

**Buffett Center for International and Comparative Studies  
Working Paper Series**

**The Politics of International Regime  
Complexity Symposium**

- Karen J. Alter, Northwestern University, & Sophie Meunier, Princeton University, “The Politics of International Regime Complexity”
- Christina Davis, Princeton University, “Overlapping Institutions in Trade Policy”
- Emilie M. Hafner-Burton, Princeton University, “The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe”
- Laurence R. Helfer, Vanderbilt University, “Regime Shifting in the International Intellectual Property System”
- Alexander Betts, University of Oxford, “Institutional Proliferation and the Global Refugee Regime”
- Stephanie C. Hofmann, Cornell University, “Overlapping Institutions in the Realm of Security: The Case of NATO and ESDP”
- Judith Kelley, Duke University, “The More The Merrier? The Effects Of Having Multiple International Election Monitoring Organizations”
- Daniel W. Drezner, Tufts University, “The Power and Peril Of International Regime Complexity”

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# The Politics Of International Regime Complexity<sup>\*</sup>

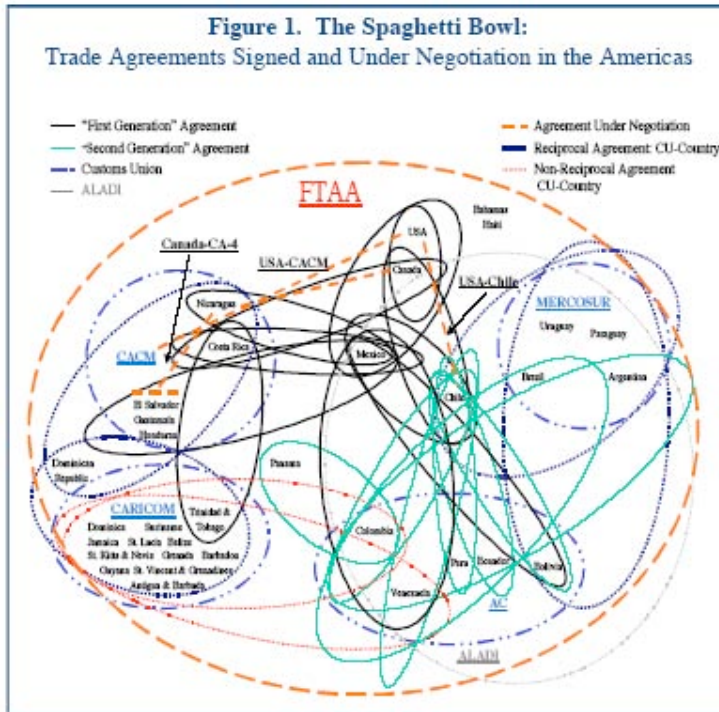
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The number, level of detail, and subject matter of international agreements have grown exponentially in recent decades. From peacekeeping to telecommunication standards, from the monitoring of elections to the protection of endangered species, it seems that every policy issue is nowadays the subject of multiple trans-border agreements. The proliferation of international agreements multiplies the number of actors and rules relevant for any given decision of international cooperation. The Inter-American Development Bank's Spaghetti bowl of Trade Agreements below captures, perhaps in the extreme, this emerging density and complexity of international governance (see Figure 1).

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Source: “The Spaghetti Bowl of Trade Liberalization” in *Latin American Economic Policies*, Vol. 19, 2002.

Following David Victor and Kal Raustiala’s analysis of “regimes complexes,” we call this growing phenomenon “international regime complexity” (Raustiala and Victor 2004: 279). “International regime complexity” refers to the presence of nested, partially overlapping and parallel international regimes that are not hierarchically ordered. Although rule complexity also exists in the domestic realm, the lack of hierarchy distinguishes *international* regime complexity, making it harder to resolve where political authority over an issue resides (Alter and Meunier 2006: 365,377).<sup>1</sup>

<sup>1</sup> The lack of hierarchy comes from the reality that there is no agreed upon supreme international authority- in fact or in law. International law has “conflict of law” rules of thumb that can resolve unintentional conflicts among rules, but these conventions do not resolve the problem of no supreme international legal authority, which is why conflict of laws conventions are unable to establish a international law hierarchy when states fundamentally disagree about which rule or institution they prefer. International lawyers worry about this problem (Kingsbury 1999).

We are not the first to point out the need to think of international cooperation as a complex system (Young, 1996; Aggarwal, 1998; Snyder and Jervis, 1993; Putnam, 1988; Evans, Jacobson, and Putnam, 1993; Waltz, 1979, 1959). But while this need is readily admitted, few studies, and even fewer theories, are available to guide scholars in thinking about the consequences of this complexity. The state-centric bias of international relations, combined with a tendency to focus on the origin rather than the implementation of formal rules, leads political scientists to focus overwhelmingly on the causes of international regime complexity. We are, however, more interested in its consequences.

How is the sheer complexity of international governance today, with its multiple set of rules and institutions, affecting international politics? Does international regime complexity impact decision-making and political strategies, as well as empower some actors and interest groups? How does complexity enhance or undermine the effectiveness of international regimes? More generally, what analytical insights can be gained by thinking about any single agreement as being embedded in a larger web of international rules and regimes? These questions, and others, are raised by the reality that, increasingly, international governance occurs via a multitude of nested, partially overlapping, and parallel trans-border agreements.

This symposium draws from a wide set of literatures to think about how the complexity of international governance may be shaping international politics. Section I locates this research question in existing and emerging literatures on complexity studies. Section II provides concrete ways to think about how regime complexity may influence the politics of international cooperation. Section III ends by considering the implications of incorporating international regime complexity into quantitative and qualitative approaches to studying the politics of any single trans-border issue.

The symposium then proceeds with issue-specific contributions. We asked a set of scholars to reflect on how international regime complexity may be causally important for the issue they study. The contributions address a range of international issues—trade, military intervention, election monitoring, refugee politics, intellectual property policy, and human rights protection—and represent an original, though tentative, rethinking of an existing body of scholarship undertaken by each author. The insights gleaned, like the causal effects identified in this introduction, do not point in a single direction. Sometimes complexity empowers powerful states actors, while at other times NGOs and weaker actors gain from the overlap of institutions and rules. Sometimes overlap introduces positive feedback effects that enhance cooperation and the effectiveness of any one cooperative regime. Sometimes, however, complexity introduces unhelpful competition across actors, inefficiencies, and transaction costs that end up compromising the objectives of international cooperation and international governance.

It is not our ambition to make strong causal claims about unidirectional effects from complexity. Rather, the symposium provides scholars with insights from multiple disciplines to help them investigate the role of international regime complexity in areas they care about, in the hope that doing so will save others time and spur more research on this topic.

## **1 What we know about International Regime Complexity**

Political scientists have studied the issue of why and how international commitments proliferate and overlap under the rubrics of “nested institutions” and “complex interdependence.” Scholars have pointed out that sometimes agreements overlap because conversation about one topic leads to discussion about a related topic, creating spillover across issues (Haas 1964). Sometimes international agreements are intended only as a starting point, to be followed up by

subsequent agreements (Young 1996; Abbott and Snidal 2003). Or sometimes sub-groups of states desire different or deeper cooperation than the whole, thus they create additional agreements (Young 1996; Reinhardt and Mansfield 2003). Sometimes linkages across agreements are crafted to create packages that collectively are more attractive to various participants (Aggarwal and Spiegel 1997; Abbott and Snidal 1998; Aggarwal 1998; Aggarwal 2001; Aggarwal and Fogarty 2005). And sometimes second or third agreements are negotiated to create “strategic ambiguity” about how to interpret any single agreement (Raustiala and Victor 2004) or to create redundancies that allow for continued cooperation should any single agreement fail. The above set of ideas is about the *origins* of international regime complexity: where it came from, why it arose, and what it looks like today.

By contrast, this symposium is interested in the *consequences* of international regime complexity. With this focus we are connecting to an emerging field of complexity studies. A complex system is a system with a large number of elements, building blocks or agents capable of interacting with each other and with their environment. Scholars who study complexity note that within complex systems, knowledge of the elementary building blocks - a termite, a neuron, a single rule - does not even give a glimpse of the behavior of the whole, and may lead to faulty understandings of the building blocks themselves (Amaral and Ottino 2004: 147-8). Scientists offer as an example the human brain. Researchers can discover a lot about neurons, but knowing about neurons in isolation does not add up to comprehending consciousness, let alone how the brain works as a whole. Similarly, we can study the dynamics of the Kyoto Protocol, but doing so will not ultimately help us understand how global warming gets addressed.

The inter-disciplinary field of complexity studies has thus far primarily focused on mathematical and computational techniques to chart the relationships among actors and to

analyze the evolutionary tendencies within complex systems (Macy and Willer 2002: 145-150). Moving beyond the observation that most people are connected by six degrees of separation (Watts 2003), complexity scholars have created tools to map actor relationships so as to reveal nodes of relationships and dynamic interactions that may not be apparent to the naked eye.

Political scientists are beginning to think about how relationships within complex systems matter. For example, a group of scholars are mapping networked security relationships in the Commonwealth of Independent States, and asking more broadly if creating nested security institutions is a new alliance strategy (Willerton et al. 2007). The more we learn about the role of transnationally networked actors in international politics (Keck and Sikkink 1998; Zanini 2002; Slaughter 2004; Pedahzur and Perliger 2006; Carpenter 2007; Newman 2008), the more helpful political scientists may find network mapping techniques.

But these social network maps also have limitations, as sociologists have realized. Roger Gould cautions that social network analysis contributes to intellectual progress mainly where there is a pre-existing body of theory which can shape the questions and relationships investigated through network analysis (Gould 2003: 265). In other words, we must first develop expectations about how regime complexity influences networked relationships and makes them causally important before we can know which relationships to map and what the mapping might mean.

Complexity scholars also use agent-based modeling to examine how the interactions of actors come to shape strategies and cooperation outcomes. For example, Robert Axelrod uses agent-based modeling to show how cooperation can emerge from actors using tit-for-tat reciprocity in their interactions, (Axelrod 1984; Axelrod and Keohane 1986) and how norms,

cultures and conflicts can interact to create ethnic conflict and global polarization (Axelrod 1997). By changing decision-rules and making controlled assumptions about interactive effects during organizational development, complexity scholars are able to estimate when organizations will evolve linearly (in path-dependent, punctuated equilibrium, or cyclical ways), versus when they will develop in non-linear chaotic or random ways (Dooley and Ven 1999; Morel and Ramanujam 1999). Sociologists consider organizational dynamics within groups such as the development of reputation and trust, and how factors like bounded rationality or preference affinities shape interactive outcomes within complex systems (Macy and Willer 2002).

Agent-based modeling is useful when agents are autonomous yet interdependent, when agents follow simple rules (like tit-for-tat reciprocity), when agents are adaptive and backward-looking, and when rules and norms emerge from bottom-up interactions rather than to top-down political imposition (Macy and Willer 2002: 146). But international regime complexity does not bubble up from below, nor do the politics of international regime complexity evolve purely through the interaction of the actors who negotiated the agreement. International agreements are negotiated by governments, transformed into domestic implementing legislation by legislative bodies, actually implemented by sub-state actors (administrative agencies, state governments, local police, contracted firms, NGOs etc), whose actions get reviewed by domestic courts. The end result is that treaty implementation involves actors who played little to no part in crafting the original agreement. These differences do not mean that agent-based approaches cannot be useful—complexity scholars are developing modeling tools for different types of situations. These differences do, however, suggest limitations for models that rely on interactions among a single set of actors—e.g. states or NGOs.



We see the core insight of complexity studies as helpful—the ideas that understanding units does not sum up to the whole and that the dynamics of the whole shape the behavior of units and sub-parts. We believe that the first step is to develop some theoretical hunches about how international regime complexity matters. In the next section we build on insights from a variety of disciplines to provide insights into the ways the international regime complexity may be causally important.

## **2 The Politics of International Regime Complexity**

Many scholars believe that the formal relationships within and across international institutions are defining of the politics that follow, thus they invest in mapping and explaining differences in how international agreements relate to each other. Clearly the situation of “*parallel regimes*” (where there is no formal or direct substantive overlap) differs from “*overlapping regimes*” (where multiple institutions have authority over an issue, but agreements are not mutually exclusive or subsidiary to another) and “*nested regimes*”(where institutions are embedded within each other in concentric circles, like Russian dolls)(Aggarwal 1998). One could map out even more nuances in how regimes connect to each other, but it isn’t clear that such distinctions causally shape the politics that follow. Not all overlaps will be causally significant, nor is it clear that nested regimes have fundamentally different politics compared to overlapping regimes in large part because the default situation is that international law does not establish hierarchy across treaties or regimes.

Maps of international regime complexity are helpful in identifying the actors and institutions involved in an issue. But we believe that international regime complexity is causally important in how it affects the strategies and dynamic interactions of actors. We identify five

different pathways through which international regime complexity changes the strategies and dynamic interactions of actors. These pathways present both opportunities and challenges for the goal of developing effective and legitimate solutions to international problems.

### **1. The implementation stage is defining of political outcomes**

Most international cooperation scholars focus on the negotiation of agreements, and in particular on the formal rules that influence politics. But political deals often get redefined during implementation because the actors who implement agreements have different priorities and are subject to different pressures than are the policy-makers who designed the deal in the first place. International regime complexity adds a new twist to implementation politics: *international regime complexity reduces the clarity of legal obligation by introducing overlapping sets of legal rules and jurisdictions governing an issue.* Lawyers refer to this problem as the “fragmentation” of international law.<sup>2</sup> Where state preferences are similar, lawyers overcome fragmentation by crafting agreements that resolve conflicts across regimes, and thus legal ambiguity is transitory. Where preferences diverge, states block attempts to clarify the rules and thus ambiguity persists, allowing countries to select their preferred rule or interpretation.

With the rules themselves and/or the hierarchy across roles remaining fundamentally ambiguous, agreements get defined and redefined across time and space. In her contribution to our symposium, Emilie Hafner-Burton finds that during the implementation stage, opponents of human rights linkages to trade agreements have used the Vienna Convention on the Law of Treaties to strip out the human rights requirements demanded by the European Parliament. But

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<sup>2</sup> The International Law Commission has working groups and subcommittees that seek to overcome this fragmentation. Their reports are available on-line: [http://untreaty.un.org/ilc/guide/1\\_9.htm](http://untreaty.un.org/ilc/guide/1_9.htm)

this strategy is only used when the human rights linkages become a barrier in bi-lateral relations, and thus for many agreements the linkage remains. In Stephanie Hofmann's study of European Defense and Security Policy (ESDP), preference divergence created significant ambiguity in the "Berlin Agreements," which affected operations, creating delays and confusion on the ground. In the case of refugee policy analyzed by Alexander Betts, United Nations policy became redefined over time to take into account developments in parallel domains—migration and security policies. In all of these cases, the formal texts remained the same. Only in examining implementation were the transformations, either made possible or complicated by international regime complexity, revealed.

**Implementation politics *lessons*:**

1: International regime complexity contributes to international law fragmentation and rule ambiguity. Where state preferences are similar, states will coordinate to create a clear set of rules. Where preferences diverge, ambiguity will persist allowing countries to select their preferred interpretation.

2: Because states can select which rules to follow and because each international venue allows a different set of actors to be part of the political process, implementation politics will end up defining which international agreements become salient, and the meaning of international agreements.

Next steps: The next question to ask is from the sea of overlapping agreements, which agreements and which interpretations come to dominate over time? Which actors are able to influence interpretations and prioritization across agreements? When does a rule or an interpretation harden and become difficult to shift through reframing or reinterpretation?

## 2. International Regime Complexity enables “Chessboard politics”—Cross institutional political strategies

We asked our contributors to consider the counterfactual question —what would have been a likely outcome if parallel and overlapping institutions did not exist? From this exercise we could see that even where decision-makers do not actively reference other institutions, parallel regime politics could sometimes explain the timing and content of the policies adopted. In some cases, the greatest action took place outside of the central institution of focus.

We use the concept of “chessboard politics” as a more open way of explaining how international regime complexity alters the strategic playing field. Once a density threshold is reached (Pierson 2004: 83-87), the existence of multiple institutions with authority over an issue allows moves made in a single international institution to reposition pawns, knights, and queens within other institutions. Sometimes repositioning is done intentionally, and sometimes it occurs incidentally.

A number of our contributors identified **forum-shopping** strategies where actors select the international venues based on where they are best able to promote specific policy preferences, with the goal of eliciting a decision that favors their interests. In her contribution to this symposium, Judith Kelley analyzes a case where governments shopped for election monitors they believed would render the most favorable declaration for them. In Hafner-Burton’s study of trade and human rights, forum shopping was a means for voices excluded from one venue (the European Parliament has no role in World Trade Organization negotiations) to impose their preferences in a different venue (the European Parliament must approve bi-lateral trade

agreements between the EU and individual countries). Not only did the European Parliament gain a voice, but the different bargaining context for the bi-lateral agreements limited the ability of weaker recipient states to veto the linkage between trade and human rights. Christina Davis explains the reasons why different forums have different politics, and thus the factors that shape actor choices and outcomes in different forums.

We also identified **cross-institutional political strategies** *where actors promoted agenda across multiple international institutions to influence policy outcomes*. Whereas forum-shopping is focused on achieving a desired outcome within a given regime (a favorable decision, for example), *regime-shifting* is designed to reshape the global structure of rules (Helfer 2004: 14). According to Larry Helfer, when developing countries were out-maneuvered within the World Trade Organization, they “*regime-shifted*”—they turned to parallel regimes where alternative priorities existed. Developing countries encouraged regimes, such as the World Health Organization, to speak to the balance of protecting intellectual property and promoting other goals—such as public health. Developing countries then invoked these statements and rules in the World Trade Organization, negotiating to have exceptions crafted in parallel venues written into the global rules. Alexander Betts discusses a similar strategy. European states created parallel multilateral venues focused on migration and internally displaced people where they arranged to keep potential refugees from reaching their territory. These alternative venues created both a mechanism and a language to transform a person fleeing persecution into a person seeking economic migration, and thus a way to avoid European obligations under International Refugee rules.

***Strategic inconsistency*** is another cross-institutional strategy observed by Raustiala and Victor: contradictory rules are created in a parallel regime with the intention of undermining a

rule in another agreement (Raustiala and Victor 2004: 301). Helfer notes that developing countries also sought to create Intellectual Property interpretation that were inconsistent with TRIPs rules. Hofmann's contribution reveals a slightly different strategy, what one might call *strategic ambiguity*: the British desire to make NATO the primary security institution clashed repeatedly with the French desire that the ESDP be the primary security institution shaping the positions these states took in a variety of political debates over specific substantive policies—cooperation agreements between NATO and ESDP, decisions on the common resources for the ESDP, and decisions regarding specific interventions. These clashes ended up shaping the policies adopted in each institution, making them vaguer than originally intended.

***Chessboard Politics lessons:***

1: International regime complexity enables cross institutional political strategies including: forum-shopping, regime-shifting, and strategic inconsistency. In forum-shopping, the shopper strategically selects the venue to gain a favorable interim decision for a specific problem. In creating strategic inconsistency, the actor intentionally creates a contradictory rule in a parallel venue so as to widen his/her latitude in choosing which rule or interpretation to follow. In regime-shifting, actors may use forum-shopping, strategic inconsistency, or other strategies with the ultimate goal of redefining the larger political context so as to ultimately reshape the system of rules itself.

Next steps: Forum-shopping is the most oft discussed though not necessarily the most common consequence of international regime complexity (Abbott and Snidal 1998; Helfer 1999; Alter and Vargas 2000; Diehl, Ku, and Zamora 2003; Walders and Pratt 2003; Helfer 2004; Hafner-Burton 2005; Jupille and Snidal 2005; Busch 2007; Davis 2007). Christina Davis

suggests that the possibility to shop among forums may well be less common than scholars imagine. We need to better understand how common it is for regime complexity to generate choice of forum opportunities, while identifying the other ways in which trans-institutional strategies operate—such as cross-institutional strategizing, and creating strategic inconsistency across agreements. We also need to give equal focus to non-strategic systems effects-- that is, changes in the chessboard of international politics that are not the result of state strategizing (see our discussion of feedback effects).

### **3. Complexity forces bounded rationality on actors**

The web of international rules, agreements, and regimes is so complex, with so many moving pieces, that it may well be impossible to keep track of changes within all institutions, and thus to strategize globally. Scholars who focus on organizational dynamics find that complexity inspires a strategy of incremental decision-making, where small steps are taken tentatively to minimize risk and where characterizations of the problem decisively shape outcomes (Jones, Boushey, and Workman 2006: 57-9). Scholars building on the insights of political psychology find that complexity leads to selective information processing and a reliance on relations and heuristics to cut through what is an overwhelming amount of information. This reliance affects politics because what constitutes the “rational” choice is far less clear, and because the time horizons of politicians may be out of sync with the time needed for cause-effect outcomes to become clear. Where bounded rationality prevails, we are also likely to find unintended consequences and an important role for feedback effects in shaping outcomes (Pierson 2004: 38-40; Jacobs and Teles 2007).

Our contributors are looking at issue-areas rather than the behaviors of specific actors, thus they did not investigate how bounded rationality operates. Still, a few implications can follow from the reality that complexity increases the prevalence of bounded rationality. First, we may well find that complexity contributes to making states and IOs more permeable, creating a heightened role for experts and non-state actors which over time can dwarf in causal import the influence of governments (Hawkins and Jacoby 2006). In this respect, this analysis cuts against the grain of international relations scholars who enthusiastically embrace the principal-agent metaphor where the world is circumscribed to include only state principals and IO agents (Hawkins et al. 2006). Second, we may also find that networks of experts coordinate transnationally to define the “problem” and the needed solution (Newman 2008). In this way, non-state and sub-state actors can end up monopolizing the information that governments receive, driving cross-national interest convergences and policy change (Haas 1992; Dezalay and Garth 2002; Sikkink 2003; Slaughter 2004).

Or, as Drezner suggests in his concluding piece, we may find that the reality of bounded rationality further advantages the rich and powerful—be they the most resourced states, firms able to hire expensive lawyers, or the most organized activists. These actors would be advantaged because they are the best placed to hire expert advice, and to fund and encourage the types of activities undertaken to influence problem framings and solution descriptions.

***Bounded rationality lessons:***

1. *International regime complexity can create a heightened role for informers--experts, lawyers, and NGOs—which help states manage rule and institutional confusion.*



2. *International regime complexity can increase actors' reliance on heuristics. Therefore, the way to influence actor behavior is to create problem framings and problem answers for governments. Because international regime complexity contributes to rule ambiguity and allows for cross-institutional strategies, complexity creates opportunities for political actors to shift framings.*
3. *Causal complexity makes it harder to identify clear cause and effect relations, complicating the task of identifying optimal policies and assigning accountability for problematic decisions. Feedback effects, because they play out over time, are more likely to become defining of policy and politics where bounded rationality is present.*

Next steps: We need to study further the roles, influence and behavior of the actors who help states and IOs find their way through complex terrains—the lawyers, NGOs, and sub-contractors, with awareness of what is going on at the ground level. We need to better understand heuristics—informal methods, ideologies, ideas and rules of thumb. How are heuristics generated and changed? When and how do heuristics shape decision-making? How do heuristics vary across states, cultures and time? Once we know more about the heuristics states use, the formal approaches of complexity studies can help us think about how heuristics play out over time, and about how changing heuristics and assumptions may alter outcomes.

#### **4. International regime complexity generates small group environments**

We tend to assume that international cooperation will be the opposite of a small group environment because of the large number and heterogeneity of states involved. The typical assumptions in international relations analysis -- that states are the unit of analysis, that “where you stand depends on where you sit” (that title or nationality defines the perspective the actor

brings into the room (Alison 1969: 711)--- also obscure the extent to which small groups are shaping international cooperation. By focusing on the names as well as titles of actors, network analysis can reveal the small groups operating in international policy domains.

Small groups involve face-to-face interactions where the group is small enough and interaction is sufficient for members to develop perceptions of each other. Groups, as opposed to collectivities of individuals, develop expectations, norms, shared goals, and differentiated roles for members (Harrington and Fine 2000: 313). International regime complexity contributes to creating small group environments by multiplying the number of international venues, and thus the occasions for state representatives to interact. Because international agreements are technical, diplomacy is a skill, and language knowledge is useful for international bargaining, it is increasingly the case that a single office and even a single individual will handle multiple portfolios. The more valuable expertise becomes, the more we will find that the same individual is crafting a country's policy for multiple institutions. Indeed, over the arc of an individual career, the same person may well serve in multiple capacities—for instance as a state representative, a member of a non-governmental organization, and an IO official.

Scholars have studied small group environments to understand how repeated interactions shape creativity, risk taking, and trust across actors. Complexity scholars focus on the nature of networked connections, examining how differences in the connections (degrees of separation or other types of differences) affect outcomes (Amaral and Ottino 2004:151-7). For example, Brian Uzzi finds that firms that create “small world” networks, where producers and suppliers are connected by few degrees of separation, behave differently than firms that do not create small world supplier networks (Uzzi 1997a, 1997b). Sociologists focus on how sub-cultures develop within small groups, and how familiarity of members shape information processing, decision-

making and behavior of actors within the group (Harrington and Fine 2000, 2006). Political analysts have imputed policy styles and outcomes to small group dynamics (Janis 1972; Katzenstein 1985)

All of these literatures argue that smallness creates deeper connections among actors, providing multiple advantages. Small groups can be imbued with trust, which leads to a willingness to solve problems collectively and makes taking risks less costly. These factors facilitate innovation and also increase the value of reputation. Yves Dezalay and Bryant Garth show how small group dynamics help explain the development and rapid spread of the “Washington Consensus” (a set of economic best practices) within multi-national institutions and individual states to create rapid policy change across a number of developing countries (Dezalay and Garth 2002). Antonin Cohen and Mikael Rask Madsen have shown how small group dynamics were also behind the explosion of supra-national agreements and legal mechanisms in Europe in the 1950s (Cohen and Madsen 2007; Madsen 2007). In this symposium, Davis suggests that the small group dynamic of trade negotiations may increase the value of reputation across agreements.

Small group environments can also present potential dangers—group think, in-group/outgroup rivalry, and a failure to fully monitor and respond to what goes on outside of embedded networks. The dangers can generate the types of decision-making pathologies Michael Barnett and Martha Finnemore observe within multilateral institutions (Barnett and Finnemore 1999; Barnett and Finnemore 2004).

***Small Group Dynamics Lessons:***

International regime complexity contributes to creating small group environments by multiplying the number of international venues, and thus the occasions for states representatives to interact.

1. The more technical an issue, and the more expertise is valuable, the more likely small group environments will exist. Small group environments make it easier for relationships based on trust to emerge, and they increase the willingness of actors to solve problems collectively, to experiment, and to take risks.
2. The more insular a small group, the greater the risk of the down sides of small group dynamics- group think, in-group/outgroup rivalry, and a failure to fully monitor and respond to what goes on outside of embedded networks.

Next steps: Once we have found out which actors guide states through international regime complexity, we can then investigate if and how repeat interactions across a small number of closely and multiply connected actors shape their interpretation and behavior. We can identify which issues are more likely to be influenced by small group dynamics, and we can begin to contrast domains characterized by small group politics with domains lacking such politics, and to study how widening the small group changes political behavior and outcomes.

We also need to better understand what “access for non-state actors” means. The many calls for greater “democracy” in IO policy-making suggest that further increasing the role of stake-holders will make IOs more responsive and thus more popular. But given that international regime complexity engenders both small group dynamics and bounded rationality, increasing stakeholder access could end up mainly increasing the influence of already connected actors. How do small group dynamics shape access and voice? What works to incorporate the

voice of out-groups, and thus how do different techniques of providing access create different political outcomes?

### **5. Feedback Effects: Competition and Reverberation**

International cooperation enthusiasts tend to stress the positive feedback effects from cooperation: learning and coalition building leading to critical masses of support, and the spillover-like expansion of international cooperation (Haas 1964; Haas 1990). Yet positive spillover is not the only possible feedback effect from international cooperation. When we asked our contributors to consider the counterfactual—what the politics they were studying would look like if overlapping and parallel institutions did not exist—they identified a number of incidental systems effects caused by the reality of international regime complexity.

Kelley and Hofmann identify ongoing **competition** between IOs and NGOs: competition for constituents, resources, and projects, so as to demonstrate their effective organizational capacity. Some scholars expect competition to yield efficiency gains and to increase state control of IOs since states can forum shop (Cogan 2008). Both Kelley and Hofmann find that where organizations are competing, actors lack an incentive to coordinate their efforts, thereby generating the types of persistent inefficiencies frequently lamented, such as repetitive efforts, turf battles, and uncoordinated policy which has achievements by one organization later undermined or erased. Kelley highlights that states did not want the UN to be the premier institution overseeing election monitoring. Instead, NGOs and regional organizations developed their own monitoring capacity. These organizations then competed for visibility, which led election monitoring organizations to concentrate on capitals (where the press congregates) instead of spreading their resources throughout the countryside. Competition also allowed

recipient states to strategize-- to select and encourage friendly IOs and NGOs, and to make it extremely hard for unfriendly IOs and NGOs to effectively monitor the elections. States were then able to spin and manipulate divergent monitoring reports to justify suspect elections.

In the case of European Defense and Security Policy, Hofmann finds that competition limited the imagination of policy-makers—the ESDP largely replicated NATO because it was what most European actors knew. Continued competition between the two security institutions further replicate the similarities, even though it would have been more efficient if the organization's developed complimentary as opposed to substitutable capacities.

Beyond this symposium, Clifford Bob argues that competition for resources among NGOs creates a market for morality, where fund raising and credit taking incentives as opposed to need determine which causes NGOs embrace (Bob 2002). R. Charlie Carpenter finds that important causes can fail to gain attention because they cross the domains of too many NGOs, which makes the cause unattractive for specific NGOs because they cannot create a unique brand association between themselves and the cause (Carpenter 2007).

Competition need not be wholly negative. Kelley finds that having multiple election monitors increases the resources available and provides ways to escape deadlock within single institutions. Indeed she suggests that if the UN had managed to make itself the premier election monitoring body, we might find fewer states willing to allow in election monitors. Competition can also spread the risks since failure by one actor will be less catastrophic if there are multiple service providers. Competition can also promote productive experimentation as different actors use different approaches, and it can force organizations to become better performers.

In addition to strategic efforts to shift multiple international game boards, our contributors found that changes within one institution could reverberate across parallel institutions. The international cooperation game board may shift as actors meet and are informed by their experiences in multiple forums (leading to changes in their policy preferences) and because events in one arena can reverberate in ways that states cannot fully anticipate or control. In Betts' analysis, the seemingly unrelated issue of security and migration came to define what was possible when it came to dealing with refugees, leading the United Nations High Commission on Refugees to reinterpret how it understood its mandate. In Davis' contribution, regional and issue specific trade agreements were not per se designed to undermine multilateral trade deals, but none-the-less such agreements sapped support for World Trade Organization (WTO) talks because in creaming off the easier issues, multi-lateral negotiations became harder and fewer actors had a direct stake in their success.

Accountability politics is another sort of systemic feedback effect. On the one hand, international regime complexity blurs which institution is authoritative, and thus makes it harder to assess which actors or institutions to hold accountable. On the other hand, international regime complexity can create access for more actors, and thereby be a force for greater political accountability. For the issue of Intellectual Property, it was clear that the TRIPs agreement did not meet the needs and desires of developing countries to have access to inexpensive medicines and to protect indigenous technologies. Helfer's discussion of how regime-shifting ended up altering global intellectual property rules can be read as an example of international rules being adjusted to take greater account of the interests of developing countries. While the requirements of TRIPs were not relaxed in any fundamental ways, developing countries were able to lock in

more flexibility than American and European IP interests may have preferred, and they were thus able to resist aspects of US pressure to adopt TRIPS-plus bilateral agreements.

It is also possible for popular accountability politics to redefine state preferences. Betts found that governments responded to popular concerns about influxes of foreigners by strategizing to keep refugees from entering their territories, and by finding ways to avoid classifying a person as a refugee. One result was that states end up sending individuals back to contexts where their safety cannot be assured. Another result is that the UNHCR developed new strategies to prod states to address the issue of internally displaced people.

Albert Hirschman famously identified three forms of political behavior—exit, voice and loyalty (Hirschman 1970). Davis hypothesizes that international regime complexity could increase loyalty, in Hirschman’s sense of the term, by increasing the reputation costs of breaking any one agreement. International regime complexity also arguably increases the prevalence of legal and illegal exit—non-compliance, regime avoidance, or withdrawal from an IO. International regime complexity can also make it easier for states to abandon an inconvenient obligation. Betts finds that international regime complexity combines with ambiguity to allow states to escape the inconvenient UN refugee institutions. Hafner-Burton shows how the Vienna Convention for Treaties was used to strip away the bi-lateral human rights provisions inserted by the European Parliament. And if parallel regimes provide substitutable benefits, states will also lose less by giving up any one agreement.

***Feedback effects lessons:***

1. International regime complexity creates competition among institutions and actors. Competition can have negative effects—turf battles and a failure to coordinate efforts.



Competition can also have positive effects--increasing total resources, spreading risk, allowing experimentation. Competition also increases the options of aid recipients, allowing them to pick and choose which organization can service their needs.

2. International regime complexity increases the chances of unintentional reverberations—changes in one institution having effects in parallel domains.

3. International regime complexity makes it harder to locate which institution or actor is responsible for an issue, and thus it can undermine accountability.

4. International regime complexity can increase the value of loyalty, because what states do in one arena will affect perceptions of others in other arenas.

5. International regime complexity facilitates exit via non-compliance, regime shifting, or withdrawal from IOs.

Next steps: When is competition beneficial, and when is it pathological? Where is non-compliance a form of accountability politics, part of maintaining a fragile equilibrium? Where is non-compliance destructive of the normative order or an indication of regime failure?

The above discussion identifies a number of ways in which the reality of international regime complexity can alter international politics. We do not expect the abovementioned factors to matter when there is a general consensus on an issue, since consensus will either be reflected in overlapping, nested and parallel agreements, or rules will quickly be coordinated to resolve ambiguities and contradictions across agreements. Thus, when the problem is diagnosed the

same way by diverse actors and the understanding of the solution is similar and agreed upon, international regime complexity will not meaningfully affect international cooperation. But where there is significant political disagreement, we are both more likely to find international regime complexity and to find that this complexity is causally important.

Not all of the pathways we identified may be employable by actors seeking to promote their own specific agendas. Also, the above set of expectations can push in multiple directions. Thus we cannot develop a general theory of how international regime complexity will manifest itself or shape international politics. We can, however, say that where actor preferences diverge and a threshold of international regime complexity occurs, explanations involving the behavior of actors or the outcomes of cooperation politics will be more “fuzzy”—there will be multiple paths to an outcome, involving linked sets of behaviors and events. If the “fuzzy” nature of causal relations are ignored—e.g. the more analysts make assumptions about homogeneity of actors, interests and institutions, and the more analysts ignore the relevance of parallel venues--the less accurate and insightful the analysis will be (Ragin 2000: 120-145).

### **3 Methodological Implications of International Regime Complexity**

International relations and comparative politics scholars are well versed in studying international cooperation, globalization, and international organizations. But we tend to study these phenomenon in discrete ways, focusing on pieces (institutions, policy issues, actors) and ignoring or defining as exogenous to our study the larger context. To think in terms of international regime complexity is to study interactive relationships and analyze how the whole shapes the pieces. Doing so leads us to consider how the same people and groups reappear in and

navigate multiple dimensions, and how life in the multiple dimensions shapes strategies and preferences. Considering individual issues and institutions as being embedded in a larger whole of cooperation regimes can help us uncover new politics and identify new questions.

After surveying the literature and investigating the consequences of international regime complexity, we have come to conclude that the nature of connections across international regimes themselves—whether regimes are nested versus overlapping or parallel to each other-- is probably not causally salient. Rather, international regime complexity has a causal influence primarily by creating a political environment that alters the behavior and political salience of states, IOs, and sub-state actors. While we do want to understand the origins of regime complexity, we urge international relations and comparative politics scholars to give equal weight to analyzing the consequences of regime complexity for issues they care about. We hope that the insights we have culled from complexity studies, sociology, organizational theory, and political psychology provide ways forward.

Even if scholars are not interested in this challenge, the arguments advanced in this symposium have implications for quantitative and qualitative methods of studying international cooperation and international phenomena. Quantitative studies need to rule out the possibility that politics occurring in overlapping or parallel domains are centrally defining the relationships they are studying, and thus scholars should as a matter of course include variables from other agreements and probe for multi-step interactive effects across issues and agreements. Qualitative studies should also as a matter of course check to see if choices and behaviors of actors are shaped by larger chessboard politics --is the timing or framing of an issue are shaped by politics occurring in overlapping and parallel regimes where states and even individuals also operate? Qualitative studies should also ask the counterfactual—if the overlapping and parallel domains

did not exist, would the politics we are studying be different? Would the actors' preferences, analyses, and strategies be different if the parallel regimes did not exist? Would the way the issue is defined and understood be different?

The findings of this symposium also suggest a significant reorientation in how one thinks about multilateralism and the politics of international cooperation. Most international relations analyses start with the “problem structure” of cooperation and state interests to understand international regime dynamics. The main implication of this symposium is that in the present era of international regime complexity, viewing cooperation in terms of states *de novo* coming together to pursue collective interests may be highly misleading. Most new cooperative endeavors and most efforts to include new actors will need to be located within a structure that already has a lot of actors, interests, and hardened beliefs. Creating a fully new institution—a solution advocated, for example, by those who see the United Nations as beyond repair-- may temporarily escape these forces. But over time the same factors that have generated international regime proliferation will create new means for chessboard politics, and the systemic reverberations across agreements will mean that even new institutions will be shaped by the existence of parallel and overlapping institutions. Given this reality, understanding international agreements and institutions as a piece of a larger structure may provide greater insight into actor behavior and international political outcomes.

We may well find, as Dan Drezner suggests, that the more things change, the more they stay the same. International regime complexity may empower new actors—informers who help states navigate international complexity and actors who have access in one forum but not another—but it does not change the fact of great power international dominance. Indeed complexity in some respects may advantage the most well endowed actors who have the

resources to work more easily through maze of rules and players. But because complexity creates openings for non-state actors to influence outcomes, and because not all chessboard politics can be calculated or controlled, international regime complexity matters even for powerful states. The lack of any ordering principle for international legal obligations means that no deal is supreme, and no multilateral outcome inherently more authoritative. Furthermore, powerful actors will still be interacting with actors who participate in and are shaped by politics in other domains, so that over time powerful actors will have to deal with the reality of parallel institutions that they cannot control.

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# Overlapping Institutions in Trade Policy

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For any given trade problem, states face a wide menu of options from which to select trade negotiation strategies. The original goal of leaders who established the multilateral trade regime in 1947 was to eliminate the regional trading blocs that were blamed for the spiraling economic crisis of the 1930s. A single framework was expected to simplify negotiations and promote nondiscrimination. Nonetheless, the General Agreement on Tariffs and Trade (GATT) under Article XXIV allowed for the creation of customs unions and free trade areas so long as they liberalize “substantially all trade,” do not increase restrictions for third countries, and are notified to GATT. Even these minimal conditions have not been closely monitored, despite the apparent contradictions between the expansion of preferential liberalization alongside the strengthening of the multilateral trade rules based on the principle of nondiscrimination (Srinivasan, 1998). Consequently, the trade regime encompasses a central multilateral institution, the GATT and its successor World Trade Organization (WTO), and an extensive web of preferential trade agreements (PTAs) at the bilateral and regional level. The number of trade agreements has seen more than a four-fold increase since 1990 and continues to grow steadily.<sup>1</sup> Other fora for discussing trade policies

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<sup>1</sup>Medvedev (2006, 11) report an increase from 53 agreements in effect in 1990 to 229 in effect in 2004. WTO Director General Pascal Lamy has estimated that 400 will be in force by the year 2010.[http://www.wto.org/english/news\\_e/sppl\\_e/sppl53\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm).

include the OECD and regional organizations such as APEC. The resulting “Spaghetti bowl of trade agreements” (see figure in Alter and Meunier this volume) has attracted much policy debate and research among economists about trade diversion and welfare effects (e.g. Bhagwati and Panagariya, 1996). Certainly there is no question that the proliferating sets of rules have added complexity for firms and customs officials who must navigate rules of origin and tariff levels that differ by agreement. Equally important is the effect of overlapping institutions for the *politics* of trade.<sup>2</sup>

This paper argues that international regime complexity influences trade politics at three stages: selection of venue, liberalization commitments, and enforcement of compliance. The unit of analysis is the strategy taken to open markets. Adjudication and negotiation are treated as alternative strategies to address trade barriers that may be relevant for each stage.<sup>3</sup> The paper shows that international regime complexity in trade produces many of the expected effects highlighted in the framing paper by Alter and Meunier: forum shopping, increased reliance on technical experts, small group environments, and competition among institutions.

## 1 Selection of Venue

Overlapping institutions raise the possibility of *forum shopping* similar to the practice in a public law context of choosing among court jurisdictions. This paper examines the more general categories of negotiations that vary from bilateral to multilateral negotiations or adjudication. Even these

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<sup>2</sup>For a more comprehensive review of the economic and legal dimensions of overlap between PTAs and the WTO that are not addressed here, see Bartels and Ortino (2006).

<sup>3</sup>Previous work has shown that states use adjudication or negotiation to solve similar problems (Davis, 2003, 2008; Mansfield and Reinhardt, 2003). Petersmann (2006) provides legal and normative analysis for how adjudication and negotiation represent alternative strategies.

trade fora that differ substantially in their institutional form may be used to address similar trade policy issues. For example, steel industry regulations have been addressed in several fora: after a surge of steel imports in 1998, the United States engaged in bilateral negotiations with exporters such as Japan, Korea, and Russia; a steel subsidies agreement is being negotiated under the auspices of an OECD Steel Committee; the Doha Round negotiation group on WTO rules addresses subsidies and anti-dumping rules that affect the steel sector; and, several WTO dispute panels have ruled on steel anti-dumping and subsidies policies. While it is not uncommon for an issue to be addressed in multiple fora, few are addressed in all possible fora – some selection is made. Trade authorities with limited resources cannot engage simultaneously in negotiations on all fronts for all issues. This section will discuss how resource capacity and domestic pressure influence the choice of forum.

As international regime complexity in trade increases the role for experts, lawyers, and NGOs, it places more demands on state resources. The ability of a state to meet this level of expertise can influence their choice of forum. A brief discussion of standards policies illustrates the point. The Agreement on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Standards (SPS) formally link WTO commitments to international standards set in other international bodies. For example, food safety and labeling regulations that affect trade have been addressed through the activities of the Codex Alimentarius Commission, WTO meetings in the TBT and SPS committees, and in several WTO disputes. U.S. delegates to the Codex meetings hold Ph.D. degrees in science or agricultural economics to allow their contribution to discussions about topics such as food hygiene and additives.<sup>4</sup> Statements in the TBT and SPS committees

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<sup>4</sup>See [http://www.fsis.usda.gov/regulations\\_&\\_policies/Codex\\_Delegates\\_and\\_Alternates/index.asp](http://www.fsis.usda.gov/regulations_&_policies/Codex_Delegates_and_Alternates/index.asp) for list of delegates and their qualifications.

routinely call for scientific evidence to justify the position on a particular barrier. Several WTO disputes, such as the WTO panel about the EU ban against import of meat treated with growth hormones, have relied upon testimony by scientific experts, both those advising the national governments and those called to testify by the panel (Pauwelyn, 2002). In addition to scientific advice, adjudication across all issue areas has become increasingly legalized and now is conducted largely by professional lawyers, either in-house or hired private counsel.

On the one hand, increasing number of venues and expertise requirements exclude some countries. Developing countries are challenged to meet the levels of expertise and many lack the personnel to participate in all venues. In particular, developing countries are more likely to be absent from standards-setting bodies and are more likely to challenge a trade partner policy by raising it as an issue in WTO committee meetings rather than through adjudication. On the other hand, reliance on third parties can help these countries avail themselves of more institutional options. Coping strategies for developing countries include sharing information about meetings among developing country coalition members, taking advice from NGO groups (some countries have even allowed foreign national representatives of NGO organizations to join as official members of their delegation to WTO negotiations), and hiring foreign law firms or the Advisory Centre on WTO Law to assist with WTO adjudication (Shaffer and Mosoti, 2002; Patel, 2008). Some developing country governments have become quite adept at building strategies across venues, as shown by Larry Helfer's contribution to this symposium. Overall, one would expect larger states to participate across all venues; their forum choices reflect a matter of which receives more priority. For smaller states, there is more likely to be uneven participation across venues with constrained options for how to address any particular trade problem.

In addition to resource constraints, domestic political pressure influences choice of forum.

On the side demanding liberalization, interest group preferences over choice of fora reflect an underlying concern to get the best outcome for the lowest transaction costs. Sensitivity to the speed and scope of liberalization represent important variables for interest groups. This may lead some groups to explicitly advocate use of one venue. Bilateral or regional negotiations offer the quickest solution by reducing the number of actors and issues. In particular, dynamic industries with rapid product turnover may find WTO negotiations or adjudication too slow to be worth investing resources (Davis and Shirato, 2007). In addition, industries with a regional comparative advantage but not a global advantage favor regional agreements that allow them to exclude third parties (Chase, 2003; Busch, 2007). Yet given fears of noncompliance, there are distinct advantages to systems with formal rules backed up by a dispute mechanism and to venues with a larger membership to amplify the value of a litigated victory (Martin, 1992; Drezner, 2006). For the centralized business organizations that have longer time horizons and aggregate across many export industries (e.g. the U.S. Chamber of Commerce, UNICE of Europe, or Keidanren of Japan), their lobbying activities advocate use of both PTAs and the multilateral regime to support liberalization, but their major policy statements place greatest priority on gains from the multilateral forum.

The differences in timing and scope of liberalization are also relevant for the preferences for forum choice by interest groups on the side resisting liberalization. From the perspective of protectionist groups, those trying to limit the scope of liberalization may favor bilateral or regional fora while those more concerned about delaying the timing of liberalization will favor multilateral fora that typically have a longer period for negotiation and implementation. The baseline expectation, however, is for protectionist groups to attempt to veto *any* liberalization regardless of forum.

Hence, a critical feature in the selection dynamic is the relative flexibility of one forum over another to exceptions. The capacity for respondent governments to refuse concessions at the bi-

lateral level limits the issues that will be negotiated bilaterally to those without strong domestic opposition from interest groups. For example, Pekkanen, Solis and Katada (2007) argue that Japan began to pursue bilateral agreements when political sensitivity required negotiating flexible agreements that allowed carve-outs to avoid harming key domestic constituencies such as farmers. Even the market power of the United States and EU is limited in its coercive capacity within bilateral settings. While the United States and EU can force their priorities into bilateral agreements with small states that depend on access to their markets, such tactics are less viable with other major trading powers. The WTO rules against unilateral sanctions have raised the costs of coercive bilateral negotiations, which are no longer seen as legitimate and may face counter-sanctions (Schoppa, 1997). The U.S. attempt in 1995 to threaten sanctions against Japan for its refusal in bilateral talks to make concessions on auto market access led to Japan filing a WTO suit against the United States and brought a quick settlement in which the United States backed down on its major demands.

The exclusion of specific products and issues is more difficult in the multilateral forum. To the extent that the gains of multilateral liberalization depend upon broad participation, all states face incentives to support an inclusive issue agenda. During the early agenda-setting stage of trade rounds, consensus rules produce law-based bargaining that increases participation by adding issues (Steinberg, 2002). With the demands of the increasing membership, even agriculture and textile issues had to be included on the agenda of the Uruguay Round and Doha Round. For example, Korea gained a carve-out excluding rice from liberalization in the bilateral PTA with the United States that was concluded in March 2007, which contrasts with partial opening of its rice market in the Uruguay Round over intense domestic opposition. It is even harder for the respondent to veto adjudication. WTO rules eliminated the GATT practice of allowing a state to block a panel

against its policies. As a result, disputes with strong resistance to liberalization are the most likely to end up in WTO trade rounds or adjudication.

The resulting pattern is clear. The main venue to address trade problems among the US, EU, and Japan is the WTO, while they each pursue bilateral trade agreements with smaller states where the trade structure and exceptions in the agreement reduce domestic adjustment costs. Agricultural topics with entrenched opposition are mainly negotiated in the Doha Round while information technology where there was little organized opposition was dealt with in a sectoral agreement in the WTO among members willing to sign up.

Actors develop trade strategies to use a particular venue for a trade problem according to their expectation of which will deliver a better outcome. Each forum offers tradeoffs: reliance on experts and adjudication can provide objective standards but also become its own capacity constraint; larger membership increases the scope for benefits and high enforcement but reduces flexibility to choose partners and exceptions. Within the context of international regime complexity in trade, few problems are addressed in isolation. On the one hand, the selection dynamic discussed here pushes many controversial topics into the WTO. On the other hand, actors strategically operate across venues so that actions taken in a bilateral or regional forum can change politics in ways that will spill over to influence WTO negotiations. This leads to the next question: how does international regime complexity influence liberalization?

## **2 Liberalization Commitments**

This section will focus on the outcomes for the level of liberalization commitments across different venues given conditions of international regime complexity. The question of whether PTAs

represent a building block or a stumbling block for multilateral liberalization has been a focus of substantial research, with evidence cited to support both positions (Bhagwati and Panagariya, 1996; Mansfield and Milner, 1999; Krueger, 1999; Kono, 2007).<sup>5</sup> Recent empirical research shows that membership in a PTA does not make a state more or less likely to liberalize multilaterally (Goldstein, Rivers and Tomz, 2007). As a positive force, the ability to choose among competing jurisdictions and use exit as a form of leverage encourages more liberalization. Yet it also can undermine liberalization by disaggregating interest group lobbying.

Competition among multiple jurisdictions can improve institutional performance by creating a market for production of a public good (Hooghe and Marks, 2003, 240). First, through expansion into new issue areas, one can see “PTAs as test beds for multilateral action” (Barton et al., 2006, 55). Provisions on labor or environment regulations that have been too controversial to include among the diverse membership of the WTO have been successfully negotiated first in bilateral agreements. Each PTA acts as a template for future agreements - indeed, there is considerable path dependency as most agreements closely follow the text of previous agreements. The expansion of countries accepting such rules on a bilateral basis facilitates eventually incorporating the issue into the multilateral rules. Second, as an alternative to the multilateral system, regional agreements can provide bargaining power vis a vis other states that fear exclusion (Whalley, 1998; Mansfield and Reinhardt, 2003). The United States successfully used this strategy when it pushed forward with NAFTA and APEC in the early 1990s when the Uruguay Round negotiations were deadlocked. The threat of a competing trade regime of regional blocs pushed states to renew their commitment to the multilateral negotiations. Similarly, following the impasse at the Cancun meeting of the Doha

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<sup>5</sup>Note that an area for further exploration is the effect of regional agreements on bilateral agreements. See Brummer (N.d).



Round in September 2003, the United States increased efforts to negotiate free trade agreements with Latin American states.<sup>6</sup> This is only a credible option, however, when the PTA includes a large economic area (Drezner, 2006, 91).

The use of PTAs as both templates and bargaining leverage for multilateral negotiations generates the kind of chessboard politics discussed by Alter and Meunier. Some provisions in PTAs are negotiated in anticipation of their impact on the multilateral process. A smaller state may extract concessions in exchange for agreement to the template desired by the larger state. For example, Whalley (1998, p. 78) discusses how Canada offered to include service liberalization provisions in NAFTA because it knew that the United States wanted to use these provisions in the ongoing multilateral talks and would offer Canada better terms on other issues in the bilateral package. Analysis of the effects of PTAs in isolation would overlook these reverberations.

One must also consider the possibility that use of the exit strategy in narrow trade agreements will erode support for multilateral liberalization. Research has shown the importance of cross-sector linkages to promote liberalization by using exporter gains to offset importer concessions (Destler and Odell, 1987; Davis, 2004). To the extent that export industries gain market access through bilateral, regional, or sectoral agreements, however, they have less incentives to lobby for the multilateral process. This dynamic has contributed to the deadlock of Doha Round negotiations. Companies are reported to have shifted their lobbying efforts away from the multilateral round to instead focus on bilateral agreements that can be negotiated more quickly and shaped to address key issues of importance to business such as investment.<sup>7</sup> EU Trade Commissioner Peter Mandelson has criticized this change in business lobbying as making it harder for negotiators to gain political support and depriving them of “countervailing pressure” necessary to balance

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<sup>6</sup> *The Financial Times*, 6 December 2003.

<sup>7</sup> *Financial Times*, 12 December 2005; 18 October 2006.

agriculture groups.<sup>8</sup>

Whether overlapping institutions will have a positive or negative impact on negotiations for the core multilateral framework depends on the relative economic stakes for the most powerful actors and the perceived stability of the rules. Uruguay Round negotiations presented the prospect for new gains for American and European business in the areas of services and intellectual property, and the outdated provisional GATT system was seen to be at risk of collapse. Under these conditions, the rise of competing regional agreements generated renewed political commitment to achieve success in the multilateral forum. In contrast, industries in both developed and developing countries have seen the Doha Round as offering few gains, while the strength of the WTO system makes the status quo represent a safe fall-back option. As politics shifts to other arenas, the unraveling of interest group support reduces the prospects for substantial multilateral liberalization.

### 3 Enforcement of Compliance

By reducing the clarity of legal obligation, international regime complexity can generate more litigation and contradictory rulings at the enforcement stage. First, some policies may be interpreted as consistent with PTA rules but not the WTO or vice versa. This can lead to legitimate confusion about the appropriate policy as well as strategic forum shopping in the choice of litigation venue to challenge policies. The trade regime presents an institutional context with highly legalized dispute settlement mechanisms in both PTAs and the WTO.<sup>9</sup> For example, the United States and Canada

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<sup>8</sup>*Financial Times*, 12 December 2005; 18 October 2006.

<sup>9</sup>Some RTAs include provisions for compulsory jurisdiction or a forum choice clause, but even these measures leave open considerable leeway for the complainant to choose jurisdiction. See Kwak and Marceau (2002).

engaged in over a decade of litigation about Canadian subsidy policies for its timber industry with each side citing NAFTA and WTO adjudication decisions to support their position. As the legal interpretation deadlocked, neither side changed their policies until eventually a bilateral political settlement was signed September 2006. This case has led many to fear that proliferating rules will contribute to wasteful litigation. Second, the increase of rulings that overlap for a substantive issue may create further tensions for compliance. In another example, Brazil has been faced with a dilemma as a WTO panel has ruled against the policy reform that it had introduced in order to comply with a ruling by the regional trade court of Mercosur.<sup>10</sup>

Does such forum shopping among alternative adjudication venues undermine compliance? Evidence suggests that the above examples may be anomalous and are unlikely to have widespread effect on the regime. There have only been a handful of trade disputes in which two states have engaged in litigation at both the regional and multilateral levels on essentially the same policy issue.<sup>11</sup> Davey (2006) notes that even as PTAs have established dispute systems closely modeled on the WTO system, they are infrequently used. He contends that higher legitimacy and enforcement power make states view the WTO dispute mechanism as more effective. NAFTA members

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<sup>10</sup>Brazil adopted a policy to restrict the import of re-treaded tires because they were breeding grounds for mosquitoes. After a Mercosur court ruled that the policy was a violation, Brazil changed the policy to exempt the type of re-treaded tires traded with its Mercosur trade partners. The new policy was then challenged by the EU (WTO DS 332), and the WTO Appellate Body ruled in December 2007 that while WTO agreements (Article XX) gave Brazil the right to ban tires for public health, the Mercosur exemption violated WTO non-discrimination principles.

<sup>11</sup>Another case with multi-level litigation is the European banana import regime, which was contested at the WTO and also led to litigation brought by Germany before the ECJ (Alter and Meunier, 2006). The United States and Mexico have engaged in litigation in NAFTA and WTO about trade in sugar and taxes on soft drinks. Brazil challenged duties on poultry imports by Argentina in Mercosur and then WTO adjudication

settle most of their trade disputes in the WTO.<sup>12</sup> Moreover, the value of setting a precedent in the multilateral forum makes the regional option appealing only in a narrowly constrained set of circumstances when their industry is strong relative to their regional partner but weak relative to the WTO membership (Busch, 2007). In fact, when states are able to solve disputes in the regional forum this can reduce the number of cases in the multilateral forum. Although we hear most often about the softwood lumber case that generated excessive litigation with multiple NAFTA and WTO cases, over one hundred disputes about anti-dumping and countervailing duties have been resolved through the NAFTA Article 19 provisions that allow companies to challenge government decisions through an expedited NAFTA panel process.

Compliance disputes can have a positive effect when they push forward negotiation on rules. In the case of the steel negotiations, the victory by the EU and other complainants in a WTO panel against U.S. safeguard tariffs protecting its steel industry was cited as adding more momentum to the OECD talks.<sup>13</sup> Brazil and other agricultural export states have used victories in WTO disputes against U.S. and EU agricultural subsidies to add pressure for concessions on agriculture in the Doha Round.<sup>14</sup> Even when ambiguity of rules pushes political debates into the implementation and interpretation phase as suggested by Alter and Meunier (this volume), an increase of compliance disputes may in turn push forward the politics for negotiating new agreements.

Overlapping institutions can also promote greater compliance by increasing incentives to main-

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<sup>12</sup>Mexico, Canada, and the United States have initiated 28 WTO complaints against each other in contrast to only three complaints under NAFTA Article 20 dispute settlement. There have been many NAFTA Article 19 disputes, in which industries directly challenge specific antidumping or countervailing duty decisions. These cases are not parallel to the government to government legal challenges about rule compliance in WTO and NAFTA article 20 disputes, but offer a venue that settles some issues before they could rise to government disputes.

<sup>13</sup>*The Financial Times*, 6 December 2003.

<sup>14</sup>*Inside U.S. Trade*, 17 November, 27 October 2006.

tain a good reputation. As noted by Keohane (1984, p. 104) in his discussion of regime compliance, “Disturbing one regime does not merely affect behavior in the issue-area regulated by it, but is likely to affect other regimes in the network as well. For a government rationally to break the rules of a regime, the net benefits of doing so must outweigh the net costs of the effects of this action on other international regimes.” His key point is that a good reputation is valued for the benefits achieved across multiple regimes. Multilateral trade dispute settlement gains enforcement power from its role to provide information about reputation to the broader membership; the expectation is that states with a bad reputation will suffer a penalty in future interactions (Maggi, 1999). The proliferation of trade agreements increases the occasions at which a state faces a penalty for a poor reputation. A state that frequently violates its WTO commitments could be given worse terms in bilateral trade agreements, or find itself unable to find any partner willing to negotiate a PTA. For example, negotiations for an economic partnership agreement between Japan and China have been slowed by concerns that China’s poor compliance with the WTO TRIPS agreement make its compliance with any “WTO plus” commitments unlikely. Russia’s poor compliance with intellectual property provisions in bilateral agreements has been cited as a factor slowing its ability to gain approval for WTO accession.<sup>15</sup> One would expect these reputation penalties to eventually encourage higher compliance across venues.

The tendency for international regime complexity to generate “small group environments” (Alter and Meunier this volume), will work in favor of a dynamic where overlapping institutions magnify reputation effects to increase compliance. As the same people engage each other across institutional fora, which is especially common among the expert group of trade lawyers engaged in litigation, there is rapid diffusion of information about specific cases. This close network of repeat

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<sup>15</sup>*Inside U.S. Trade*, 7 September 2007.

players helps to uphold a common reputation for a state within the trade regime.

## 4 Concluding Remarks

Trade policy is a rich area for research on overlapping institutions given the large number of agreements regulating trade. This paper suggests that decisions at every level of a trade negotiation must take into account related institutions. First, the choice of institutional venue is constrained by both legal and political pressures such that many politicized disputes are filtered into the WTO. Second, competition between bilateral and multilateral venues for making liberalization commitments can generate complementarities or undermine support for multilateral liberalization. Finally, at the enforcement stage, multiple rules add complexity that could increase litigation. But at the same time, international regime complexity encourages stronger compliance by adding more incentives to uphold a good reputation. Failure to take into account the selection process created by overlapping institutions could lead to mistaken conclusions about institutional effectiveness. In particular, multilateral institutions may look less effective than bilateral institutions, when they are actually getting harder issues. Willingness of states to negotiate and comply with agreements depends on the broader context of overlapping institutions. Economists have long disagreed over the welfare effects from overlapping regional and multilateral trade agreements. There is need for more political scientists to join this debate and research the political effects of overlapping institutions on such critical variables as bargaining power, interest group mobilization, and reputation.

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

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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 paper 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, (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 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.<sup>1</sup> EU Member States also belong to an overlapping regional treaty regime governed by the European Convention on Human Rights (ECHR),<sup>2</sup> as well as a global human rights treaty regime governed by the United Nations (UN); both are comparatively weak on enforcement.<sup>3</sup> 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.<sup>4</sup> The Community and its

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<sup>1</sup> GATT/WTO members participating in PTAs are required to meet a set of preferential trading conditions defined in the text of GATT.

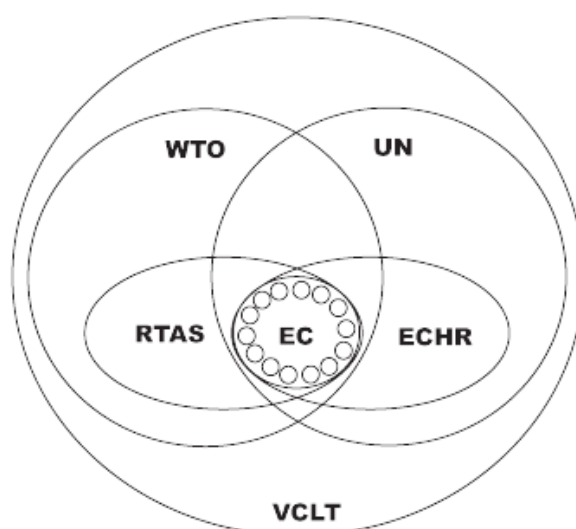
<sup>2</sup> All Council of Europe member states are party to the Convention, which establishes the European Court of Human Rights.

<sup>3</sup> In addition to the Universal Declaration of Human Rights there are seven core international human rights treaties currently in force.

<sup>4</sup> 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

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 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



### **Forum Shopping**

Europe has a problem: they want to protect their workers from the ills associated with globalization, and they have long been pushing for the protection of human rights as a solution (Alston 1999). Despite best intentions, existing human rights institutions — whether global or regional — are not able to protect human rights, most failing to enforce the norms they proffer provisions (Article 60). While only 108 states have ratified the VCLT, most provisions of the treaty are accepted as customary international law.

(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.<sup>5</sup> 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 enforce norms that overlapping human rights institutions cannot protect. The fact that Europe belongs both to PTAs and the WTO by no means caused Member States to link human rights rules to trade; it did create the option for Europe to chose 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,<sup>6</sup>

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<sup>5</sup> WTO First Ministerial Declaration, Adopted in Singapore in December 1996.

<sup>6</sup> 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.

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 vehemently opposed the PTA. They 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.<sup>7</sup> 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;<sup>8</sup> only Member States could be parties to such conventions. Europe had a dilemma: they had passed legislating 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 trade agreement with a less significant instrument in the form of a Joint Declaration (1997)<sup>9</sup> 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 incentives 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

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<sup>7</sup> European Report 1997.

<sup>8</sup> See Opinion 2/94 on accession to the ECHR.

<sup>9</sup> 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.

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 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 overlapping 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.<sup>10</sup> Its threats helped spur the inclusion of human rights provisions into PTAs, which give the Parliament more influence to

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<sup>10</sup> Interview record # 21 2004.

shape European policy in the WTO and the UN.

These examples hint 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 internal 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 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.<sup>11</sup>

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<sup>11</sup> Interview record #42 2005.



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.<sup>12</sup> Although the Community would eventually suspend trade concessions to Yugoslavia anyhow,<sup>13</sup> 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 nested 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, 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

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<sup>12</sup> Interview record #13 2004.

<sup>13</sup> Council Regulation (EEC) No. 3300/91 of 11 November 1991 (OJ 1991 L 315).

partly by consistency with overlapping commitments to international law on treaties – completely lacking in enforcement.

*Lesson 3:* International regime complexity allows member states 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.<sup>14</sup> 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 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.<sup>15</sup> *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.<sup>16</sup> It also draws attention to the ways in which nested and overlapping institutions shape actors' political strategies and outcomes – the focus of this symposium. My research suggests that 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

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<sup>14</sup> EU Annual Human Rights Report, 10 October 2003 13449/03 COHOM 29.

<sup>15</sup> For indepth analysis of enforcement, see Hafner-Burton 2009.

<sup>16</sup> Hafner-Burton 2005; 2009.

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 contentious 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.

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.<sup>17</sup>

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.

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.

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<sup>17</sup> For a detailed analysis of these Community dynamics, see Hafner-Burton 2006.

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.

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## **Regime Shifting in the International Intellectual Property System\***

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The institutions and rules of the international intellectual property system provide an important illustration of how regime complexity shapes domestic and international politics. In particular, complexity enables a strategy of “regime shifting” whereby states and non-state actors relocate rulemaking processes to international venues whose mandates and priorities favor their concerns and interests. In forum shopping, actors shift venues too, but the goal is a single favorable decision. Regime shifting, by contrast, is an iterative longer-term strategy whose goal is to create outcomes that will have feedback effects in other venues. Regime shifting works by broadening the policy spaces within which relevant decisions are made and rules are adopted, thereby expanding the constellation of interests and issues that actors must consider when defining rules, norms, and decision-making procedures.<sup>1</sup>

This essay first describes and graphically illustrates the multifaceted nature of the international intellectual property system and describes its origins. It then analyzes the consequences of international regime complexity for international and domestic politics,

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<sup>1</sup> Regime shifting is distinct from other cross-institutional political strategies—such as forum shopping and strategic inconsistency—that international regime complexity can engender. Actors forum shops to gain a single favorable outcome or decision that they could not obtain in an existing venue. Actors seek strategic inconsistency to create multiple valid rules and interpretations that expand the zone of permissible action. By contrast, actors regime shift to reshape the larger political context of an issue area with the ultimate aim of restructuring the existing system of rules themselves.

emphasizing the strategy of regime shifting and its consequences for chessboard politics and the domestic implementation of international rules.

## **I. The Origins of Complexity in the International Intellectual Property System**

The intellectual property system is composed of a dense thicket of linkages and relationships among treaties, international organizations, and multilateral, regional and bilateral negotiating venues. Deeply nested multilateral agreements comprise some parts of this system, the most famous being the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). TRIPs is one of a family of World Trade Organization (WTO) treaties and itself incorporates an earlier group of multilateral agreements (including the Berne Convention, the Paris Convention and the Rome Convention) protecting patents, trademarks, copyrights, and other intellectual property rights. Rules relating to intellectual property also exist in other institutions, such as the Conference of the Parties to the Convention on Biological Diversity (CBD), the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), and the Food and Agriculture Organization (FAO). Parallel treaties and institutions predominate in other areas, such as the intersection of human rights and intellectual property, a topic that has been actively studied from different perspectives within the United Nations human rights system as well as within the WTO and WIPO. (Helfer, 2007, 2004a, 2004b)

**[Figure 1 about here]**



The system was not always so densely populated. As recently as the early-1990s, the treaties and international organizations concerned with intellectual property occupied a highly specialized and technocratic corner of international law with few connections to other issue areas. That relative isolation ended in 1994 when the United States and the European Communities, pressured by their respective intellectual property industries, shifted intellectual property negotiations from the WIPO to the WTO and linked the result of those negotiations (the TRIPs Agreement) to the new WTO dispute settlement system. Any nation seeking to join the international trade club was required to accept a package deal that included both strong intellectual property rights and robust international enforcement of those rights (Drahos, 2003).

That TRIPs dramatically expanded intellectual property protection standards is well known to legal scholars and political scientists (Reichman, 1995; Sell, 2003). What is less understood is how TRIPs created tension points within other issue areas—such as human rights, public health, biodiversity, and plant genetic resources—that acted as catalysts for new intellectual property rules in nested, parallel, and overlapping international institutions. These tension points had both substantive and procedural dimensions. (Helfer, 2004a)

Substantively, TRIPs required states to grant intellectual property rights in fields—such as genetic resources, pharmaceuticals, and plant varieties—that developing countries believed should not be treated as private property on moral or cultural grounds.

This opposing regulatory approach was already embedded in overlapping regimes. The conflicts between TRIPs and the contrary rules in these regimes weakened the clarity of those rules and created uncertainty for states over how to reconcile the resulting conflicts.

Procedurally, tensions were created by TRIPs' more stringent enforcement mechanisms as compared to the weaker enforcement systems that exist in international regimes outside of the WTO. As a treaty nested within the WTO, TRIPs enforcement occurs through the WTO's dispute settlement system, a system in which WTO panels and the WTO Appellate Body issue rulings that interpret IP protection rules and in which states that fail to comply with these rulings risk retaliatory trade sanctions. The strength of the WTO dispute settlement system created a structural imbalance whereby the stronger pressures to adhere to TRIPs undermined states' ability to comply with the rules of other regimes where those rules intersected with TRIPs.

## **II. The Consequences of Complexity in the International Intellectual Property System**

TRIPs' expansion of intellectual property rules and enforcement mechanisms engendered resistance from developing countries and civil society groups. Although developing countries had accepted TRIPs as the price of admission to the WTO, many had done so without giving adequate consideration to the treaty's costs or its domestic political consequences. Civil society groups feared that TRIPs would undermine the

rules and objectives of the human rights, public health, biodiversity, and plant genetic resources regimes in which they carried out their advocacy work. (Helfer 2004a)

In the decade following the adoption of TRIPs, both sets of actors worked to limit the adverse effects of the treaty and to roll back its more onerous provisions. In response to these efforts, industrialized countries (most notably the United States and the European Communities) and their intellectual property industries attempted to shore up support for TRIPs and to extend its provisions by adding them to regional and bilateral trade and investment treaties. These competing efforts to undermine and extend TRIPs were characterized by at least three of the five mechanisms described by Alter and Meunier in their introductory article (Alter & Meunier).

First, state and non-state actors adopted a strategy of “regime shifting.” As I explain below, regime shifting enabled both powerful and weaker states to relocate rulemaking initiatives to international venues concerned with other issue areas—such as foreign investment, human rights, public health, and biodiversity. These regimes were more closely aligned with the shifters’ interests because of their distinctive mandates, differing memberships, or greater permeability to non-state actors.

Second, the expansion of the intellectual property system privileged certain strategies, arguments, and outcomes while disfavoring others, providing a quintessential illustration of chessboard politics. These politics cannot be understood by taking a static snapshot of the system at a single moment. Rather, they require a dynamic perspective

that considers the development of the system over time, including the interactive effects of simultaneous and sequential negotiations in multiple venues. Adopting this perspective reveals a central objective of regime shifting—the creation of legal rules in one forum as an intermediate strategy for later incorporating those rules into other institutions and treaties. By adopting this multi-step strategy, actors can increase their bargaining position relative to the power they could have exercised were treaty-making confined to a single international venue.

Third and finally, complexity both shapes and constrains implementation politics, in particular how states incorporate international intellectual property rules into national legal systems. It does so in two opposing ways. In some instances, the complexity provides states with “cover” to implement their preferred interpretation of ambiguous treaty obligations. In others, it enables powerful countries to outflank weaker states by creating rules in one venue that eliminate or dramatically constrain the discretion those countries had previously negotiated in a different venue.

In the sections that follow, I elaborate on each of these three mechanisms.

#### **A. Regime Shifting by Powerful and Weaker States**

In the years immediately following the adoption of the TRIPs Agreement, industrialized countries whose domestic industries benefitted from strong intellectual property rights sought to build on the TRIPs Agreement by further expanding those

rights. They initially turned to WTO and WIPO, organizations these states believed would be hospitable venues in which to negotiate new multilateral agreements. These efforts made some limited progress, but were quickly sidelined by more pressing problems, such as the failed attempt to launch a new round of trade talks in Seattle in 1999. Part of the backlash against the WTO was triggered by a growing resistance from developing countries and civil society groups to the moral, political, and economic legitimacy of TRIPs and the high costs of complying with the treaty (Drahos, 2002).

With negotiations in the WTO effectively stalled, both proponents and opponents of strong intellectual property rules sought out greener pastures in other international regimes as a step toward a broader restructuring the existing system of rules. Developing countries decamped to the WHO, FAO, and CBD. These organizations and negotiating venues offered these states advantages that they did not possess in the WTO and in WIPO. First, the goals of these institutions—to promote public health, plant genetic sources, and biodiversity—predisposed them to view challenges to expansive intellectual property rights sympathetically. Second, industrialized nations were either absent from these venues (the United States has never ratified the CBD, for example) or were represented by government ministries whose negotiating mandates were more sympathetic to developing country concerns. Third and finally, the WHO, FAO, and CBD, unlike the WTO, were relatively open to civil society, including NGOs that were highly critical of TRIPs and that worked with developing states to fashion strategies for challenging the treaty (Helfer, 2004a, 2004b).

The United States and the European Communities, by contrast, shifted their efforts from the WTO and WIPO to bilateral and regional trade and investment treaties, incorporating IP protection rules into agreements governing trade, tariffs, and investor protections. Industrialized states could more easily leverage their economic and political clout in these intimate negotiating forums. In exchange for enhanced access to their markets, these states demanded that developing countries ratify the new WIPO treaties or adhere to intellectual property protection standards that exceeded those found in TRIPs. Opponents derisively labeled these bilateral and regional agreements as “TRIPs plus” treaties (GRAIN, 2005).

These contemporaneous negotiation of competing intellectual property standards in different multilateral, regional, and bilateral venues created dense “policy spaces” in which legal rules intersected in diverse and contradictory ways (Keohane & Nye, 2001). For developing countries, the different goals, memberships, and NGO permeability of the WHO, FAO, and CBD provided opportunities to generate “counterregime norms”—treaties and nonbinding recommendations that challenged TRIPs (Helfer, 2004a). But even as counterregime norms were being drafted in these multilateral venues, they were undermined by the simultaneous negotiation of more stringent intellectual property rules in bilateral and regional “TRIPs plus” treaties.

Regime shifting also produced more convoluted and conflicting legal rules than would have been generated in a single international organization, in which the same actors operating under a single subject matter mandate would have been unlikely to adopt

inconsistent standards. Not surprisingly, post-TRIPs scholarship analyzing the intellectual property regime complex has devoted considerable attention to reconciling these conflicting legal obligations. (Helfer, 2004c; Saffrin, 2002).

As the foregoing discussion illustrates, regime shifting in the international intellectual property system enabled both powerful and weaker states to develop legal rules that more accurately reflected their respective interests and concerns. As I explain below, the goal of this strategy was not simply to create conflicting rules. Rather, regime shifting enabled these competing groups of countries to create new approaches that had feedback effects in other venues. These feedback effects broadened the relevant policy domain by expanding the constellation of interests and issues that actors were required to consider when defining rules, norms, and decision-making procedures. The result was a restructuring of the entire system of intellectual property protection rules.

## **B. Chessboard Politics and the Consequences of Shifting Negotiations to Multiple International Venues**

A recognition that intellectual property protection standards are fashioned in multiple international regimes does not explain how states benefited from this disaggregated rulemaking system. In fact, the inconsistent legal rules generated by the regime complex may initially appear detrimental to states' interests. As Alter and Meunier argue, however, chessboard politics cannot be discerned by examining a single

historical moment. Rather, the strategies of actors and their consequences emerge over time as a result of the interactive effects of negotiating in multiple venues. Analyzing an international regime using this evolutionary perspective reveals the strategic advantages that complexity provides to certain actors, in particular less powerful states.

Recall that developing countries and civil society groups opposed to strong intellectual property rights regime shifted to other international venues to create counterregime norms that conflicted with TRIPs and “TRIPs plus” agreements. To mount an effective challenge to these treaties, however, developing countries needed to do more than simply create counterregime norms. They needed to integrate those norms into the WTO and its powerful dispute settlement system.

Developing countries could, of course, have proposed revisions to TRIPs without first crafting their proposals in other international venues. Yet their past experience in negotiating in the WTO against the far more powerful industrialized states made them wary of doing so. In particular, during the Uruguay Round of trade talks leading to the adoption of TRIPs, the United States, European Communities, Japan, and Canada had formed a negotiating “quad” that excluded developing countries from key agenda setting and drafting sessions. As a result of this strategy, developing countries had little choice but to accept the final package deal that the quad presented to them (Drahos, 2003).

The existence of international regimes in which developing countries had greater influence changed the international negotiating dynamic and, as a result, strengthened



their bargaining position in the WTO in two distinct ways. First, the existence of parallel and overlapping venues for intellectual property rulemaking enabled like-minded states to coordinate their challenges to TRIPs around reform proposals that had first been tested and refined in more sympathetic venues such as the CBD, FAO, and WHO. When developing states later introduced these proposals into the WTO (in the second phase of their regime shifting strategy), they followed this previously agreed-to script for reform. By negotiating as a group to achieve a predetermined outcome, these states created a counterweight to the industrialized country quad (Helfer, 2004a).

Second, the existence of parallel and overlapping institutions enabled developing countries to adopt rules in one forum (the CBD, for example) that were in tension with rules previously approved in another venue (such as the WTO). As discussed above, these rules decreased the clarity of international law. But they also created “strategic inconsistencies” that developing states used to bolster their arguments for revising TRIPs. (Raustiala & Victor, 2004) In particular, these states justified their demands for reform by invoking rules that states, intergovernmental officials, and legal experts had endorsed in other venues. By invoking these previously sanctioned rules, developing countries could plausibly claim that their reform proposals were a rational effort to harmonize inconsistent legal rules governing the same subject matter rather than a self-interested ploy to back away from a treaty they had previously pledged to uphold (Helfer, 2004a).

Developing countries successfully employed this multi-step regime shifting strategy to promote the Declaration on the TRIPs Agreement and Public Health, a

document adopted by the WTO in 2001 as part of the launch of a new round of trade talks in Doha. The Declaration's proponents—a consortium of more than fifty developing states and their NGO allies—demanded greater access to patented medicines used to treat HIV/AIDS and other pandemics. To support this goal, the coalition relied on proposals to restrict pharmaceutical patents that had previously been adopted in the WHO and the UN human rights system. Developing countries cited these proposals to urge the WTO membership to address “an issue that has aroused public interest and is being actively debated outside this organisation, but one which we cannot afford to ignore” (’t Hoen, 2002 at 38 n.38). The result was a Declaration that endorsed the coalition’s view that TRIPs “can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all” (Public Health Declaration, 2001, ¶ 4). In the years following the Declaration’s adoption, WTO member states have amended TRIPs to expand its compulsory license rules to benefit poor countries facing public health emergencies (Abbott, 2005).

As this discussion illustrates, international regime complexity altered the politics of intellectual property. It allowed developing countries to employ a multi-step regime shifting strategy in which they first created counterregime norms in international venues sympathetic to their interests, and later relied on those norms to enhance their bargaining position in the WTO. Regime complexity thus enabled developing states to increase their power in the WTO in a way that would have been impossible had negotiations been confined to that organization. This multi-step strategy is only revealed, however, by a

dynamic analysis that considers how actors use different venues to promote their interests over time.

### **C. Regime Shifting and the Politics of Domestic Implementation of International Rules**

A third consequence of international regime complexity relates to the incorporation of international obligations into national legal systems. As compared to a single-venue regime, the existence of overlapping and parallel regimes modifies implementation politics in two distinct and opposing ways.

First, the multiplicity of legal rules generated in nested, overlapping, and parallel institutions can make it more difficult to claim that states have implemented rules in ways that violate their treaty obligations. In particular, as the rules regulating intellectual property become more numerous, nuanced, and contradictory, they provide greater leeway for states to interpret and implement rules to further their own interests while remaining nominally within the boundaries of what international rules require.

Decision 486 of the Andean Community provides an apt illustration. Adopted by the biodiversity-rich nations of this South America sub-region in 2000, Decision 486 seeks to reconcile the intellectual property protection rules of TRIPs with the biodiversity preservation measures of the CBD. It does so by imposing various restrictions on patents derived from biological materials found in Andean Community member states (GRAIN,

2000). Whether these restrictions are in fact compatible with TRIPs' patent protection rules is open to debate (Helfer, 2004a). Yet no state has filed a WTO dispute settlement complaint challenging Decision 486 as a violation of TRIPs. To the contrary, Andean Countries have promoted the legislation as a good faith attempt to harmonize the two multilateral treaties, albeit an attempt that furthers their own interests in safeguarding the region's biological heritage.

Second, international regime complexity provides opportunities for powerful states to narrow the options available to weaker countries to implement intellectual property rules into their national legal systems. TRIPs expressly contemplates that WTO member states may adopt higher standards of intellectual property protection in other international agreements. Capitalizing on this rules, the United States has sought to strengthen and clarify the obligations in TRIPs via so-called TRIPs-plus bilateral treaties. In these negotiations, the United States uses its economic clout to compel weaker developing countries to adopt stringent intellectual property rules that close off implementation options sanctioned by multilateral agreements.

For example, TRIPs requires WTO members to protect new plant varieties. But it allows them to do so "either by patents or by an effective *sui generis* system or by any combination thereof" (TRIPs, Article 27.3.b). Developing countries interpreted this provision as permitting them to tailor plant variety laws to their domestic agricultural needs. Yet the United States and the European Union have used TRIPs plus treaties to

restrict this discretion, pressuring several of these countries to enact legislation that favors the interests of foreign commercial plant breeders (GRAIN, 2004).

The end result is greater variation at the national level. An analysis of international rules alone does not reveal the true state of play. Rather, the salient politics emerge through country-by-country and issue-by-issue interpretations by domestic actors.

### **III. Conclusion**

The international intellectual property system is comprised of nested, overlapping, and parallel treaties and institutions that are populated by a shifting mosaic of issues, states, and non-state actors. Scholars seeking to understand the international and domestic politics of intellectual property must consider the ways in which international regime complexity influences the strategies of state and non-state actors as they vie for legal and policy dominance over the rules that govern innovation and creativity policy.

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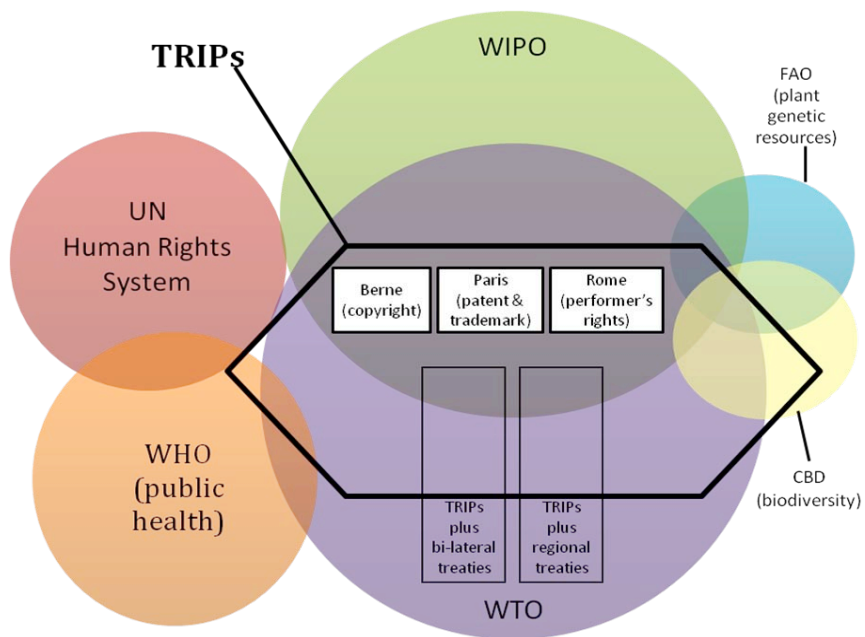
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**FIGURE 1**

**The International Intellectual Property Regime Complex**

# **Institutional Proliferation and the Global Refugee Regime**

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At first glance, the norms, rules, principles and decision-making procedures that govern refugee protection appear relatively straightforward. The basis of the refugee regime is the 1951 Convention and its 1967 Protocol. The Office of the United Nations High Commissioner for Refugees (UNHCR) has responsibility for overseeing the regime, and its annual Executive Committee represents the regime's core arena for inter-state decision-making. However, over time, the proliferation of new global governance instruments has led to a range of institutions which exist in parallel or overlap with elements of the regime. Many of these are complementary, such as the European Convention on Human Rights (ECHR) and Convention against Torture (CAT). Since the 1990s, however, new governance arrangements – in areas such as migration and the protection of internally displaced people (IDPs) – exist in parallel to, and partly overlap with, the regime in potentially competitive and contradictory ways.

These new institutions have emerged in the context of the growing politicisation of international migration and have offered states a range of new instruments through which they can meet their interests in relation to the movement of people fleeing persecution, while bypassing the 1951 Convention and UNHCR. This essay argues that the proliferation of these new parallel institutions is a significant factor in explaining recent change in the international politics of refugee protection. It suggests that this competitive institutional environment has contributed to changing the role of UNHCR and has had a potentially negative effect on the quality of protection available to

refugees. Institutional proliferation has had these consequences by creating opportunities for states to engage in regime shifting, switching the venue for conversation about refugees to institutions that focus also on migration and security governance. As a result, while the formal refugee protection rules and the UNHCR's mandate stays largely the same, the most relevant politics for refugee protection occurs in parallel domains.

### ***The New Institutional Proliferation***

The main actors in the refugee regime have generally been regarded to be UNHCR and states. UNHCR has existed to monitor states' compliance with the 1951 Convention on the Status of Refugees. Overlapping and parallel institutions with a human rights orientation have tended to be complementary, reinforcing the protection standards of the regime. Regional instruments such as the OAU Convention and the Cartagena Protocol were explicitly conceived as complements to the 1951 Convention. Human rights treaties, in particular article 3 of the ECHR and Article 3 of the CAT, have also provided sources of what has been referred to as 'complementary protection' (i.e. legal sources of refugee protection that come from outside of international refugee law) for refugees fleeing persecution (Gorlick, 2000; McAdam, 2007).<sup>1</sup>

However, in contrast, a new form of potentially contradictory institutional proliferation has taken place since the 1990s. Led by a renewed state interest in migration control, international institutions have begun to emerge in two areas that were previously

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<sup>1</sup> For example, in the cases of *Tapia Paez v Sweden* at the Committee Against Torture and *Chahal v UK* at the ECtHR, the states against which the cases were brought were prevented from deporting asylum seekers excluded from refugee status under the exclusion clauses of the 1951 Convention if they were likely to face torture or inhuman or degrading treatment or punishment upon return. *Tapia Paez v Sweden*, CAT, Communication No. 39/1996; *Chahal v United Kingdom* (22414/93) [1996] ECHR 54 (15 November 1996).

unregulated at the global level: international migration and internal displacement. These new institutions have been created by states in response to the increase in South-North migration since the 1980s and the growing securitisation of asylum and immigration in the 1990s and early 2000s. Although neither migration governance nor IDP governance have a direct institutional relationship to refugee protection, the creation of these parallel institutions has implications for the politics of refugee protection.

In the first instance, there has been a proliferation in institutions purporting to regulate international migration (Crisp, 2004). Despite the absence of formal multilateral governance in this area, a range of informal, regional and inter-regional governance structures have emerged as states have recognised international migration to be of growing political importance and have recognised that migration can only be addressed through international cooperation. These new institutions have included the European Union's common Justice and Home Affairs (JHA) policy, which has included an attempt to develop a common asylum and immigration policy (Garlick, 2006); the Intergovernmental Consultations on Migration, Asylum and Refugees (the IGC), established by a group of likeminded states with a secretariat in Geneva as the basis for informally discussing asylum and immigration policy outside of traditional multilateral forums such as UNHCR (Schuster, 2005); the Global Commission on International Migration (GCIM) and the new multilateral Global Forum on Migration and Development (GFMD), for example. Alongside these emerging structures, the International Migration Organization (IOM) has played an increasingly prominent role in relation to global migration governance, despite existing outside of formal UN structures. These emerging structures have mainly existed in parallel to the global refugee regime,

but with some significant elements of overlap, insofar as actors such as the EU, IGC and IOM have addressed asylum as a migration issue. In particular, the new migration institutions overlap with the refugee regime insofar as they have influenced refugees' access to spontaneous arrival asylum.

In the second instance, a new institutional framework for addressing the issue of internally displaced persons (IDPs) has emerged since the 1990s (Weiss and Korn, 2006). This new framework is based upon the creation of the position of the UN Secretary-General's Special Representative for IDPs and the 1997 *Guiding Principles of Internal Displacement*, which represents a soft law the relevance of existing human rights law and international humanitarian law standards for IDPs. This shift towards a new multilateral framework for IDPs was based partly on the recognition that in contrast to refugees, internally displaced people rarely received access to international protection. However, it was also driven by a migration control agenda within which many Northern states have identified the 'internal flight alternative' as a means to ensure that individuals fleeing persecution do not need to leave their countries of origin but can receive protection within their own states. The 'internal flight alternative' represents one way in which the new IDP regime overlaps with the refugee regime. This is because it implies that in situations in which would-be refugees are able to find protection within their own state they may be refused asylum and returned to their country of origin. The way in which the human rights, migration and IDP regimes overlap with the refugee regime is illustrated in the diagram below.

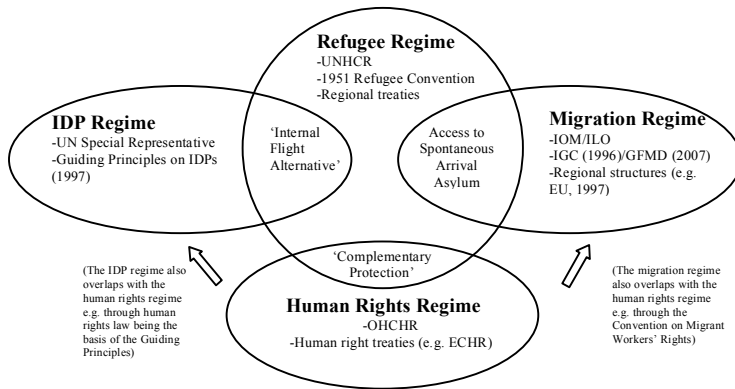


Fig. 1: Diagram illustrating the main actors and institutions in the global refugee regime and how the regime exists in parallel to and partly overlaps with the migration, IDP and human rights regimes. The intersections of the Venn diagram illustrate some of the ways in which the refugee regime overlaps with other regimes.

### ***How International Regime Complexity Alters the Politics of Refugee Protection***

Although the new institutional proliferation has taken place in relation to international migration and IDPs rather than refugees, it has nevertheless had significant implications for the politics of refugee protection. Despite UNHCR consistently arguing that ‘refugees are not migrants’, the fact that refugees move across borders and refugees’ ability to seek protection is dependent upon their trans-national mobility, governance that relates to human mobility has direct relevance for asylum and refugee protection. Aside from this practical relationship, the creation of parallel institutions in relation to international migration and IDPs has been relevant to refugee politics for two principal institutional reasons.

The parallel institutions enable states to circumvent UNHCR and the 1951 Convention. International refugee law only imposes obligations upon states once refugees reach their territory; if they can find alternative ways to avoid refugees reaching their territory then they can avoid these legal obligations. Asylum destination states in the North have been able to use the new international institutions relating to migration control or IDPs to keep refugees from reaching their territory, thereby averting their

obligations towards refugees. For example, states have increasingly used IOM in service provider roles that would once have been the domain of UNHCR including refugee return and the care and maintenance of asylum seekers and refugees. The IOM is preferred because it is outside of the UN framework and therefore unencumbered by the human rights obligations and state scrutiny the UNHCR faces.

The IGC and the EU Council of Ministers have been used by states as forums for inter-state dialogues on refugee issues, instead of using the UNHCR's Executive Committee. As a result, new mechanisms for addressing asylum and refugee protection get decided without UNHCR involvement. For example, EU states have used the IGC and the IOM to develop innovations such as the offshore processing of asylum claims. States have also increasingly attempted to use the institutional mechanisms relating to IDP protection as a substitute for refugee protection. In Sudan, Sri Lanka, Afghanistan, and Burundi, for example, states have used the concept of 'internal flight alternative'.

*A de facto* result of regime shifting is that the most relevant political decisions regarding refugee protection are increasingly made in the context of migration and security discussions. States have rarely been interested in refugee protection for altruistic reasons. During the Cold War, the US and Western European states offered asylum to refugees fleeing Communism as a means to discredit Communist regimes, and they contributed to supporting refugees who fought Communism in the proxy conflict of the developing world. In the post Cold War era, Northern states' became primarily concerned with managing migration. The responsibility for the asylum and refugee protection agenda has been shifted from state departments to governmental units that deal with migration and security issues such as justice and home affairs. In the post 9/11 era,

refugee concerns have been subordinated to security concerns. These shifts in state concerns explain both the creation of the new international institutions for migration and security issues, and how refugee and asylum issues have become subordinated in these new institutions.

While the formal rules and mandate regarding refugee protection has not changed significantly, increasingly UNHCR has recognised that in order to engage in the politics of refugee protection it needs to be an active participant in debates that go beyond the immediate scope of the refugee regime. It has thereby become actively engaged in wider multilateral forums such as the Global Forum on Migration and Development, regional discussions such as the EU debates on Justice and Home Affairs, and the wider UN debates on humanitarian assistance and IDP protection. As it has done so UNHCR has adjusted its strategy, in ways discussed in the next section.

### ***Consequences for Refugee Protection***

The new migration institutions have undermined the quality of refugee protection insofar as they have enabled states to use international institutions to prevent spontaneous arrival asylum seekers acquiring access to the territory of states in which they would otherwise claim asylum. For example, through regional cooperation, the EU has developed Frontex, the EU's border control agency, which engages in military patrol of attempts by migrants to acquire access to the EU's Southern or Eastern borders. At the international level, IOM provides services to European states that enable them to limit the access of asylum seekers crossing from Sub-Saharan Africa to the EU via the Maghreb. Many of the new border control mechanisms have been identified as being inconsistent



with the notion that refugees should not be forcibly returned to countries in which they face a well-founded fear of persecution (*non-refoulement*).

The new institutional framework on IDP protection has watered-down the quality of refugee protection insofar as it has been used by states as a tool of containment for would-be refugees, provided a justification for forcibly returning refugees to their country of origin, and has diverted resources from refugee protection to IDP protection. A number of states have instrumentalised the notion of IDP protection as means to limit the outflow of refugees. Past examples of this include the creation of ‘safe zones’ or ‘humanitarian corridors’ in Bosnia, Iraq and Somalia (Dubernet, 2003). Although the IDP regime may have the potential to be complementary of refugee protection, many Northern states have financially and institutionally prioritised IDP protection over refugee protection because they have perceived in-country protection to be a substitute for refugee protection.

Perhaps most significantly, however, the new parallel institutions have contributed to changing the work and mandate of UNHCR. In order to compete with the other emerging institutions and to ‘make itself relevant’ to states, UNHCR has gradually expanded into the areas in which it faces institutional competition. Since 2000, UNHCR’s work has grown to incorporate a greater focus on both migration and IDP protection. Its traditional mandate was confined to providing protection and durable solutions to refugees. In response to the wider competitive environment, it has brought consideration of the issues of both international migration and IDPs within the organization and adapted its work in ways that have potentially perverse consequences for refugee protection.

In the early 2000s, UNHCR has increasingly recognised that states respond to refugees in the broader context of international migration and has tried to engage in the politics of migration (UNHCR, 2007). The new migration control agenda contributed to a widely recognised ‘crisis of asylum’, with Northern states increasingly preventing refugees’ access to their territories, while Southern states received inadequate international support for the refugees they hosted. Recognising that the 1951 Convention was not adequate to address these concerns, UNHCR conceived the Convention Plus initiative in 2003 (Betts and Durieux, 2007). Its aim was to supplement the aspects of refugee protection inadequately addressed by the Convention. The initiative attempted to facilitate a ‘grand bargain’ on the allocation of responsibility for refugee protection, whereby Northern states could meet their interest in limiting irregular migration *through* contributing to refugee protection in the South. The initiative thereby attempted to use issue-linkage to connect Northern states’ interests in migration to refugee protection (Aggarwal, 2000; Haas, 1990). Central to this initiative was the notion that ‘protection in the region of origin’ could serve as a substitute for spontaneous arrival asylum and an implicit recognition that so long as Northern states funded protection in the South they could legitimately control immigration. As I argue elsewhere, complexity offered UNHCR an opportunity to engage in issue-linkage as a means to channel states’ wider interests in other issue-areas into a commitment to refugee protection (Betts 2008). While this has not always worked, UNHCR has been able to use institutional connections between refugee protection and other issue-areas as a basis for claiming that protection is related to states’ higher order concerns in parallel domains such as migration and

security. However, by recognising that Northern states do have a valid migration control agenda and trying to channel this into a commitment to protection in the region of origin, UNHCR has legitimated many of the control mechanisms that undermine Southern refugees' access to protection in the North.

In 2005, UNHCR also formally took responsibility for IDP protection. After many years of playing an *ad hoc* role in relation to IDP protection, UNHCR agreed to take on formal institutional responsibility for protection within an inter-agency 'cluster approach' for addressing the needs of IDPs. High Commissioner Antonio Guterres proclaimed that henceforth UNHCR could become the UN's protection agency rather than simply its refugee protection agency (Loescher et al, 2008). Yet, without additional staff or significant additional funding it is not clear how taking on formal responsibility for IDPs will affect UNHCR's ability to meet its core refugee protection mandate. The experiences of the 1990s in situations such as Bosnia and Iraq certainly suggest that having the same organization responsible for both functions can lead to contradictory outcomes, undermining refugees' access to protection by imposing upon them an 'internal-flight alternative'. In Bosnia, UNHCR's role in providing protection to IDPs in the so-called 'safe havens' served not only to provide inadequate protection to IDPs but also to deny them access to asylum in other states (Dubernet, 2003). The danger for UNHCR is that, as it enters new policy arenas and takes on a greater role in areas such as migration and IDP protection, it risks diluting or undermining its original refugee protection mandate and its ostensibly 'non-political character'. However, the danger of not engaging with the new competitive institutional environment is that the organization and the refugee regime risk irrelevance.

This suggests that regime complexity represents a potentially important factor in influencing change in the role and strategy of IOs. As the institutional environment became increasingly competitive, UNHCR chose to adapt in order to maintain its relevance in the context of state regime shifting. In their work on IOs, Barnett and Finnemore (2004) also use UNHCR as a case study for exploring the process of IO adaptation and change. They argue that UNHCR has reinterpreted its mandate to become an organization more focused on refugee repatriation than on refugee protection. They note specific ways in which the mandate gets reinterpreted. They attribute much of this change to the organization's own internal dynamics – or organizational pathologies. Contra Barnett and Finnemore, this article suggests that an important factor in driving change in UNHCR's role and mandate has been regime complexity. However, insofar as UNHCR's response to the new institutional competition has led to perverse consequences that flow from internal choices, the explanation is compatible with and builds upon Barnett and Finnemore's explanation of IO adaptation and change.

### ***Conclusion***

Concerned about irregular migration as a threat to security, Northern states have increasingly tried to avert their legal obligations to accept refugees who reach their territory through policies aimed at limiting asylum seekers' access to their territory. In this context, they have created new institutional structures in relation to migration and IDPs, which exist in parallel to the refugee regime. These emerging regimes have some areas of overlap with the refugee regime. For example, both have implications for refugees' access to spontaneous arrival asylum channels: the IDP regime offers an

internal flight alternative to protection in another country, which is increasingly considered in states' assessment of asylum claims; the migration regime has implications for refugees' mobility and hence access to spontaneous arrival asylum.

The new institutional proliferation has affected states' strategies, enabling them to bypass UNHCR by using the alternative regimes to limit the arrival of asylum seekers onto their territory, and thereby escaping their obligations under the 1951 Convention without overtly violating its central tenets. States prefer the parallel venues because they can more easily address their migration and security concerns. Without the new institutions there would have been fewer means for Northern states to coordinate so as to limit asylum seekers' ability to reach the borders of their territory. In turn, the institutional proliferation has affected UNHCR's strategy as it has struggled to maintain its relevance. It has led the UNHCR to adapt its mandate to incorporate elements of these wider issues, and to engage in the politics of other regimes and to use issue-linkage as a strategy for channelling states' wider concerns with migration and security into a commitment to refugee protection. The danger with this shift in UNHCR's role is that, as it competes with the new institutional alternatives, it compromises its core mandate and legitimates the states' strategies that undermine refugees' access to protection.

The analysis of the effects of institutional proliferation on the refugee regime offers two further implications for the framework set out by Alter and Meunier in this edition. On a methodological level, it highlights the challenge of attributing causality to institutional proliferation. The new institutional proliferation has taken place in the context of growing state concerns with migration and security. These concerns have been led by trends such as globalization and the post 9/11 era. This begs the question of to

what extent it is the underlying politics or the resulting institutional proliferation that is driving change in refugee politics. In reality, it appears to be both, demonstrating that it is difficult to bracket away where overlap comes from, and that the causes and consequences of overlap may be closely intertwined. On a conceptual level, the case study highlights the way in which institutional proliferation may create opportunities for issue-linkage. One of the key ways in which UNHCR has attempted to turn the new institutional competition to its advantage has been to use overlap as a basis on which to appeal to states' wider interests in migration and security and to claim that these have a relationship to refugee protection. As the most relevant politics for refugee protection has been relocated away from the refugee regime, so UNHCR has had to engage in the politics of other regimes as a means to advocate for refugee protection.

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## **Overlapping Institutions in the Realm of International Security: The Case of NATO and ESDP**

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Ever since European Union (EU) member states decided to create the European Security and Defense Policy (ESDP) in 1999, both ESDP and the North Atlantic Treaty Organization (NATO) have occupied the institutional space of crisis management. Despite American suspicion of an autonomous European security institution (Albright 1998), EU member states created an alternative to NATO crisis management activities.<sup>1</sup> Both organizations have operational credibility. ESDP has conducted 20 operations and missions since it was declared operational in 2001. At the same time, NATO has conducted 17 operations. Some of these operations took place in the same theater, and at times ESDP operations have relied on NATO assets. Nonetheless, as NATO's General Secretary recently observed, "it is astounding how narrow the bandwidth of cooperation between NATO and the Union has remained. There is a remarkable distance between them" (De Hoop Scheffer 2007).

ESDP and NATO are typically examined in isolation, perhaps because of the relative absence of interaction between these two institutions.<sup>2</sup> But institutional overlap has important repercussions for both institutions and their member states. In line with this

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<sup>1</sup> The US was supportive of the European Security and Defense Identity, the European pillar *inside* NATO through which the European member states could conduct military operations without the Americans – a so-called nested institution. But the US government never encouraged an independent European security institution. Former US ambassador to NATO, Nicholas Burns, once called ESDP "the most serious threat to the future of NATO" (quoted in Koch 2003: 11). In a similar context, former Defense Secretary William S. Cohen warned "NATO could become a relic" (quoted in Hamilton and Aldinger 2000: A28).

<sup>2</sup> Most literature on ESDP disregards the influence of NATO on ESDP (and *vice versa*), as ESDP is either seen in the context of EU integration (Menon 1993; Howorth 2001), or in relation to US's hegemony (Walt 1998/99, 2002; Kissinger 2003; Brooks and Wohlforth 2005; Posen 2006; Paul 2005; Pape 2005). Two exceptions are Peters (2004) and Howorth and Keeler (2003).



symposium, this piece sets out to explain some important consequences of international regime complexity in the field of international security.

Overlap between ESDP and NATO has two effects. First, overlap has generated chessboard politics shaping member state strategies. I discuss these strategies in examining implementation of the Berlin Plus agreement,<sup>3</sup> which attempts to manage overlap between the two institutions. Second, institutional overlap has generated a number of feedback effects. The prior existence of NATO shaped the conceptualization and organization of ESDP at its creation, and the existence of two alternative security institutions continues to influence how the institutions evolve — how each institution defines security interests and how states adjust the mandate of each institution to address changes in the security environment. Because both institutions are intergovernmentally organized and consensus-based, the actions and decisions of both institutions reflect the agreements of members. Chessboard politics and feedback effects are consequently interrelated—states strategize to affect outcomes in one venue or another, and decisions in one institution can feed back, affecting decisions and behaviors in the other institution.

The resulting lack of cross-institutional coordination has created inefficiencies in the crisis management interventions of each institution, including delays in troop deployment and a lack of strategic guidance in operations. While it is hard to characterize NATO's and ESDP's relationship as either competitive or cooperative, overlap has clearly impeded the development of an efficient division of labor between the two institutions.

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<sup>3</sup> “Berlin Plus” is a short title for a comprehensive package of 14 agreements between NATO and EU, based on conclusions of the NATO Washington Summit in April 1999 and coming into force in March 2003. See [http://www.nato.int/shape/news/2003/shape\\_eu/se030822a.htm](http://www.nato.int/shape/news/2003/shape_eu/se030822a.htm) for more details. See Reichard (2004) for an examination of the legal dimensions of the agreement.

## Mapping ESDP and NATO Institutional Overlap

Overlap between ESDP and NATO occurs along three institutional dimensions: *membership, mandate and resources*.<sup>4</sup>

*Membership.* At ESDP's creation in 1999, 11 of NATO's 19 members were also part of ESDP and 4 ESDP members were outside NATO's membership. Today, 21 states are members of both ESDP and NATO. 5 NATO states are not part ESDP, and six ESDP states are not part of NATO (Figure 1, below). The 21 states that are members of both institutions can strategize across institutions, while the eleven states that are members of one institution and not the other can maneuver within a single institution (ESDP or NATO) to undermine the interests of states in the other institution.



Figure 1: Membership overlap in 2008.

\* Denmark opted out of ESDP.

\*\* But members of NATO's Partnership for Peace (which includes a security agreement with NATO).

<sup>4</sup> Common resources are assets and capabilities that are owned by all member states commonly instead of resources that are brought to the institution by member states. As such they cannot be captured through the membership dimension.

*Mandate.* ESDP and NATO mandates are largely similar and do not specify either a functional or geographic division of labor between the two institutions.<sup>5</sup> Both institutions engage in crisis management interventions to address violations to international peace and security. These crisis management mandates comprise the so-called “Petersberg tasks”: humanitarian and rescue tasks, peacekeeping, and combat-force tasks (including peacemaking).<sup>6</sup>

*Resources.* The two organizations rely on both national and common assets to plan and conduct military operations.<sup>7</sup> Military hardware is primarily a national asset. However, command and control structures are crucial common assets for both institutions: NATO has the common Supreme Headquarters Allied Powers Europe (SHAPE) and ESDP has its common Civil-Military Cell and Operation Centre (OpsCen). SHAPE has undergone many changes since the end of the Cold War and it best equipped to plan and conduct high-intensity operations.<sup>8</sup> Conversely, ESDP’s Civil-Military Cell and OpsCen are best equipped to plan and conduct battalion size military operations as well as civilian missions in combination with military operations (Perruche 2006; Cornish 2006). Hence, if ESDP wants to conduct a high-intensity military operation, it requires NATO assets;

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<sup>5</sup> The one salient difference is that NATO’s mandate includes collective defense while ESDP has not extended its activities in this area – or at least not yet. The only time since NATO’s creation in 1949 that its collective defense article has been invoked was after the attacks of September 11, 2001. While ESDP does not have a collective defense provision, key EU documents refer to “autonomous capacity to take decisions” to “launch and conduct EU-led military operations” (European Council Nice 2000: Annex VI).

<sup>6</sup> ESDP incorporated these tasks from its inception in 1999 and NATO gradually broadened its mandate since the end of the Cold War based on its Article 2 (see Strategic Concept 1999).

<sup>7</sup> National assets that the member states themselves own are important, but are considered under the membership dimension of overlap. It is important to note the troops for ESDP and NATO operations come from the same basic national pool.

<sup>8</sup> Interview with British senior official, February 22, 2007.

and if NATO wants to plan and conduct a civil-military operation, it requires the assets of an institution such as ESDP.<sup>9</sup>

As each institution's degree of autonomy is linked to the command and control structures at their disposal, planning capabilities quickly became a contentious element of institutional overlap. The so-called Berlin Plus agreement of 2003 aimed to regulate how confidential information would be shared between NATO and ESDP, as well as how the newer ESDP would have recourse to NATO common assets.<sup>10</sup> However, as the next section will show, there are a number of ambiguities in the agreement that have given rise to conflicting interpretations, affecting its implementation.

### **Strategies on the Chessboard: Berlin Plus and Beyond**

Chessboard politics manifest themselves in member state strategies that I call "turf battles," "hostage taking," and "muddling through." Below, I explain these strategies with examples drawn from the politics surrounding the Berlin Plus agreement and its implementation.

*Hostage Taking.* States that are members of just one institution can use their membership to obstruct the relationship between both institutions, holding them "hostage" in pursuit of narrow interests.<sup>11</sup> Turkey, a NATO member outside the EU, and Cyprus, an EU

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<sup>9</sup> In principle, NATO can also rely on other institutions with civilian assets, such as the United Nations, the Organization for Security and Cooperation in Europe, or non-governmental organizations or the private-sector. In practice, however, the membership overlap between NATO and ESDP, as well as ESDP's capabilities, make it a natural partner.

<sup>10</sup> Berlin Plus allows ESDP to use the deputy commander, planners and key staff in NATO's chain of command in order to plan and head operations.

<sup>11</sup> Arguably, exclusion from the other institution reduces the peer pressures and reputation costs the government is subjected to, as it is only socialized in one institution.

member outside NATO,<sup>12</sup> have both taken positions that essentially held the larger institution and the inter-institutional relationship hostage by using their veto powers. Ankara does so in the interest of advancing accession negotiations with the EU, while Nicosia's obstructionism demonstrates Cyprus's state sovereignty vis-à-vis Turkey.<sup>13</sup> Overlap enables these states to transform an otherwise marginal institutional position into far-reaching influence.

Turkey insists that Berlin Plus is the general framework under which NATO and ESDP interact, granting NATO a right of first refusal when it comes to deciding when and where to intervene, and hence, allowing NATO to interfere in ESDP planning of all its operations.<sup>14</sup> One of the many effects of this strategy is that NATO and ESDP can only meet formally to discuss concrete Berlin Plus operations,<sup>15</sup> while every other security issue cannot be talked about. Invoking the terms of the Berlin Plus agreement, Turkey refuses to allow Cyprus (and Malta until April 2008 when it joined PfP) to participate in discussions regarding Berlin Plus operations.<sup>16</sup> In return, Cyprus (and Malta until April 2008) block any other formal meetings.<sup>17</sup>

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<sup>12</sup> This happens with occasional backing from the dual member states Greece and France.

<sup>13</sup> Interview with EU official, February 9, 2007.

<sup>14</sup> Turkey's insistence to participate to some degree in ESDP decision-making was already apparent during the negotiations of Berlin Plus. When the European states created ESDP, Turkey initially refused to finalize the Berlin Plus agreement by insisting on participating in ESDP's operational planning. This resulted in no interactions between the two institutions during ESDP's first four years. Turkey relented after it was guaranteed that no ESDP operation would interfere with its security interests. The delayed signing of the agreements led to a one year delay of ESDP's first military operation in Macedonia. Though some ESDP member states (notably France and Belgium) wanted to go ahead without NATO support, others insisted that the agreements should be signed before ESDP would go in (Britain, Spain and Germany) to not weaken the Alliance's standing.

<sup>15</sup> Interview with British official #1, December 5, 2006. The EUFOR ALTHEA operation in Bosnia and Herzegovina is at the moment the only ESDP operation under Berlin Plus.

<sup>16</sup> Turkey can do so because the Berlin Plus agreement says that operations are discussed with states that have a security agreement with NATO. Interviews with German officials, November 15, 2006; February 6, 2007; and March 16, 2007.

<sup>17</sup> Many observers suggest that this obstructionism could be alleviated through either concessions to Turkey in accession negotiations or resolution of its dispute with Cyprus. Interview with EU official, February 9, 2007.

*Turf Battles.* Some European countries aim for ESDP becoming the primary institution dealing with crisis management, partly in order to exclude the US from influencing European policy. Certain NATO members, especially the US, would like to expand NATO's "turf" into civil-military crisis management, which is currently occupied by ESDP.<sup>18</sup> These state interests manifest themselves in the form of turf battles over the geographic and functional scope of both organizations, and in fights over resource acquisition and access. In this competitive strategy, countries advocate policies that shape the capability and mandate of one institution – often at the expense of the other.

Perhaps the most important turf battle has been between the US and those ESDP member states that want to develop ESDP as an alternative to NATO, particularly France, along with Belgium, Luxemburg, and Spain. These European states argue that Berlin Plus is not the cornerstone of the inter-institutional relationship. Instead, these seek to assure full ESDP autonomy without eventually having to rely on NATO via Berlin Plus. One concrete example can be seen in the long-running dispute over the creation of a *permanent* operational headquarters inside ESDP (EUOHQ). Dissatisfied with the EU's dependence on NATO's SHAPE for planning capabilities under the Berlin Plus agreement, the French, Belgian and Spanish governments want ESDP to have a headquarters capability that would provide it the autonomy to decide when and how to intervene in any crisis or conflict.

*Muddling Through.* With hostage taking and turf battles impeding formal cooperation,

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<sup>18</sup> See Paul 2005; Pape 2005 and Posen 2006 for a discussion of the US role in NATO after the end of the Cold War.

states interested in a division of labor between ESDP and NATO, or even modest cooperation between them, are forced to find informal alternatives – in essence, to cooperate by “muddling through.”

The United Kingdom, Netherlands, Czech Republic, Slovakia, Hungary, and Germany initially hoped that the Berlin Plus agreement would become the cornerstone of a cooperative NATO-ESDP relationship.<sup>19</sup> These governments lament the inefficiencies that the competitive dynamics of hostage taking and turf battles have created, and have initiated informal meetings on the ministerial level, the so-called “transatlantic luncheons and dinners.” Because these meetings are informal, there is no record taken, no communiqué issued and no decisions are presented to the public. More importantly, the British and Dutch governments are suspicious of a EUOHQ and regard a potential ESDP headquarters as undermining the de facto “right of first refusal” that Berlin Plus gives NATO when it comes to high-intensity crisis intervention. But as a compromise amongst EU members, and in the spirit of operability, ESDP members agreed to establish a Civil-Military Cell, an OpsCen with a peacetime permanent staff, and liaison teams between NATO and ESDP.<sup>20</sup>

Indeed rather than resolving tensions that might result from institutional overlap, the ambiguity of the Berlin Plus agreement is itself an artifact of international regime complexity and is heavily implicated in the politics of institutional overlap. As a result, the difference over how to implement Berlin Plus are at best very time consuming, at worst, they waste scarce resources, delay troop deployment, and put military and civilian

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<sup>19</sup> Phone interview with German senior military official, January 17, 2008.

<sup>20</sup> These nascent planning capabilities have been met with US protests (Koch 2003). The US insists that ESDP should not be independent of NATO and that it will only support ESDP when it is married to NATO (Dempsey 2003: 2).

troops in danger, as I discuss below in looking to feedback effects between the two institutions.

### **Feedback Effects: Reverberation and Competition**

As international regime complexity does not only give rise to turf battles and hostage taking, competition is not the sole mode of interaction between NATO and ESDP. However, one cannot deny that the relationship is partly driven by competitive dynamics. Competition is usually seen as a means to induce efficiency. An efficient division of labor would witness NATO and ESDP develop complementary strengths. To some extent, ESDP's focus on smaller operations represents complementarity with NATO by default, if not by the design of several of its more ambitious and ardent Europeanist member states. But there is also evidence that "reverberation" and "competition" lead NATO and ESDP to move in similar directions with regards to institutional resources and mandate. Rather than diverging, the two institutions have continued to overlap significantly. The way the two institutions conceptualize security, and how they have designed their mandate and resources is largely repetitive.

*Conceptualizing Security.* Contemporary crisis management involves military and civilian elements: the military component includes the deployment of military forces for deterrence and coercion in peacemaking and peacekeeping, while the civilian component includes policing, training, rule of law, institution building and other peacebuilding tasks. NATO has historically focused on the military aspects of security, and left civilian elements to organizations such as the OSCE or the UN.



When ESDP was being created in 1999, its future member states had a chance to improve on existing templates, focusing on civilian aspects and leaving the military aspects to NATO, or finding a way to balance the two approaches. It would have made sense for ESDP's to have focused more on civilian crisis management, as most European states lack the military capabilities needed for high-intensity operations and the European Commission was already active in this area. Such a coordinated division of labor between NATO and ESDP was always an option, but did not occur. Instead, the French government sought to occupy NATO's "turf." The British government, in the interest of building up a European security institution and cooperating with European partners and NATO, went along with it.

Thus, with NATO's successful Kosovo operation Allied Force being a primary referent, NATO's template fed back into the design of ESDP. ESDP's core documents stressed security's military component, including plans for a Rapid Reaction Force of 60,000 troops sustainable for one year.<sup>21</sup> The desire of some ESDP member states to develop military crisis management capabilities autonomous from NATO's also led ESDP to replicate NATO's organizational structure, including a political body, a military body, and international military and civilian staff. ESDP copied NATO's structure even though the architects of ESDP were aware that NATO's institutional design had contributed to poor coordination between military and political bodies.<sup>22</sup>

Over time, ESDP and NATO have failed to agree on a division of labor, but have instead continued to develop in similar directions. After its creation, ESDP member states realized that existing EU civilian crisis management capabilities gave ESDP a

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<sup>21</sup> The St Malo Declaration in 1998, the European Council conclusions of Cologne in 1999 and Helsinki in 1999 exemplify the focus on military institutional and capability build up.

<sup>22</sup> Interview with British official #2, December 5, 2006.

comparative advantage over NATO, which remained focused on the military side.<sup>23</sup> When ESDP started to incorporate civilian crisis management into its planning and operations, building up civilian command structures and a police force, there was therefore another opportunity to develop a division of labor whereby NATO would concentrate on the high-intensity military operations, and ESDP would assume primary responsibility for civilian, civil-military and low-intensity military operations.<sup>24</sup> Instead, at the insistence of the US and Turkey, who have pursued turf battle and hostage taking strategies, NATO has followed ESDP in incorporating civilian elements into its doctrine and operations (Hofmann 2008; Yost 1998). ESDP, on the other hand, continues to aspire towards the capabilities to autonomously conduct high-intensity military operations.<sup>25</sup> Arguably, this reflects an important example of competition across the institutions, as without ESDP, NATO would have been less pressured to reconceptualize its approach to crisis management operations to become more comprehensive, and could have left civilian crisis management to the UN or OSCE.<sup>26</sup> Indeed, the success of ESDP operations

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<sup>23</sup> Up to the end of the 1990s NATO's outlook remained military, despite the fact that a combination of civilian and military resources and expertise have become central to crisis management. Before ESDP's existence, NATO cooperated with the UN and the OSCE in the Balkans to address the civilian crisis management issue.

<sup>24</sup> Interview with German official, March 16, 2007.

<sup>25</sup> The US proposals to include civilian capabilities into its operational planning include the "Berlin Plus reverse" and the Comprehensive Political Guidance, both of which have been met with resistance by the French, Belgians, and others. Seeking to limit the influence of NATO, France and others wants NATO confine itself to collective defense. These states fear that NATO's expansion into civilian crisis management will relegate ESDP to the role of "junior partner." Phone interview with German military official, Brussels, 17 January 2008.

<sup>26</sup> The US has until recently placed heavy emphasis on the military dimensions of security, as witnessed in its force deployment in Iraq and Afghanistan and the Pentagon's preeminence over the State Department. Interview with German official, March 16, 2007.

with extensive civilian elements contributed to NATO's appreciation of civilian forces<sup>27</sup> and NATO has borrowed from the EU's success with civil-military missions.<sup>28</sup>

Capabilities often come to define what actions are taken. Noting how crisis management increasingly involves military and civilian elements, rather than focusing on one or the other, a British official who observed the repetition lamented "it was a mistake that the set up was so similar."<sup>29</sup> The result is that both institutions define security in civilian and military terms, seeking to pursue both objectives rather than stepping back to decide who is best equipped to do one or the other.

*Practicing Security.* The consequences of international regime complexity and the presence of multiple policy-making venues have also affected substantive policy decisions. Without overlapping institutions and the competitive strategies they engender, the practice of crisis management would be substantially different, and arguably, more efficient.

First, in post-conflict reconstruction operations where both organizations are on the ground but responsible for different tasks (i.e. NATO for military operations and ESDP for civilian or civil-military missions),<sup>30</sup> no code of conduct has been established between

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<sup>27</sup> Ibid.

<sup>28</sup> Some NATO members have created provincial reconstruction teams (PRT) in Afghanistan where national ministries such as the defense, foreign, development, and interior ministries work together in ways that mirror EU practices (Interview with German military official, February 6, 2007). Furthermore, NATO has trained Iraqi security forces, supported relief efforts after the Asian tsunami, in Pakistan after the October 2005 earthquake, and following Hurricane Katrina in the US (Interview with NATO military official, February 8, 2007). NATO's success with PRTs in Afghanistan has also contributed to this new understanding of security (Interview with Canadian official, February 6, 2007). See also "Riga Summit Declaration," <http://www.nato.int/docu/pr/2006/p06-150e.htm>.

<sup>29</sup> Ibid.

<sup>30</sup> This includes, for example, Kosovo with KFOR and EULEX Kosovo (EU Council decision to launch it February 16, 2008) or Afghanistan with ISAF and EUPOL Afghanistan, KFOR was deployed in the wake of Operation Allied Forces in 1999 and is still on the ground today. NATO currently has 15,900 KFOR troops deployed in Kosovo to help maintain security and stability.

the two institutions and no delineation of tasks is possible due to the hostage taking strategies outlined above. Technical arrangements such as guidelines for the cooperation between the military (NATO) and police (ESDP) forces become politically controversial between members such as Turkey, Cyprus, Greece, and France. Turkey insisted that ESDP operations have to be put under the Berlin Plus terms, which ESDP refused.<sup>31</sup> Cyprus, on the other hand, delayed the deployment of ESDP troops because it argued that as long as Berlin Plus is an option and it is not privy to all the information, it could not vote in favor. Hence, the organizations have had to muddle through by relying on the member states themselves, as well as on tactical cooperation based on the social skills and entrepreneurship of their respective personnel. But people on the ground, constrained by mandates that reflect divisions among member states, cannot fully compensate for the absence of strategic cooperation at higher levels.<sup>32</sup> This significantly slows the deployment of EU operations into areas where NATO is already present, and can jeopardize the safety of ESDP civilian forces that are working alongside NATO troops in crisis areas.

Second, in situations where both organizations are equipped to conduct the same operation, there is competition to assert institutional presence, which hampers coordination efforts, resulting in negative feedback effects such as the duplication of efforts and even unnecessary deployments. For example, at the insistence of several member states, both the EU and NATO have been conducting the same civil-military

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<sup>31</sup> Interview with NATO military official, April 10, 2008.

<sup>32</sup> The deployment of the EU police missions in Bosnia and Herzegovina (EUPM) and EUPOL Afghanistan were delayed mainly because there was no agreement as to how these missions should relate to NATO (Kupferschmidt 2006). More recently, diplomats and bureaucrats in both the ESDP and NATO have been nervous about the division of security roles for ESDP and NATO in Kosovo (Economist 2007: 34). The danger is that, for example, a German KFOR soldier (NATO) stands next to a German police officer (ESDP) as a riot breaks out, but they face different rules of engagement and cannot act upon a common code of conduct. Interview with NATO official, April 17, 2007.

operations in Darfur in support of the African Union Mission in Sudan (AMIS) II (Biscop 2006: 7). Another example can be found in ESDP's recent African operations. ESDP's Artemis operation in DR Congo was a military operation undertaken, at the initiative of France (who arguably could have done it alone), largely to prove that ESDP can act militarily autonomous of NATO (Ulriksen, Gourlay and Mace 2004; Martinelli 2006).

### **Conclusion**

The relationship between ESDP and NATO is characterized by neither outright cooperation nor competition. Instead, the interests that are pursued through different member state strategies have led to an ambiguous relationship. Competition arises through turf battles and hostage taking as states maneuver within each organization to promote their specific policy preferences even as a certain degree of cooperation is achieved by muddling through. These dynamics have weakened NATO's role as Europe's primary security organization, despite US insistence that it retain the primary role in European security (Nuland 2007; Olsen 2007). Clearly the US would have more influence if NATO were the only collective security institution around. Speaking of ESDP's increasing autonomy from NATO, EU's High Representative Javier Solana has said "it won't happen in a way that will destroy NATO. It's true that the United States may lose some leverage as Europe gets stronger, but this is inevitable and by no means an unhealthy thing" (Drozdiak 2000: A01).

Another result of these strategies has been to undermine institutional performance in ways that cannot be compensated for by simply muddling through on an ad hoc basis. Observers and practitioners alike say that the impasse between the two institutions has

wasted resources and political capital in Darfur and has made the Afghan operation less effective than it could have been, with many fearing that the same will occur in the ongoing NATO and newly launched ESDP operations in Kosovo.<sup>33</sup> Learning and institutional memory are impeded because no lessons learned documents are written in common. Instead, the inter-institutional relationship experiences competition and cooperation on various operational levels at the same time. Yet in spite of competitive dynamics, compromises are reached, with the result that mandates of both institutions remain in flux.

The heart of the issue is that there is no strategic consensus regarding whether NATO or ESDP should deal with crisis situations and in what capacity. The decade since ESDP's emergence has witnessed important changes in crisis management, as member states alternatively cooperate and compete around ESDP and NATO. Perhaps these differences will be alleviated. A number of recent developments point towards increased cooperation. The US has signaled new support for ESDP in exchange for stronger European support in Afghanistan, while France has taken steps towards reintegration in NATO, alleviating turf battles that have marred cooperation. Malta has recently rejoined NATO's Partnership for Peace, while Cyprus has taken a step towards reviving the peace process with its February 2008 elections, meaning that two persistent "hostage takers" could have new incentives for strategic cooperation between ESDP and NATO. However, Turkey is unlikely to join the EU in anything but the long-term and will likely persist in impeding formal cooperation where it can. Whatever the case, member state strategies around crisis management and feedback effects mean that both institutions are

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<sup>33</sup> Phone interview with German senior military official, January 17, 2008.

likely to exercise an important influence on one another in coming years, resulting in enduring inefficiencies.

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## **The More The Merrier?\***

### **The Effects Of Having Multiple International Election Monitoring Organizations**

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To operate legally and effectively within a country international election monitors must be formally invited. An invitation is always in writing and it is essentially a form of legal agreement that grants the organization official status and access to polling places, policy makers and documents such as voting registries that they would not otherwise legally be able to access. As monitoring organizations have proliferated (Kelley 2008), governments often invite multiple intergovernmental, regional and international non-governmental organizations to monitor their elections. These organizations may cooperate and they sometimes even have a formal umbrella organization. Usually, however, they operate independently and neither organization has any superseding authority in assessing the quality of the election.<sup>1</sup> The organizations thus arrive independently at their assessments, which sometimes therefore differ.

Monitoring organizations have considerable influence. Domestic elections are highly consequential for countries and their governments. Although governments do not grant monitoring organizations the authority to make a final binding judgment of their elections, the

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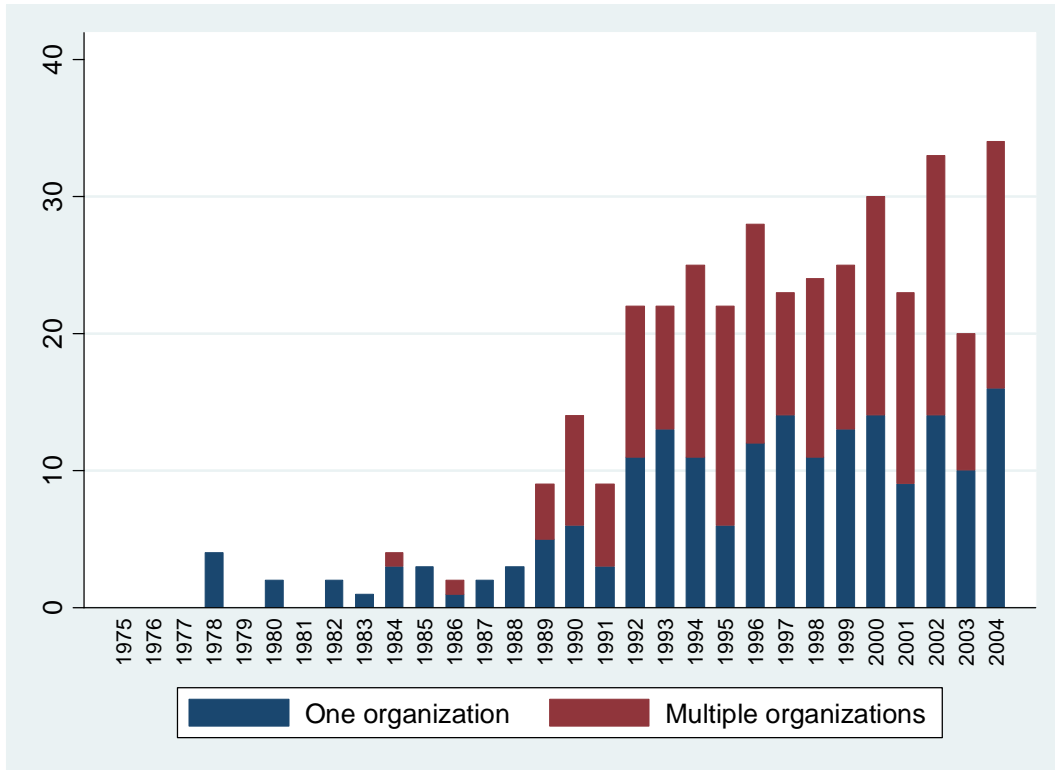
<sup>1</sup> Alter and Meunier call these “overlapping regimes.” This issue, 8.

assessment of monitors influences the government's perceived legitimacy. Their invitations to monitors as well as monitors' choices about how to assess an election are highly sensitive decisions. This article asks: How complex is the field of international monitoring? Why did it become so complex? How does the complexity influence the politics of election monitoring? And finally, what observations and questions do the insights from international election monitoring yield for the broader concept of international regime complexity?

*The density of international election monitors*

International election monitoring has grown increasingly common over the last 15-20 years. Between 1975 and 2004, 385 elections were monitored by at least one of 18 major organizations. In about half these monitored election just one major monitoring organizations was present. In about a quarter of all the monitored elections two major organizations were present. About 12 percent had three major organizations present, and in the remaining roughly 15 percent of elections there were between 4 and 7 major organizations present. Naturally, if minor organizations were added to the data, the number of elections with multiple monitoring bodies would grow drastically. In Cambodia in 1998, for example, the United Nations (UN) fielded a Joint International Observer Group which oversaw 34 separate observer missions.

**Figure 1: Number of elections with one organization present and with multiple organizations present, 1975-2004.**



*Source: The data includes the following organizations: The Organization for Security and Cooperation in Europe (OSCE – formerly CSCE), Council of Europe (CE), European Union (EU), Carter Center, CS, the OAS, NDI, IRI, IFES (Formerly the International Foundation for Election System), the Norwegian Helsinki Center, the European Parliament, the International Human Rights Law Group, the Asian Network for Free Elections, the Elections Institute of South Africa, the South African Development Community, the Economic Community Of West African States, the African Union (formerly the Organization of African Unity) or the United Nations (UN).*

From a theoretical perspective it is also interesting to note the different possible relationships that countries may have with monitoring organizations. Sometimes the organizations represent the different institutions to which the states belong, such as the OAS and the UN, or the Commonwealth Secretariat and South African Development Community may

operate alongside each other, or the OSCE, the European Parliament and the Council of Europe may go to the same election. At other times, however, other organizations, such as the European Union or non-governmental organizations may express an interest in monitoring the elections and be invited.

When there are multiple International election observation missions present, they can operate in several different ways. Occasionally the UN or a regional IO supervises all the monitoring organizations under a so-called umbrella system. This happened for example in Cambodia in 1998 under the “Joint International Observer Group.” This cooperation structure resembles some form of “nesting” although the cooperation is entirely voluntary and an organization can break free of it should it disagree with the joint conclusions. For example, the Cambodia 1998 case turned out to have quite a bit of inter-agency wrangling (Bjornlund 2004). There may also be cooperative arrangements between international non-governmental and regional organizations. For example, several non-governmental organizations may operate under the aegis of the OSCE, collectively formulating an OSCE position, although these organizations may in addition issue individual reports. Most commonly, however, international monitoring organizations operate independently.

*Why did international election monitoring become so complex?*

The field of international election observers was not always so crowded. Initially only a few regional and international organizations were active. The UN began by supervising elections in non-sovereign territories throughout the 1950s-1980s. The Organization of American States (OAS) joined as the first regional organization to conduct some nominal election monitoring

starting in 1962, and shortly thereafter the Commonwealth Secretariat (CS) began to monitor elections in British colonies. When the demand and supply of monitoring rose rapidly with the end of the Cold War, an intense debate arose over the extent to which the UN should assume a leading role. Many Western States favored enhancing the UN role, but many other states hesitated to compromise the principle of non-intervention and sovereignty (Santa-Cruz 2005; Kelley 2008). If the debate had been able to overcome these objections, today's election monitoring capacity might have been more centrally coordinated through the UN. This was not to be, however. Although the UN capacity to assist in elections was expanded, its mandate remained quite restricted, but continued to operate within multiple organizational agencies such as Unit for Democracy, the UNDP and sometimes in peace-keeping operations.

Because of the limited UN mandate, some regional organizations increasingly came to see it as their responsibility to monitor elections in their regions and, since they were looking out for the interests of their members, sometimes in other regions as well. Several regional organizations such as the Organization for Security and Cooperation in Europe (OSCE, formerly CSCE), the Commonwealth Secretariat (CS), and the Council of Europe declared free elections in member states as an organizational concern and intensified monitoring efforts. The OAS created a Unit for Democratic Development (Organization of American States 1990). The European Union (EU) eventually got onboard with its first monitoring mission to Russia in 1993 as part of its Common Foreign and Security Policy Separately, however, the EU's European Parliament also engaged in election monitoring, sometimes jointly with the OSCE.

In addition, several strong non-governmental organizations had also been engaged in election monitoring in the 1980s and were gaining expertise. These NGOs, mostly US based organizations such as the Carter Center (CC) and the Council of Head of Government of Freely

Elected States, the International Human Rights Law Group, the International Democratic Institute (NDI) and the International Republican Institute (IRI) also began to receive official invitations from governments to monitor elections. NGOs in other regions soon followed.

*What are the costs and benefits of a complex election monitoring regime?*

The complexity of the international monitoring regime has benefits as well as costs. One benefit of the complexity of the international monitoring regime may have the benefit of allowing several organizations to *reinforce* each other in important ways. Organizations may for example coordinate to expand their coverage of polling stations, hold joint conferences to discuss the election process, and even seek to arrive at mutually supporting conclusions and align their public statements. The coordination can even include jointly directed operations and joint statements. In the case of South Africa in 1994, for example, the four groups of international observers present issued a joint demarche in early March 1994 (Anglin 1995). The UN secretary general later commented that the level of coordination between the four observer groups was “probably the closest form of cooperation seen by our organizations so far, although he noted there was still room for improvement (Anglin 1995 86).

Mutual positive reinforcement has several positive effects. When different organizations agree on the norms to be used and on their assessment, they bolster each others’ legitimacy and the legitimacy of their findings. More importantly, consensus between multiple assessments increases the burden on the incumbent government to respond to criticisms and makes it more difficult to dismiss the assessments. Thus the international community and domestic actors gain greater support for a push for reforms of the incumbent regime. For example, the fact that the majority of monitoring organizations present declared that the Ukraine 2004 presidential



elections had been rigged increased the pressure on the government to rerun the elections, which resulted in a change of government. Mutual enforcement of criticism of the governments is actually quite common in the field of election monitoring. As noted later, a portion of international election monitoring missions have disagreed with each other. Still, in the majority of the cases the monitors agree with each other. It seems that organizations are most likely to reinforce each other when the facts on the ground are very clear or when they have a history of cooperation or other institutional links. Thus, this type of relationship is common between the Carter Center and the National Democratic Institute, between the Elections Institute of South Africa, the South African Development Community, or between the Council of Europe and the Organization for Security and Cooperation in Europe.

A second benefit of the complexity of the monitoring regimes is that the availability of multiple organizations may help *avoid deadlock and paralysis*. Although so-called forum shopping has downsides too, as discussed later, the existence of a choice of regimes can open up alternatives that might not otherwise have been politically feasible to implement. For example, if only one organization was in charge of election monitoring (perhaps because this capacity had been bestowed more fully to the UN), this certainly would avoid many complications that overlapping election monitoring produces. However, it might also reduce monitoring operations significantly. If countries seeking to invite monitors thought that the only existing agency was biased against them, for example, they might be less inclined to have monitors. Certainly there are some countries that would prefer to exclude certain organizations from their elections, yet many of these countries can find regional organizations or non-governmental organizations that are acceptable to them. Thus, in the same way that the use of NATO provided the West with an alternative organ for taking action in the Balkans, or in the way that the EU uses its own trade

agreements to link trade and human rights because the WTO cannot do so (Hafner-Burton, this issue), the availability of multiple institutions within the regime of election monitoring or other fields may facilitate desirable action.

Unfortunately these benefits are countered by some costs. For example, the presence of multiple international monitoring organizations can lead to inter-organizational politics. As Cooley and Ron have argued, all transnational actors are concerned about organizational survival (Cooley and Ron 2002). Recognition as an important monitoring organization helps non-governmental organizations fundraise and helps intergovernmental organizations to enlarge their mandates. Thus, a crowded field of monitoring organizations may lead to *competition for resources, attention and influence*.<sup>2</sup> One Carter Center observer of Guyana's 2001 election noted that when the observers all gathered to provide input for a press statement, there was considerable pressure to rush to be the first to issue a press statement.<sup>3</sup> Other case studies indicate that such competition is common. The overlap of organizations in Cambodia 1998 also displayed turf wars between organizations. In one assessment, the United Nations Development Program reports:

Relations with the European Union (who recruited many observers through UNDP's UN Volunteers programme) and US funded long-term observers, on the other hand, were more challenging for UNDP and the EAD [the UN Electoral Assistance Division], which was mandated to coordinate all international election observers. Intending to maintain a high profile during the election, some EU technicians gave the impression that they were, in fact, charged with the overall coordination of international election observers and were reluctant to share information with the UN/UNDP. Similarly, despite repeated efforts by the UN, several US funded observers behaved as if they refused to acknowledge their link to the UN structure (United Nations Development Programme No date).

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<sup>2</sup> Alter and Meunier call this a "feedback effect." This volume, 16.

<sup>3</sup> Personal Interview with anonymous mission member, August 2006.

The lack of coordination and information sharing at an organizational level also risks inefficiencies and the pursuit of sub-optimal strategies (Cooley and Ron 2002). Competing for the public eye, election monitoring organizations may all decide that the capital is the most important place to allocate their resources, whereas if larger agencies pooled their resources, they might instead be able to send monitors to the countryside as well. Thus, overlaps may lead to redundancies, communication failures and waste.

Finally, because organizations may have different biases, political agendas, capabilities, methodologies, and standards, they may outright contradict each other or work at cross purposes. Although this is not the most frequent effect, it is potentially the costliest. The *Data on International Election Monitoring* (DIEM), which includes 577 election monitoring missions between 1980 and 2004,<sup>4</sup> shows 56 cases where although at least one monitoring organization denounced elections, twenty-two other monitoring missions endorsed those very same elections and 34 missions chose to remain ambiguous. Examples of contradictions include the elections in Kenya in 1992, in Cambodia in 1998, in Zimbabwe in 2000 and 2002 and in Nigeria in 2003. In Haiti in 1995 the head of the official U.S. observer delegation described the elections as “a very significant breakthrough for democracy,” while the IRI criticized “the nationwide breakdown of the electoral process (Carothers 1997 fn 11).” The Council of Europe election report sums up similar contradictions after elections in Azerbaijan in 1998:

Their [other elections monitoring missions] comments on the elections the day after polling day ranged from the positive ‘in keeping with national legislation and international standards’ (the delegation of observers of the Interparliamentary Assembly of the Commonwealth of Independent States); ‘not a single violation in an polling station’ (observers from the Central Election Commission of the Russian Federation)

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<sup>4</sup> NSF sponsored data gathering project by the author, in progress.

to more negative comments: ‘an improvement over the 1993 and 1995 elections but a missed opportunity falling short of international norms’ (International Republican Institute).’ (Council of Europe 1998 6).

The possibility of contradictions can engender what Alter and Meunier call “Chessboard politics (this issue, 5).” Anticipation of criticism from certain organizations may lead governments to forum shop. Although formally most organizations have prerequisites for monitoring an election, governments can often find organizations that are more favorable than others. For example, in Kenya’s election in 1992, President Moi’s government invited the Commonwealth Secretariat which he expected to be favorably disposed towards him, whereas he refused the Carter Center and NDI because his relationship with the US had “cooled” since late 1989 (Throup and Hornsby 1998 269). For the Zimbabwe 2000 and 2002 elections the government erected so many impediments for monitors that only highly sympathetic organizations remained.<sup>5</sup> Russia’s strict conditions for the OSCE monitors similarly led the OSCE to refuse to monitor the 2008 presidential election, subsequently leaving the field dominated by friendlier monitoring organizations. That said, the Council of Europe did remain an active observer group and did criticize the elections severely.

If governments are successful at engendering contradictions between monitors, then they can contrast contradictions to *spin and manipulate* their conclusions or quote only the assessment they prefer (Balian 2001).<sup>6</sup> Cambodia 1998 once again provides a clear example. The highly varying assessments were ripe political fodder. Most misused was a comment by a US observer, calling the elections the “miracle of the Mekong.” Cambodian Prime Minister Hun Sen latched

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<sup>5</sup> Government to bar poll observers from ‘hostile states’, says Chinamasa, *Daily News*, 26 November, 2001, cited in (Dorman 2004)

<sup>6</sup> This is akin to Alter and Meunier point that different agreements in a complex regime can sometimes be used to undermine each other (this volume, 11).

unto this isolated statement to support his country's admission to the ASEAN. Meanwhile, witnesses before the US Senate Foreign Relations Committee cited critical election observer statements to undermine the credibility of the election, while the Australian press used the positive assessments to criticize the cries of foul play by the opposition.<sup>7</sup>

Another example of spin and manipulation was the aforementioned 2002 Zimbabwe election in which the OAU secretary general officially endorsed Mugabe's refusal to allow the EU to monitor the election.<sup>8</sup> In an absurd use of statistics, which also highlights the density of monitoring organizations, *The Herald*, a Zimbabwean government controlled newspaper, argued that:

“[T]here were 33 teams of international observers, or 528 individual team members. Of the 33 teams [counting national delegations], 24 teams or 324 individual team members judged the elections to be generally free and fair while nine teams, or 204 individual team members, generally condemned the elections as neither free nor fair. ... Taken together, the majority carried the day and so, the minority should submit to the verdict of the majority.”<sup>9</sup>

The ability of governments to manipulate the election monitoring experience increases as the number of organizations available for monitoring grows. The slate of invitations to the 2008 Russian presidential election, for example, carefully balanced the number of Western versus pro-Russian observers invited, almost as if strategically ensuring that the assessments would be split evenly.<sup>10</sup> The ability of governments to exploit the diversity of monitors and engender

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<sup>7</sup> Fraud claim smacks of sour grapes, *The Australian*, August 11, 1998

<sup>8</sup> [Zambia: OAU secretary-general endorses Mugabe's rejection of foreign observers](#), *BBC Monitoring Africa - Political Supplied by BBC Worldwide Monitoring*, February 15, 2002.

<sup>9</sup> [Zimbabwe; Group's Poll Report Biased, Racist](#), *Africa News*, April 30, 2002.

<sup>10</sup> “List of foreign and international organisations invited to observe preparation and conduct of the election of the President of the Russian Federation on March 2, 2008.” Available at [http://www.cikrf.ru/eng/elect\\_president/international/list.doc](http://www.cikrf.ru/eng/elect_president/international/list.doc). Last accessed on March 25, 2008.

contradictions is also higher in countries that are geopolitically important or experience violence during the election, because monitors may be willing to temper their criticisms to retain diplomatic goodwill or peace (Kelley Unpublished manuscript).

## **Conclusion**

Focusing on the overlaps between international election monitoring organizations highlights some effects that have not received much attention. Whereas there has been considerable criticism of individual organizations for endorsing flawed elections or managing their missions poorly (Geisler 1993; Carothers 1997), discussion of the interactions of monitors has been absent. As the above discussion has shown, however, focusing specifically on the effects of the organizational overlaps prompts questions about why contradictions arise and the policy consequences such contradictions. It also raises questions of how monitors can avoid competing with each other and avoid wasteful duplication in the field. In a positive light, the focus on the multiplicity of monitoring organizations also highlights ways that international actors can magnify their influence on domestic politics, because their consensus can bolster their individual legitimacy as well as the legitimacy of the international norms they stress. On the latter point about norms, it is also interesting to note the changing role of the United Nations and its influence on the norms of monitoring. Whereas the complexity of the regime arose partly because a lack of agreements on norms about elections and sovereignty prevented the UN from taking a unitary role, the United Nations has recently steered the effort to bring diverse election monitoring organizations together to establish a set of joint standards of election observation. The result was the “Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers (United Nations 2005).” The declaration has not

assuaged the competitive elements of monitors, improved coordination to avoid waste, or preempted instances of disagreement. However, it is an indication that convergence on these norms are progressing. This is good, because there is absolutely no indication that the complexity of the regime is decreasing.

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## **THE POWER AND PERIL OF INTERNATIONAL REGIME COMPLEXITY**

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Karen Alter and Sophie Meunier correctly point out that the recent proliferation of international rules, laws and institutional forms present important questions for regime theory. This has triggered attention to the role that forum-shopping, nested and overlapping institutions, and regime complexes play in shaping the patterns of global governance.<sup>1</sup> The previous papers in this symposium all move the discussion forward on the political implications of international regime complexity. Looking at the theoretical and empirical arguments presented by all the contributors, however, it seems clear that that complexity's effects on actor strategies – particularly powerful actors – remains open to debate. Some of the posited effects of international regime complexity – bounded rationality, small group dynamics, feedback effects, and a renewed attention to the politics of implementation – have contradictory or cross-cutting effects. Further effects of regime complexity – cross-institutional strategizing, the asymmetrical distribution of legal and technical expertise, and the fragmentation of reputation and undermine the significance of institutions in complex environments. This memo considers the effect that regime complexity has on how powerful actors approach world politics – in part by connecting the current debate with past discussions about the significance of international regimes in world politics.

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<sup>1</sup> Shanks, Jacobsen and Kaplan 1996; Goldstein et al 2001; Raustiala and Victor 2004; Aggarwal 2005; Alter and Meunier 2006; Rosenau 2007.



## **Back to the future<sup>2</sup>**

To understand how international regime complexity can affect global governance outcomes, it is worth reflecting why international institutions are considered to be important in the first place. In the debate that took place between realists and institutionalists a generation ago, the latter group of theorists articulated in great detail how international regimes and institutions mattered in world politics. The primary goal of neoliberal institutionalism was to demonstrate that even in an anarchic world populated by states with unequal amounts of power, structured cooperation was still possible (Keohane 1984; Oye 1986; Baldwin 1993; Keohane and Martin 1995; Hasenclever, Mayer and Rittberger 1996; Martin and Simmons 1998).<sup>3</sup> A key causal process through which institutions facilitate cooperation is by developing arrangements that act as “focal points” for states in the international system (Schelling 1960). Much as the new institutionalist literature in American politics focused on the role that institutions played in facilitating a “structure induced equilibrium” within domestic politics, neoliberal institutionalists made a similar argument about international regimes and world politics.<sup>5</sup> Robert Keohane and Lisa Martin argued that, “in complex situations involving many states, international institutions can step in to provide ‘constructed focal points’ that make particular cooperative outcomes prominent.” (Keohane and Martin 1995:45)

By creating a common set of rules or norms for all participants, institutions help to

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<sup>2</sup> This section draws from Drezner 2008.

<sup>3</sup> Though often conflated, the institutionalist paradigm is distinct from liberal theories of international politics. On this distinction, see Moravcsik 1997.

<sup>5</sup> On structure-induced equilibrium, see Shepsle and Weingast 1981. See Milner 1997, and Martin and Simmons 1998, for conscious discussions of translating this concept to world politics.

intrinsically define the substance of cooperation, while highlighting instances when states defect from the agreed-upon rules.

By creating focal points and reducing the transaction costs of rule creation, institutions can shift arenas of international relations from *power-based outcomes* to *rule-based outcomes*. In the former, disputes are resolved without any articulated or agreed-upon set of decision-making criteria. The result is a Hobbesian order commonly associated with the realist paradigm (Waltz 1979; Mearsheimer 1994/95, 2001; Wendt 1999: chapter six). While such a system does not automatically imply that force or coercion will be used by stronger states to secure their interests, the shadow of such coercion is ever-present in the calculations of weaker actors (Carr 1939 [1964]; Drezner 2003.)

Most institutionalists agree that power also plays a role in rule-based outcomes as well.<sup>6</sup> However, they would also posit that the creation of a well-defined international regime imposes constraints on the behavior of actors that are not present in a strictly Hobbesian system. Institutions act as binding mechanisms that permit displays of credible commitment. In pledging to abide by clearly-defined rules, great powers make it easier for others to detect noncooperative behavior. These states will incur reputation costs if they choose to defect. If the regime is codified, then they impose additional legal obligations to comply that augment the reputation costs of defection (Abbott and Snidal 2001; Goldstein and Martin 2000).

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<sup>6</sup> Indeed, Oran Young made this point in an early article about international regimes. See Young 1980, p. 338.

In a world thick with institutions, the central problem for institutionalists is no longer surmounting the transaction costs of policy coordination, but selecting among a welter of possible governance arrangements (Krasner 1991; Drezner 2007a). As Duncan Snidal and Joseph Jupille point out: “Institutional choice is now more than just a starting point for analysts and becomes the dependent variable to be explained in the context of alternative options” (Jupille and Snidal 2005: 2). Indeed, the point of this symposium is to consider the effects of regime complexity as an independent variable. It is an unexplored question whether the proliferation of laws, rules, and organizational forms undercuts or augments the institutionalist logic articulated above.

### **Why great powers will embrace regime complexity**

Many practitioners and scholars have welcomed the proliferation of international institutions. Policymakers have issued calls for ever-increasing thickness of regimes, laws, and international institutional forms (e.g. Ikenberry and Slaughter 2006; Daalder and Lindsey 2007). The editors of *Legalization and World Politics* observe approvingly that: “In general, greater institutionalization implies that institutional rules govern more of the behavior of important actors—more in the sense that behavior previously outside the scope of particular rules is now within that scope or that behavior that was previously regulated is now more deeply regulated.” (Goldstein et al 2001: 3)<sup>7</sup>

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<sup>7</sup> See also Slaughter 1997, 2004; Rosenau 2007.

All of the papers here suggest the existence of cases when the growth of international regime complexity leads to greater adherence to norms. Kelley points out the ways in which election monitoring groups can reinforce each other. Davis points out the way in which increasing institutionalization has a multiplier effect on reputation, thereby enhancing compliance with trade rules. Hafner-Burton shows how European Community used the Vienna Convention on the Law of Treaties (VCLT) to reinforce conditionality in trade agreements. Alter and Meunier discuss the role that “metanorms” can play as international regimes act to reinforce each other. Hofmann suggests that competition between NATO and ESDP has contributed to the development of the comprehensive security doctrine. In all of these cases, competition and strategic behavior enhance the institutionalist logic discussed in the previous section.

As regimes grow into regime complexes, however, there are at least three reasons to believe that the institutionalist logic for how regimes generate rule-based orders will fade in their effect.<sup>8</sup> First, institutional proliferation can dilute the power of previously constructed focal points. Regime complexity inevitably increases the number of possible focal points around which rules and expectations can converge; by definition, however, focal points should be rare. Second, the creation of legal mandates that could potentially conflict over time can weaken all actors’ sense of legal obligation. Finally, the increased complexity of global governance structures raises the transaction costs of compliance for all actors.

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<sup>8</sup> For a fuller discussion, see Drezner 2007b.

All of these reasons create dynamics that favor the great powers more than would be expected under the institutionalist paradigm. In an uncertain world of proliferating focal points, great powers can use their ideational and material capabilities to create common conjectures by other actors about their intentions (Medina 2005; Drezner 2007a: chapter 3). Of course, NGOs and weaker actors will attempt to do this as well. Because powerful states possess greater capabilities for institutional creation, monitoring and sanctioning, however, regime complexity endows them with additional agenda-setting and enforcement powers relative to a world defined by a single regime (Krasner 1991; Voeten 2001; Johns 2007).

This logic can be seen in the cases discussed in the other memos. Helfer observes how the growth of forum-shifting in the intellectual property rights regime can lead to the creation of “counterregime norms.” The proliferation of norms leads to an inevitable increase in the number of possible focal points around which rules and expectations can converge.<sup>9</sup> Hafner-Burton’s memo discusses the extent to which the European Community strategically deployed the VCLT at different times to weaken or strengthen the human rights provisions contained in different regional trade agreements. Kelley discusses the ways in which non-democratic states can try to game different election monitors.<sup>10</sup>

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<sup>9</sup> This is true even if newer organizational forms are created to buttress existing regimes. Actors that create new rules, laws and organizations will consciously or unconsciously adapt these regimes to their political, legal, and cultural particularities. Even if the original intent is to reinforce existing regimes, institutional mutations will take place that can be exploited via forum-shopping as domestic regimes and interests change over time. For empirical examples, see Raustiala 1997; Hafner-Burton, 2009.

<sup>10</sup> For another example where actors have tried to game different NGOs and private orders, see Chatterji and Listokin 2007.

The weakening of legal obligations disproportionately enhances great powers. States, international governmental organizations, and courts will face complexity in trying to implement policies that lie at the joints of regime complexes (Aggarwal 2005; Alter and Meunier 2006). Politically, however, this situation privileges more powerful actors at the expense of weaker ones. When states can bring conflicting legal precedents to a negotiation, the actor with greater enforcement capabilities will have the bargaining advantage. Both Helfer and Alter & Meunier discuss the absence of international legal hierarchy in their papers. Hofmann discusses how Turkey has used its veto power within NATO to prevent high-level political consultations between NATO and the EU.

One counterargument would be that legal obligation fosters concerns about reputational costs if a state violates international law. Indeed, Christina Davis argues that the effect of reputation can compel actors into compliance even in a world of burgeoning complexity. Recent theoretical work, however, suggests that reputational effects are far more limited than previously believed (Downs and Jones 2002; Press 2005, and Tomz 2007). As Eyal Benvenisti and George Downs observe, “A fragmented legal order provides powerful states with much needed flexibility.... the existence of multiple contesting institutions removes the need for them to commit themselves irrevocably to any given one. This helps them to manage risk, and it increases their already substantial bargaining power.” (Benvenisti and Downs 2007: 627) Indeed, prominent policymakers in the United States have articulated this position as well (Bolton 2007).

The increase of international legal complexity also privileges great powers at the expense of weaker states and non-state actors. Negotiating the myriad global governance structures and treaties requires considerable amounts of legal training and technical expertise related to the issue area at hand. Although these transaction costs might seem trivial to great powers with large bureaucracies, specialized human capital is a relatively scarce resource in much of the developing world (Stiglitz 2002: 227; Jordan and Majnoni 2002; Reinhardt 2003; Drezner 2007a: chapter five).<sup>11</sup> This is particularly true when dealing with regime complexes that contain potentially inconsistent elements. Hafner-Burton, Helfer and Alter & Meunier reference the “spaghetti bowl” problem of overlapping international economic agreements (Sutherland et al 2005). On issues ranging from intellectual property rights to money laundering, great powers have exploited complexity to advance their interests (Drezner 2007a). An asymmetric distribution of technical expertise can also lead to a situation in which weaker actors act as if boundedly rational, while more powerful actors are better able to trace out cause-and-effect relationships.

If there is a wide divergence of interests between significant actors, then the proliferation of rules, laws and organizational forms can undercut the adherence to coherent regimes. This can be seen in the contradictory effects posited by Alter and Meunier. Small group dynamics, for example, have less of a constraining effect if, “the most relevant politics of an issue may occur over time in an entirely separate arena.” The effects of bounded rationality and feedback effects might affect the politics of

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<sup>11</sup> Some governments outsource their legal needs to western law firms well-versed in international law. This mitigates the human capital problem, but replaces it with a budgetary problem. While NGOs can supply some expertise to weaker actors, this is an imperfect substitute.

international regime complexity in the short-term, but the ability of powerful actors to engage in forum-shifting and forum-creating strategies counteracts these short-term constraints over time. Empirically, Hofmann demonstrates the extent to which the NATO/ESDP overlap has “impeded the development of an efficient division of labor between the two institutions.” Betts concludes that the complex institutional environment has, “had a potentially negative effect on the quality of protection available to refugees.”

Even instances in which weaker actors successfully exploited regime complexity appear, in retrospect, to have been ephemeral. For example, less developed countries and humanitarian NGOs succeeded in 2001 in getting the United States to agree to the Doha Declaration, creating a public health exception to the TRIPS regime. Since 2001, however, the United States has successfully blocked meaningful change by complicating the implementation of the declaration at the WTO. They have also engaged in cross-institutional strategizing by inserting TRIPS-plus arrangements into bilateral trade agreements (Drezner 2007a: Chapter 7). In a November 2006 briefing paper, Oxfam concluded that, “little has changed” since the Doha Declaration: “Through free trade agreements (FTAs) and unilateral pressure, the USA has shackled developing countries with ever-higher standards of intellectual property protection that exceed the TRIPS agreement. Other rich countries, particularly member countries of the European Union, have silently watched and reaped the benefits of the US trade agenda.” (OxFam 2006). Indeed, the European Commission explicitly warned Thailand, for example, to scale back its use of compulsory licenses for patented drugs.<sup>12</sup> The combined EU-US pressure has limited developing country use of the flexibilities ostensibly contained within the Doha

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<sup>12</sup> Andrew Bounds, “Thais warned on drug pricing pressure,” *Financial Times*, August 9, 2007.



Declaration. Indeed, both Oxfam and Médecins Sans Frontières concluded that the implementation of the Doha Declaration has failed to facilitate the delivery of affordable medicines to developing countries (Oxfam 2006; Médecins Sans Frontières 2006).<sup>13</sup>

Paradoxically, however, after a certain point institutional and legal proliferation can shift global governance structures from outcomes in which autonomous rules bind powerful actors to a more Hobbesian world. Although all actors will engage in forum-shopping, only the great powers will possess the capabilities necessary to enforce, implement or resolve inter-regime disputes.

Perhaps the existence of nested and overlapping regimes creates a new style of global bargaining, but the underlying causal determinants of international cooperation remain the distribution of power and interest. It might be, as Betts suggests in his memo, that complexity has stronger effects by altering the prevalent ideas and identities in world politics.

### **Variables to consider for the future**

In their introductory paper, Alter and Meunier state that their goal is to treat the issue of overlap and complexity as an independent variable. As we have seen, however, the mere existence of regime complexity can have contradictory effects on governance outcomes. It might be more appropriate to consider whether there are particular attributes of complexity that vary over time – and from regime complex to regime complex – that determine whether nested and overlapping regimes reinforce or undercut each other.

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<sup>13</sup> “Neither expeditious, nor a solution: The WTO August 30<sup>th</sup> Decision is unworkable,” August 2006.

One possible determinant is the degree to which powerful or particularistic interests can *capture* an individual regime. Some international organizations are the creature of powerful governments; others are a haven for particular interests, be they material or ideational. Edward Mansfield has posited that the “capture” of international institutions by powerful state or interest group could spur the creation of countervailing organizational forms (Mansfield 1995). The more that particular regimes are vulnerable to capture by interest groups, the more likely that regime complexity would lead to opportunism rather than adherence to metanorms. A related determinant is the *degree of organized hypocrisy* within a regime complex (see: Krasner 1999; Lipson 2007). A hypocritical regime complex generates policies that are at odds with great power interests, decoupled from stated norms, or so inchoate that they cannot be implemented or enforced.

In conclusion, the participants in this symposium are to be commended for demonstrating how regime complexity affects international interactions as an independent variable. Clearly, there exist circumstances when such complexity can create new and unanticipated constraints (or opportunities) for actors. That said, however, there are powerful reasons to believe that regime complexity will enhance rather than limit the great powers. Despite the hopes of global governance enthusiasts, the more things change, the more they stay the same.

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