Memo for the Conference on Institutional Nesting, February 24th, 2006.

Emilie M. Hafner-Burton

Empirical Focus

This memo concerns a population of international commercial institutions that are undergoing a political transformation —regional trade arrangements (RTAs)[1]—characterized by new rules about the protection of human rights—what I will call the *adoption of human rights*. Over 300 trade arrangements are today in force or under negotiation;[2] more than 100 have been created or changed to offer explicit language promising commitment to human rights principles; and dozens supply some kind of instrument to enforce those promises.[3] For brevity I focus my discussion on RTAs between the European Community (EC) and third parties[4] and cite relevant aspects of the literature that provide analytical leverage along the way.

Nested and Overlapping Institutions

The adoption of human rights is an institutional process that is taking place within an international regime complex[5] characterized by Type II governance;[6] that is, within a set of partially overlapping institutions where rules functionally overlap but are not coordinated or hierarchical. The figure below offers a stylization. The EC, itself subject to nested politics, belongs to RTAs that are nested within the World Trade Organization (WTO) which places commercial restrictions on cooperation,[7] as well as within the Vienna Convention on the Law of Treaties (VCLT) which places normative restrictions on breach of contracts.[8] EC Member States

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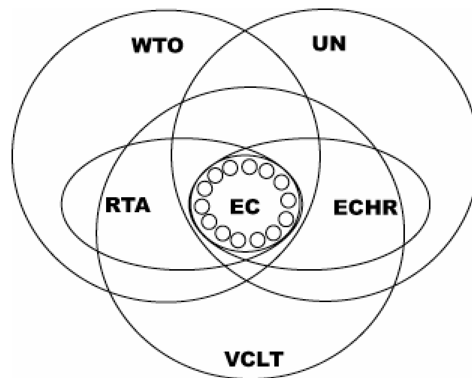
[1] RTAs include interregional, hybrid regional and transregional agreements as identified by Aggarwal and Fogarty 2004.
[2] Schott 2004.
[3] Hafner-Burton 2005.
[4] For a more comprehensive discussion of this subject matter, including a discussion of US RTAs, see my draft manuscript, *Adopting Human Rights*, available from: http://www.stanford.edu/~emiliehb/.
[5] Raustiala and Victor 2004.
[6] Hooghe and Marks 2003.
[7] GATT/WTO members participating in RTAs are required to meet a set of preferential trading conditions defined in the text of GATT Article XXIV, Ad Article XXIV, and its updates that include the 1994 Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, as well as the text of GATS Article V. Note, however, that many RTAs are *not* notified to the WTO.
[8] The VCLT and its partner treaty codify pre-existing international customary law on treaties between states or between states and international organizations or between international organizations. A party can terminate or withdraw from a treaty only when confronting a permanent "impossibility of performance" (Article 61). Suspension of a treaty is only permissible when a "material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty," thus defined as a violation of a provision essential to the purpose of the treaty (Article 60).

are also nested within a regional human rights regime governed by the European Convention on Human Rights (ECHR),[9] as well as a global human rights regime governed by the United Nations (UN).[10]



The Community and its Member States have made commitments to these various institutions; some obligations are ostensibly incompatible; and there is no universally accepted hierarchy of norms for resolving conflicts among them. Conflicts may occur at three levels: among commercial institutions; among human rights institutions; and between commercial and human rights institutions. For example, the EC adoption of human rights into RTAs can conflict with existing GATT/WTO commitments;[11] on the other hand, EC suspension of an RTA without human rights provisions has historically been at odds with obligations under the VCLT.[12] Overlapping global, regional, and specialized human rights agreements create duplicate, related, and conflicting standards for the protection of human rights.[13] Moreover, there is concern that these obligations are at odds with the trade regime, as liberalization may impair the realization of certain human rights.[14]

Puzzling Behavior

These conflicts arise from nesting and elicit questions about the nature of the EC's new institutional strategies. Why, given the abundance of human rights legal instruments already available for "use" and "selection"[15] has the EC chosen costly and risky strategies of institutional

[9] All Council of Europe member states are party to the Convention, which establishes the European Court of Human Rights.
[10] In addition to the Universal Declaration of Human Rights, there are seven core international human rights treaties, each with an established committee of experts to monitor implementation of the treaty provisions by its States parties.
[11] To-date no dispute has been taken to the WTO regarding the EC's human rights actions in RTAs.
[12] The VCLT has complicated suspension procedures for human rights violations in several instances, for example, Yugoslavia during the genocide. See Brandtner and Rosas 1998.
[13] Helfer 1999.
[14] See Cottier 2002 for a discussion of compatibility between commercial and human rights law.
[15] Jupille and Snidal 2005.

change in another forum,[16] incorporating human rights principles that cannot be characterized as solving problems of trade externalities into RTAs?

Nested Politics At Play

Governments purposely design, choose among, and change international institutions as new circumstances and problems surface that existing institutions cannot satisfactorily resolve. The adoption of human rights is accordingly a Community strategy shaped in important ways by institutional nesting and overlap and which has changed the nature of regional integration politics within Europe and between the EC and its commercial partners. I will not explain why the EC is pursing the adoption of human rights in this memo—I have elucidated the argument elsewhere[17]—but will simply identify various ways in which nested politics are at play.

Nesting Shapes the Choice of Institutional Forum

Institutional nesting and overlap motivated the adoption of human rights—the Community's incentive to "forum shop" among alternative strategies for institutional change. The potential for conflict between commercial and human rights obligations has long been a concern for the Community and its Member States; the EC has repeatedly called for the adoption of labor standards during multilateral negotiations. Since the drafting of the Havana Charter of the International Trade Organization (ITO), the majority of states have persistently rejected this understanding of trade as legitimately concerned with the protection of human rights. Differentiation has accordingly become a core principle of the regime as governments have declared that the WTO is not the appropriate institution to govern worker's rights, which are the principal concern of the International Labour Organization (ILO).[18] This policy of differentiation has repeatedly failed to satisfy the EC and the Community as a result has sought alternative sources of hierarchy.[19] Yet enforcement through existing human rights laws has been absent.[20] Incapable of adopting human rights onto the multilateral trade agenda or of enforcing their protection through accessible laws, the EC has sought an alternative venue in RTAs. The Community intentionally created overlapping institutions by adopting human rights because changing existing global agreements was insurmountable and because RTAs allowed them, as "senior partner," disproportionate control over policy.[21]

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[16] Adopting human rights into PTAs has been a risky strategy because the economic and political consequences of changing the rules have been largely uncertain and hotly contested by third parties, and because implementation threatens to undermine the authority and implementation of alternative human rights institutions. Moreover, it has been costly because the transactions costs of coordinating multiple jurisdictions for human rights governance have increased exponentially and because the sheer number of resources necessary to adopt human rights has been considerable.
[17] See: Hafner-Burton 2005, 2006.
[18] See Paragraph 4 of the WTO First Ministerial Declaration, Adopted in Singapore in December 1996.
[19] Alter and Meunier 2006.
[20] Hathaway 2002.
[21] Aggarwal and Fogarty 2004.

This shift toward regionalism occurred at a time when the Community was itself going through significant transition toward greater integration and consolidation of decision-making at the supranational level, negotiating a new legal basis for a European Union (EU) and contemplating further enlargement. Legal and normative consistency between the Community's internal and external policies was thus crucial in shaping the adoption of human rights.[22] The European Parliament (EP) again and again requested Community action on human rights abroad;[23] references to the promotion of human rights in the preamble of the Single European Act (SEA) created a weak mandate, although not a legal basis, for Parliament's appeal. That legal basis first came from the Treaty on the European Union (1992), which identified respect for human rights and fundamental freedoms as a general principle of Community law (Article 6) and as an objective of the Union's common foreign and security policy. Problems of consistency arose immediately.

To be sure, nesting and overlap are not the only factors motivating the Community's trade strategy; these factors have nevertheless played a decisive role in the changing politics of regionalism. The EC has purposively sought to harness institutional machinery designed to solve one type of problem (ensuring coordination across markets) and apply that machinery to solve another set of problems (ensuring enforcement of human rights). In the process, the Community has created a new set of potentially conflicting and overlapping international standards that reflect a drive for legal consistency within the Community.

Nesting Shapes How Agreements Are Framed

Institutional nesting has had a direct impact on the framing of the EC human rights clauses in three principal ways. First, nesting has shaped the textual references to human rights laws in each agreement. When the EC adopts human rights into RTAs it does not create new human rights and obligations; it incorporates commitments to respect existing human rights laws. The standard textual reference is the Universal Declaration on Human Rights or the United Nations Charter,[24] although references to human rights laws vary considerably across agreements. This variation occurs for several reasons, nesting among them.[25] The Community's regional trade partners are themselves nested within various human rights institutions and the human rights clause may be framed correspondingly. For example, the human rights clauses of the Community's RTAs with the Commonwealth of Independent States (CIS) refer to the Charter of Paris for a New Europe as their basis; the clause in the RTA with Morocco refers only to the Charter of the United Nations.[26] These variations can be substantively meaningful to the extent that they impose different obligations on states parties.

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[22] Raustiala and Victor 2004.
[23] European Parliament 1987.
[24] Brandtner and Rosas 1998.
[25] Different wording among human rights clauses likely also reflects particular characteristics of the country, differences among individual negotiators, and which Commission DG leads negotiations.
[26] This variation is substantively meaningful because the Charter of Paris offers a particular definition of democracy, effectively placing different requirements on Central and Eastern European states. See: Fierro 2003.

Second, institutional nesting has shaped the evolution of the Community's textual references on the status for enforcement of the human rights clause. The Community by and large started adopting human rights under Lomé IV—a RTA with the African, Caribbean and Pacific (ACP) group of states which supported "respect for human rights, democratic principles and the rule of law" without a suspension mechanism.[27] In 1991 the Council generalized this protection for human rights to all RTAs with developing countries.[28] Still, no clear or coherent legal mandate for enforcement was given. But in 1992, the Community enacted RTAs with Albania and the three Baltic states that allowed for either party to suspend the contract immediately and without consultations.[29] The "Baltic" clause proved instantly controversial; not all Member States supported the principle of suspension without consultations.[30] Nesting arguments had been used to justify the adoption of human rights as "essential elements" of RTAs in the first place; they were subsequently invoked to defend policies of weaker enforcement—the Baltic provisions clashed with a core principle of Community legal order, that all pacts must be respected, and the VCLT was again appeal to.[31] The Council consequently abandoned the "Baltic" clause in favor of a clause that obliges consultations with an offending government prior to any action and allows suspension of an arrangement *only* as a last resort after all other "appropriate measures" have been taken.[32] The standard language of the Community's clause today reflects this balance, justified partly by consistency with international law.

Third, nesting has created conflicts over the framing of agreements that have in some instances led to (or was used to justify) cooperation failure. In 1996, the Council adopted a negotiating mandate for a non-preferential RTA with Australia. Operating according to an internal mandate, the Community proposed the adoption of human rights as an "essential

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[27] Council of the European Union 1991a, Article 5(1). This arrangement was followed by a RTA with Argentina that included provisions for the protection of human rights as fundamental principles of economic cooperation without enforcement. Similar RTAs with Chile, Uruguay and Paraguay would soon follow.

[28] The 1991 resolution is non-binding and sets guidelines, procedures and priorities for improving the consistency and cohesion of EU development initiatives. The resolution emphasized that human rights were to be an explicit aim of Community development policy, calling attention to "a positive approach that stimulates respect for human rights and encourages democracy." Council of the European Union 1991b; Fierro 2001; Horng 2003.

[29] Council of the European Union 1992a. These arrangements were concluded under exclusive Community competence (with the Council acting under qualified majority, without ratification by the Member States).

[30] Because the Albania arrangement was the exclusive competence of the Community, Member States did not ratify the contract and a qualified majority in the Council was sufficient to pass the new agreement.

[31] According to the VCLT suspension of a treaty is only permissible when a "material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty," thus defined as a violation of a provision essential to the purpose of the treaty (Article 60). At heart, unless a trade arrangement defined human rights as "essential" to the purpose of the arrangement, the Community could not suspend or terminate its contract without violating the Convention. And the Community repeatedly refused to take action on this basis. Miller 2004; Pinelli 2004.

[32] Bartels 2005.

element" of the arrangement, including a standard suspension mechanism and references to the UN Universal Declaration on Human Rights (UDHR). The Australian government vehemently opposed the policy: they would not accept the Community's human rights provision or procedures for enforcement, although they were not in principle opposed to including references to human rights in the preamble or in a separate political declaration. Yet Australia contested the reference to the UDHR on the grounds that the arrangement failed to make appropriate reference to the International Bill of Rights more broadly, specifically two UN Covenants protecting human rights.[33] A ruling by the European Court of Justice (ECJ), however, had previously determined that the Community did not have competence to adhere to international human rights laws;[34] only Member States could be parties to such conventions, making Community reference to the UN Covenants problematic and a trade agreement with Australia impossible under these conditions.[35]

Nesting Shapes the Politics of Implementation

Institutional nesting has shaped the politics of implementation in various ways. First, nesting has generated a consistent drive for differentiation at the RTA level by the Community's trade partners.[36] Governments that reject the adoption of a labor clause in the WTO oppose the adoption of the human rights clause in the Community's RTAs on the same grounds—commercial agreements are not the appropriate forum to regulate human rights and members have overlapping commitments to human rights agreements.[37] Although the Community has been more successful in forcing the human rights issue regionally than multilaterally the politics of differentiation remain a persistent feature of the RTA process; they shape both negotiations and implementation. Many of the Community's trade partners continue to resist adopting or observing the human rights clause and they invoke differentiation as justification.

Second, nesting has exacerbated the complexity of implementation. Due to the intricacy of Community law and the density of institutions in which EC RTAs are nested or overlap, the Community has adopted broad and vague rules on human rights in commercial policy and left interpretation principally to the implementation process.[38] To be sure, implementation has occurred: since 1996 the human rights clause has been invoked as the basis for trade consultations, suspension of aid or other measures with Cameroon, Comoros, Fiji, Guinea Bissau, Haiti, Niger, Sierra Leone, and Togo, among many others.[39] At present, however,

[33] Fierro 2003.
[34] See Opinion 2/94 on accession to the ECHR.
[35] Nesting was by no means the only or primary cause of failure. Australia's Foreign Minister Alexander Downer reasoned that human rights conditions had no business in a trade arrangement with a developed country such as Australia that already protects people; that trade arrangements are not appropriate vehicles for human rights governance; that human rights issues are better dealt with through international legal structures provided by the United Nations; and that adopting human rights could be used for protectionist and other unfair political purposes. European Report 1997.
[36] Alter and Meunier 2006.
[37] For examples, see: ASEAN 1993 and Ministerial Declaration of Quito 2002.
[38] Raustiala and Victor 2004.
[39] EU Annual Human Rights Report, 10 October 2003 13449/03 COHOM 29.

implementation has been inconsistent, interpreted to be exclusively punitive in nature, and for the most part limited to the ACP. A great deal of political resistance to implementation by actors at all institutional levels fuels these limitations, amplified by nesting.

Third, nesting has generated repeated concerns that Community foreign policy must conform with both higher-level institutions that affect trade and security[40] and Community law. The ECJ plays no direct role in foreign policy making in the EU and is not a veto player on trade negotiations. Nevertheless, the Court has played an important role in the interpretation of Community acts to adopt human rights, recognizing over time that the Community's common commercial policy may include provisions on development cooperation without disturbing the nature of the market arrangement, but also limiting the Community's authority.[41] In its *Opinion 2/94*, for example, the ECJ ruled that the Community had no competence to accede to the ECHR, which directly impacted negotiations with Australia and New Zealand.[42] Case law has also been essential to provide a Community legal basis for PTA enforcement. In *Portugal v. Counci*l, for example, the Court upheld that the adoption of human rights could be legally used to secure the Community's right to suspend or terminate a trade arrangement if a trade partner violates human rights.[43] Over the years, the Court has recognized that the pursuit of trade has human rights connotations,[44] which has helped to legitimize the Community's regional strategy of overlap. Moreover, some of the ECJ's more restrictive judgments have created momentum to adopt new policies. For example, the Court's ruling in *United Kingdom and Others v. Commission* threw into doubt the legal basis for Community funding for human rights and directly provoked the adoption of two regulations providing a clear legal basis for the Community's human rights activities in the area of development policy.[45]

Nesting Encourages Strategies of Political Opportunism

Institutional nesting has also created windows of political opportunity for a variety of actors to pursue their interests in this process—by forum shopping for venues that are most favorable to their policy objectives. Within the Community various EU bureaucracies have attempted to maximize their influence over policy-making accordingly. It is certainly the case that the Commission has fought hard to expand their influence over Community commercial policy and in this way sought to have a decisive impact on both market integration and human rights institutions more broadly.[46] Noteworthy, however, is the role of the EP in this process—a historically weak legislative body that has strategically used RTA policy to gain influence at the

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[40] Aggarwal and Fogarty 2004.
[41] European Court of Justice 1987.
[42] The ECJ found that accession to the ECHR would require "a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order ... Such a modification ... would be of constitutional significance and ... could be brought about only be way of Treaty amendment." European Court of Justice 1996b, paragraphs 34-35.
[43] European Court of Justice 1996a.
[44] Brandtner and Rosas 1998.
[45] European Court of Justice 1999; Alston and Weiler 1999.
[46] Aggarwal and Fogarty 2004.

Community level on the basis of Member States' commitments to human rights law. Before the SEA, the EP was only consulted (under Article 238) in the passage of new RTAs. After the SEA entered into force the Parliament gained authority to reject a RTA by an absolute majority of its members, regardless of the Council's ruling.[47] Citing obligations under international law to protect human rights, the Parliament has repeatedly exercised this authority and in this manner shaped Community commercial policy. Moreover, strategies of political opportunism have not been limited to the EU's institutions; nesting has also created venues for internal challenge by Member States.[48] And institutional overlap created by the adoption of human rights has certainly created new opportunities for human rights and anti-globalization advocates to influence European foreign policy as well. The adoption of human rights into RTAs has given advocates a new forum around which to mobilize criticism as well as information, expertise, and influence.

Counterfactuals: A World Without Nesting

Things would almost certainly look differently if we were to peel away the various layers of institutions that have participated in this process. I briefly imagine a few possible outcomes.

No European Community: If the Member States rather than the Community negotiated RTAs human rights would almost certainly be excluded from the majority of trade agreements and clauses would vary more considerably in content. Many of the Member States have been neutral or even antagonistic to the adoption of human rights; others have been supportive only with certain states or provided that enforcement is limited. The Commission, Council and EP and ECJ have undoubtedly had great influence on the drafting and interpretation of the human rights clause, while the drive for legal consistency between internal Community policy and external foreign and security policy has been a paramount motivation. Still, there are a small number of Member States that may well have crafted human rights clauses that would be even stronger than those in force today. The politics of implementation would vary accordingly.

No Preferential Trade Agreements: If the EC belonged to no PTAs they almost certainly would have found another way to adopt human rights; in fact, they have simultaneously pursued alternative strategies in their General System of Preferences (GSP) and various unilateral financial instruments (for example, the TACIS program with 12 countries of Eastern Europe and Central Asia). Nevertheless, these alternatives remain substantially weaker than RTAs because they remain limited in the degree of influence they allow the Community to wield over foreign governments. In a world without PTAs we may well have seen greater EC investment in adopting human rights into these alternative institutions or in creating new tools to circumvent WTO resistance. Strategies of political opportunism would have been substantially altered, with Parliament likely to suffer the loss of greatest influence.

A WTO friendly to human rights: If governments had long ago adopted human rights into the GATT regime it is likely that Community policy to adopt human rights into RTAs would

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[47] Bieber 1990.

[48] For example, in challenge to a newly formed RTA with India, Portugal contested the Community's capacity to include a human rights clause into its trade arrangements. The ECJ ruled that provisions concerning the respect for human rights and democratic principles did not affect the character of the arrangement and that Article 181 of the Treaty gave an adequate legal basis for the adoption of human rights. For comments on the case see Steve Peers (1998) Case C-268/94 Portugal versus Council [1996] ECR I-6177 in 35 CMLR 1998, pp. 539-555.

have been weaker and potentially deferred. Resistance within the multilateral trade regime certainly did not cause the Community to adopt human rights; it did exacerbate the problem driving the Community to seek protections in the first place, publicize the issue globally, and prompt decision-makers to search for alternative venues.

A more authoritative Human Rights regime: If the human rights "regime complex" had been more effective in ensuring compliance or in establishing its authority over international trade laws it is also likely that Community policy to adopt human rights would have been weaker or altogether unnecessary.

No Vienna Convention: It is an interesting question what would have happened had there been no VCLT. Although the Community (and its legal scholars) have repeatedly invoked the Convention to justify both the adoption of human rights as "essential elements" of RTAs and the limitation of the associated suspension mechanism, it is not clear to me that outcomes would have been fundamentally different without it. What is clear is that the VCLT has had an impact on the language of the clause—without the Convention the language of "essential elements" may well have been different. However, without the VCLT it is likely in my view that strategic opponents within the Community would simply have found another set of institutions in which to embed their resistance to suspension of trade agreements.

Conclusion

The adoption of human rights by the EC has been a purposive strategy of institutional change that has been driven by and also shaped politics of institutional nesting and overlap, changing the nature of regional integration in important ways. Nesting has created opportunities for forum shopping by Community decision-makers and institutions which have brought about unprecedented institutional changes in regional integration; it has led to the creation of more institutional overlap; it has shaped the ways in which these new rules were drafted and implemented; and it has opened up windows of opportunity for strategic action. I hope this memo has contributed some empirical and conceptual basis from which to have a discussion.

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