus use PTAs to circumvent their failures in the WTO to

⁶ WTO First Ministerial Declaration, adopted in Singapore in December 1996.

enforce norms that overlapping human rights institutions, such as the UN Convention Against Torture, cannot protect. The fact that Europe belongs both to PTAs and the WTO did not cause Member States to link human rights rules to trade; it did create the option for Europe to choose a venue that would better allow the Community to achieve their objectives not being met by the human rights treaty regime alone – PTAs.

Europe's trade dealings with Australia provide another illustration; here, countries forum shopped to avoid domestic political limitations. In 1996, the European Council granted the European Community the negotiating mandate for a trade agreement with Australia. By custom,⁷ the Community proposed human rights as an “essential element:” they negotiated a PTA including references to the UN Universal Declaration on Human Rights (UDHR) and a suspension mechanism for violations of these rights. But the Australian government contested the reference to the UDHR on the grounds that the trade agreement failed to make appropriate reference to the International Bill of Rights more broadly. This was an excuse.⁸ A ruling by the European Court of Justice (ECJ) had previously determined that the Community did not have competence to adhere to international human rights laws;⁹ only Member States could be parties to such conventions. Europe had a dilemma: they had passed legislation requiring human rights to be “essential elements” of PTAs; the trade agreement they wanted to form with Australia was blocked for including these human rights regulations; but the Community had no intention of severing ties with Australia. They could not change the PTA rules on human rights. As they had done with the WTO, they simply avoided the institution on this issue, replacing the intended

⁷ European Commission 1995.

⁸ European Report 1997.

⁹ See Opinion 2/94 on accession to the ECHR.

trade agreement with a less significant instrument in the form of a Joint Declaration (1997)¹⁰ that would shift attention away from their overlapping commitments to the human rights regime that were now commonly regulated in their PTAs.

This example hints at more general implications. Regime complexity created opportunities for the Community to avoid certain institutions to suit their interests for putting laws into practice – for instance, Europe used trade institutions to the avoid enforcement problems of the regional and international human rights regimes, PTAs to avoid WTO failures on human rights, and alternative forms of trade alliances to avoid the failure of PTA negotiations on trade. *Lesson 1:* Given a set of institutional options, when the focal institution in the issue area does not provide a mechanism to achieve an actor’s objective and cannot be easily fixed, actors will forum shop, turning to the perceived second-best option, avoiding the failure. That option may be located in an entirely separate issue area.

Cross Institutional Political Strategies

By forum shopping, actors select among international venues, turning to venues that offer better results, as shown above. Other times, actors use one institution to advantage themselves in the context of a parallel or overlapping regime, what Alter and Meunier call cross-institutional strategizing. The European Parliament (EP), a comparatively weak legislative body nested in the European system, has long-championed human rights. The EP has no say over EU positions taken in World Trade Organization negotiations or in the UN human rights treaty system. Frustrated by feeble enforcement offered by the UN human rights regime, the EP has

¹⁰ A Joint Declaration on EU-Australia Relations was signed in Luxembourg on 26 June 1997 as a replacement. See Bull. EU 6-1997, point 1.4.103.

opportunistically used PTAs as a way to gain influence in other international institutions, by inserting into European Union foreign policies its preference for a stronger human rights oriented policy. In 1986, the SEA granted the Parliament the right to veto certain European trade agreements. Invoking their obligations under international and regional human rights agreements, the EP has repeatedly vetoed, or threatened to veto, Europe's PTAs in order to force commitments for human rights into trade negotiations.¹¹ Its threats helped spur the inclusion of human rights provisions into PTAs, which give the Parliament more influence to shape European policy in the WTO and the UN.

This example hints at another general implication. *Lesson 2:* Given a set of institutional options, actors will strategically use institutions in which they have more power (such as veto capacity or agenda setting) to boost their authority in another institution.

Facilitating Exit

A third tendency is for actors to use one institution to escape or invalidate a legal obligation in another institution. Regime complexity makes this 'a la carte' behavior more likely by reducing the clarity of legal obligations and by producing opportunities to forum shop. The European Union has selectively used the VCLT, a treaty accepted as customary law, to shape how human rights conditionality is defined and used. The European Community has a long history of promoting trade ties with African and Eastern European governments despite their human rights violations. Member states have largely ignored critics who lament that the Community's PTAs give profits to repressive dictators, preferring instead to strengthen ties to their former colonies wherever possible. The Community's inclusion of human rights provisions in PTAs was an

¹¹ Interview record # 21 2004.

anathema to some members of the European Council. Working through Community institutions, member states once appealed to the VCLT to blunt the effects of the human rights provisions. They invoked the same VCLT legal principle on which they based their right to pursue market influence abroad—*pacta sunt servanda*: pacts must be respected — and used this as a justification for non-action, arguing that trade agreements must be respected even when trade partners abused human rights.¹²

Years later the Community would invoke the VCLT for the contrary reason — as a strategy to make conditionality enforceable across all PTAs. This time, the motive was genocide. In 1991, extreme violence broke out in Yugoslavia. Bound by a trade agreement, the Community faced its neighbor’s crisis with no standard legal recourse to pull out from its obligations.¹³ Although the Community would eventually suspend trade concessions to Yugoslavia anyhow,¹⁴ the lesson learned was clear: the Community needed to pass a law that would allow the suspension of trade privileges with human rights abusers but that would also be compatible with obligations under the VCLT. This law would act as a safety valve that would later allow the Community a credible way to suspend its trade commitments in the event of another human rights crisis, without violating its obligations under the VCLT (Brandtner and Rosas 1998.).

The VCLT was called upon again, only one year later, to justify watering down enforcement of this same clause. In 1992, the Community created PTAs with Albania and the three Baltic states, allowing for either party to suspend the contract immediately and without consultations if human rights were violated. This “Baltic” clause proved instantly controversial,

¹² Interview record #42 2005.

¹³ Interview record #13 2004.

¹⁴ European Council 1991.

for not all Member States supported the principle of suspension without consultations. Opponents argued that the “Baltic” provisions clashed with a core principle of Community legal order, that all pacts must be respected, and the VCLT was again appealed to. The Council soon after abandoned the “Baltic” clause in favor of a weaker rule that allows suspension of an agreement only as a last resort after all other “appropriate measures” have been taken (Bartels 2005). The standard language of the Community’s clause today reflects this balance, justified partly by consistency with overlapping commitments to international law on treaties – completely lacking in enforcement.

Lesson 3: International regime complexity allows actors to pick the institution with the weakest enforcement mechanisms, thereby facilitating exit from inconvenient commitments.

Implementation

In the area of human rights linkages to trade, regime complexity makes the binding nature of human rights clauses less clear by introducing many sets of legal rules and jurisdictions. The possibility of shifting to venues with weaker enforcement mechanisms and where human rights conditions are more easily escaped leads to chessboard politics—strategizing by proponents and opponents of human rights linkages to either strengthen or weaken human rights conditionality provisions. This chessboard maneuvering shapes implementation of the rules. On the one hand, the existence of multiple and overlapping institutions makes it easier for pro-human rights actors to enforce human rights rules through linkages to trade agreements. On the other hand, international regime complexity exacerbates the difficulty of implementing the new trade rules, as plenty of actors use other institutions to resist enforcing them.

International regime complexity has allowed the EU to insert human rights conditions into PTAs, and Member States to strip application of these provisions out. These contending abilities have complicated implementation, creating inconsistency in European policy. Since 1996 the human rights clause has been invoked as the basis for trade consultations and for suspension of aid or other measures with Cameroon, Comoros, Fiji, Guinea Bissau, Haiti, Niger, Sierra Leone, and Togo, among many others.¹⁵ But its use has also been inconsistent and politically driven, as the Community sites their obligations to protect human rights under international law in some cases of violence and completely ignores these obligations under other cases where repression is rampant but trade continues. Mainly, this is because certain Member States resist suspension of trade with certain trade partners, especially some former colonies, and they use other parts of the regime, such as commitments under the WTO, rulings by the ECJ or commitment to the VCLT to shut down attempts at enforcement. *Lesson 4: Regime complexity complicates the implementation of the rules but it does not necessarily make enforcement unlikely; it could make enforcement more likely.*

Conclusion

Europe's particular experience with trade conditionality has shaped the politics of human rights protection in profound ways, at times encouraging Europe's repressive trade partners to reform – a subject that has been studied in detail elsewhere.¹⁶ It also draws attention to the ways in which nested and overlapping institutions shape actors' political strategies and outcomes – the focus of

¹⁵ European Council 2003.

¹⁶ Hafner-Burton 2005; 2009.

this symposium. Regime complexity generates opportunities for power politics and political opportunism by creating incentives for rival actors—whether states, institutions, politicians, or NGOs—to choose among institutions that allow them to get what they want, avoiding the rules they do not like in an effort to gain political advantages or using one part of the system to get advantages in another. These politics regularly lead to actions full of contradictions, as actors invoke institutions ‘a la carte’ to justify their actions and changing or conflicting interests. Even so, complexity can sometimes make possible politics that, in a simpler environment, were impossible – in Europe, this is the story of human rights in foreign policy.

One way to think about how regime complexity matters is to imagine the counterfactual of a world without any one of the existing institutions. Imagine for a moment that the European Community did not exist: If the Member States were in charge of PTA negotiations, human rights probably would never have become a core trade issue. Many member states have been neutral or antagonistic to the idea; others have been supportive provided that enforcement was cheap talk. Without the Commission and the EP, and internal changes that have magnified the influence of the EP in European policy-making, it is unlikely that human rights conditions would have been attached to PTAs.¹⁷

Imagine a WTO that is friendly to human rights: If governments had long ago adopted human rights into the global trade regime, the Community probably would never have pursued a regional strategy of enforcement. Resistance to human rights inside the multilateral trade regime exacerbated the problem by exposing the lack of political commitment to human rights, driving pro-human rights actors to search for alternative institutions where linkages between human rights and trade would be possible.

¹⁷ For a detailed analysis of these Community dynamics, see Hafner-Burton 2009.

Imagine no WTO at all: Human rights are linked to trade partly because globalization affects people's welfare and partly because trade institutions have stronger enforcement mechanisms than most of the human rights regime. Without the global trade regime, it is unlikely today that human rights would be thought of as issues for trade regulation at all.

Imagine that PTAs did not exist: The Community would probably have found another way to impose conditionality. In fact, they have simultaneously pursued alternative institutions in their General System of Preferences (GSP) and various unilateral financial and aid instruments.

Imagine a more authoritative global human rights regime: If UN human rights institutions were more effective in ensuring compliance or in establishing authority over commerce, the Community might never have turned to trade policy to begin with.

Imagine no global human rights regime at all: While UN Human Rights regimes are largely unable to enforce human rights treaties, UN treaties define which rights are important, and they create legal obligations to respect and to protect human rights. The existence of the global human rights regime makes linking trade to human rights standards possible. Indeed it is hard to imagine that human rights would be major issues for policy regulation in other arenas, such as trade, were it not for the existence of global human rights regimes.

Lastly, imagine no VCLT: Would outcomes be fundamentally different? The VCLT has shaped the language enforcement; without the Convention the "essential elements" clause would certainly be different. But this may be a matter of convenience. Without the VCLT, strategic opponents within the Community would probably have found another set of institutions in which to embed their resistance to suspension of trade agreements – here, power politics rules.

References

- Alston, Philip, Mara R. Bustelo, and James Heenan, eds. 1999. *The EU and Human Rights*. Oxford, England; New York: Oxford University Press.
- Bartels, Lorand. 2005. *Human Rights Conditionality in the EU's International Agreements*. Oxford, UK: Oxford University Press.
- Brandtner, Barbara, and Allan Rosas. 1998. Human Rights and the External Relations of the European Community: an Analysis of Doctrine and Practice. *European Journal of International Law* 3 (9).
- European Commission. 1995. Communication “On the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries”. COM (95)216 of 23 May 1995.
- European Council. 1991. Council Regulation (EEC) No. 3300/91 of 11 November 1991 (OJ 1991 L 315).
- . 2003. EU Annual Human Rights Report, 10 October 2003
- European Report. 1997. EU/Australia: Minister Fails to Solve Wrangle on Human Rights Clause. 1 February.
- Hafner-Burton, Emilie M. 2009. *Imposing Human Rights: The Transformation of Market Integration*: Cornell University Press.
- Hafner-Burton, Emilie M., and Kiyoteru Tsutsui. 2005. Human Rights in a Globalizing World: The Paradox of Empty Promises. *American Journal of Sociology* 110 (5):1373-1411.
- Hathaway, Oona A. 2002. Do Human Rights Treaties Make a Difference? *The Yale Law Journal* 111:1935-2042.

Kelly, Judith. 2004. International Actors on the Domestic Scene: Membership

Conditionality and Socialization by International Institutions. *International Organization*

58(3): 459-459.

Figure 1: The Institutional Architecture of Human Rights Conditionality

