

The EU as Provider of Frames and Scripts: Evidence on Law and Courts from Europe, Africa, Asia, and the Americas

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Abstract

Regional trade agreements (RTAs) differ a great deal in both their legal and judicial dimensions. Accounting for RTAs means, in good part, to explain those differences. A rationalist approach focused on interests, calculations, and utility-maximizing outcomes can offer limited insight into those differences. RTA officials do not operate in a vacuum. First, at the intra-regional level, they work in environments with established, and often similar, national legal and judicial traditions. Those traditions, rather than the EU, provide the frames through which officials interpret and solve the regulatory challenges associated with integration: officials develop legal frameworks and judicial mechanisms that mirror, in their overall character, what is already in place in the member states. But, second, officials are aware of RTAs elsewhere in the world – above all, the EU. The EU provides ready-made detailed instructions, or scripts, for the formulation of specific laws and judicial processes in other RTAs. If consistent with the national traditions in a given RTA, officials often adopt or mimic those scripts. Thus, overall, choices about legal and judicial design have little to do with what is ‘best’ for trade liberalization and the fulfillment of national interests. They have a lot more to do with continuity, legitimacy, and expediency.

Introduction

Regional trade agreements (RTAs) differ a great deal in both the legal and judicial dimensions. Accounting for RTAs means, in good part, to explain those differences. A rationalist approach focused on interests, calculations, and utility-maximizing outcomes can offer limited insight into those differences. RTA officials do not operate in a vacuum. First, at the intra-regional level, they work in environments with established, and often similar, national legal and judicial traditions. As I have shown in previous work and further elaborate here in light of RTAs worldwide, those traditions, rather than the EU itself, provide the frames through which officials interpret and solve the challenge of what may be called ‘cognitive misalignment’, or more simply put the existence of disparate worldviews. They develop legal frameworks and judicial mechanisms that mirror, in their overall character, what is already in place in the member states.

Second, and more importantly for our purposes in this panel, officials are aware of RTAs elsewhere in the world – above all, the EU. The EU provides ready-made detailed instructions, or *scripts*, for the formulation of specific laws and judicial mechanisms in other RTAs. If consistent with the national traditions in a given RTA, officials often adopt or mimic those scripts. Choices about frames and scripts have little to do with what is ‘best’ for trade liberalization and the fulfillment of national interests. They have a lot more to do with continuity, legitimacy, and expediency.

In this paper, I elaborate on the importance of frames and EU scripts for the design of legal and administrative systems in RTAs throughout the world. Data comes from six RTAs: the North American Free Trade Agreement (NAFTA), Mercosur, ASEAN’s Free Trade Area (AFTA), the Andean Community (CAN), the Common Market for Eastern and Southern Africa (COMESA), and the European Free Trade Association (EFTA).

RTAs and the Rationalist Perspective

Without question, the primary objective of most RTAs is economic. The goal is the integration of national economies. This is to be accomplished by way of trade liberalization: by removing tariff and non-tariff barriers to the movement of a combination of goods, services, capital, and labor. Tariff barriers are primarily taxes levied on imports. Non-tariff barriers include quotas, subsidies, fiscal incentives, and cross-national differences in regulatory regimes. Some RTAs may have political and other sorts of aspirations. This is certainly the case for the EU, for instance. But all – including the EU – remain primarily economic projects.

RTAs vary, of course, in their specific objectives. Some are primarily concerned with the trade of goods. Others add some or all forms of services and capital. Only a few include labor. Some impose a common external tariff regime on the member states, others do not. The recent explosion of RTAs only added more variety. In this paper, we will focus on seven RTAs. They were selected based on their importance, different aspirations, and varied geographical location (the Americas, Africa, Europe, and Asia). Table 1 provides a snapshot of their current membership and basic objectives:

Table 1: The Objectives of RTAs

RTA (start date)	Members	Objectives
EU (1957)	Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden	Common market: goods, services, capital, and labor with common external tariffs
Mercosur (1991)	Argentina, Brazil, Paraguay, Uruguay	Common market: goods, services, capital, and labor with common external tariff
NAFTA (1993) & Side Agreements on Labor and the Environment	Canada, Mexico, United States	Free trade area: goods, selected services, all capital, no labor
ASEAN's AFTA (1992) & Associated Services and Investments Agreements	Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam	Free trade area: most goods, most services, and most capital
Andean Community (CAN) (1969)	Bolivia, Columbia, Ecuador, and Peru	Common market: goods, services, capital, and labor with common external tariff
COMESA (1994)	Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe	Common market: goods, services, capital, and labor with common external tariff
EFTA (1960)	Iceland, Liechtenstein, Norway, Switzerland	Free trade area: most goods (but for agriculture), and (after 2001) services, capital, and labor

There is now a great deal of comparative research on RTAs (Sbragia 2008). Some of it is not concerned with the process of *making* RTAs but, rather, their impact on internal trade, the global economy, key societal groups (e.g., labor, women, migrants), the environment, and sovereignty. But a good amount does focus on the crafting of RTAs. Here, two sets of closely related questions have received considerable attention. First, how can we explain the specific content of the major agreements of RTAs? Why, for instance, does NAFTA target many agricultural products? Why, in the section on services, does it not include oil exploration? Second, how do RTA officials – understood in this paper to be national representatives involved in the project of regional integration and, only in the rare situations when an RTA has supranational institutions, officials from those institutions – operate? What motivates them and what are they pursuing?

Most of the answers have come from scholars international political economists subscribing fully or partially to the rationalist model of human behavior, according to which human beings – driven mostly by self-interest – engage in lucid calculations and strategies that ensure the maximization of their utility.¹ In the case of RTAs, this means accounting for any given characteristic in the major agreements by viewing it as the outcome of extensive bargaining among purposeful national representatives who, in asymmetrical positions of power vis-à-vis one another, work assiduously to advance the interests of their domestic constituents (and, in so doing, their own, since they depend on their constituents for reelection).

Perhaps the best known proponent of this rationalist perspective is Andrew Moravcsik. In his view, EU national representatives always go to the bargaining table with a clear mandate: to advance the interests of the major economic groups of their countries. Throughout, they remain faithful to that mission. “On not a single major issue,” Moravcsik wrote in reference to all major agreements in the history of the EU, “did governments take a position openly opposed by a major peak industrial, financial, or agricultural interest group” (1998: 475-76). Accurate in their calculations, they then strike the best deals for their constituents. These agreements always lie on the “Pareto-frontier”, a zone where all decisions “improve welfare for all governments” (1998: 25) and subject no member state to unexpectedly harmful principles or policies.

Helen Milner, a second prominent scholar, made a similar argument about RTAs in general in an important edited volume on the topic (Mansfield and Milner 1997) “Why,” she asked, are RTAs “shaped differently” in “the amount of liberalization accorded each economic sector”? Her answer was unambiguous: “the character of regional agreements reflects the rational responses of governments to their *domestic* political situations . . . I argue that governments craft regional trade agreements in an attempt to balance consumer (and thus voter) interests and pressures from their private economic agents” (Milner 1997: 77). Most of her collaborators, such as Stephan Haggard, agreed: “a theory of regional cooperation . . . must address the more fundamental question of policy preferences and capabilities of the relevant actors . . . the content of these agreements is primarily determined by bargaining among prospective members” (Haggard 1997: 21, 31).

These basic rationalist arguments were followed by numerous empirical analyses of single RTAs. Mercosur received considerable attention. Kaltenthaler and Mora argued, for instance, that the member states have extracted “the maximum economic and political benefits from integration while forgoing as little sovereignty as possible” (Kaltenthaler and Mora 2002: 90, 92), while Sánchez stressed that “the rebuilding of regionalism in Central America reflects the governments’ preferences constrained domestically by their political economy . . . and externally by global pressures” (Sánchez 2004: 31). Perhaps the most studied case after the EU, however, was NAFTA. Cameron and Tomlin (2000), in probably the most important book on the making of the agreement, examined closely the strategies that each negotiating party used to advance their agendas. A key finding was that the misalignment in objectives between the Canadian and Mexican governments strengthened the bargaining position of the United States. Numerous studies followed. In an intriguing analysis, for instance, Ortiz Mena (2006) showed how Mexican representatives managed to extract concessions from their American counterparts in key energy

¹ Note that we are not dealing here with the literature on *why* countries choose to form an RTA (see, for example, Mansfield 1998 and Mattli 1999). Our focus is on what they agree on once they have decided to join. It is worth pointing out, however, that the literature on the motivations behind the founding of RTAs is also heavily shaped by rationalist accounts.

sectors by adopting clever (unyielding at first but more open-minded later) negotiation techniques.

These rationalist interpretations of RTAs have certainly not been without their critics. But the most important counterarguments have come from scholars of the EU: whether their predominantly institutionalist insights can be turned into coherent and comprehensive replies to rationalist accounts of integration remains unclear, since they hinge on the EU's supranational character (while most RTAs are intergovernmental). These have included arguments about path dependency (Pierson 1996; Ackrill and Kay 2006; Sverdrup 2002; Holzinger and Knill 2002), the ability of organizational entities within the EU to accrue power over time at the expense of the member states (Heisenberg and Richmond 2002: 204; Alter 1998: 131), and reinforcing loops between EU institutions, and between those institutions and their environments (Sandholtz and Stone Sweet 1998; Bulmer 1998: 373). Constructivist (Mayer 1998; Laursen 2003), network-focused (Dreiling 2001), state centric (Malamud 2005), and other sorts of arguments have certainly been put forth for the other RTAs. But these have tended to be few and concerned only with single RTAs. A sustained alternative response to the rationalist perspective on RTAs, then, is still missing.

In the following sections, I put forth a sociological approach to RTAs. The focus is on the practical pursuit of grand objectives. The explanatory variables are frames and scripts, rather than self-interest and calculation. My objective is to craft a basic (i.e., widely applicable, empirically-driven, and related to fundamental aspects of integration) account of integration that departs, in spirit, from those rationalist interpretations that have so far dominated the literature.

Regional Integration: Misalignment, Frames, and Scripts

RTAs come with few instructions. Their objective is clear: trade liberalization among the member states (for their entire economies or parts of them). But a guidebook for how that objective can be pursued in practice does not exist. To use the language of world society scholars (Meyer et al. 1997), the 'worldwide model' for regional trade liberalization – available at the global level and fast diffusing across geographies – is incomplete. One challenge especially is left in the open: how to address disparate worldviews among market participants and, once a solution is found, how to deal with conflict in the new order.

The challenge of disparate worldviews is almost overwhelming. Unlike most markets in history, RTAs propose that countries merge sections or the entirety of their economies very rapidly. The effort entails bringing together populations with different perspectives on reality into a single marketplace. Those perspectives include definitional and normative notions about objects, actors, and activities in the world. Definitional notions have to do with what things 'are' in the marketplace and beyond: what is beer? What is a computer keyboard? What does pollution mean? Normative notions have to do with what things 'should be like' in the marketplace and beyond: are inequities in pay between men and women permissible? How should animals in slaughterhouses be treated? How should companies report their income? Misalignment in perspectives is problematic for free trade in three different ways. First, consumers and producers from one country hesitate to buy anything from another country if it does not conform to their expectations. Second, domestic laws often formally embody domestic cultural frameworks and make the importing of foreign products and services problematic. Third, to the extent that domestic producers have to comply with domestic law, misalignment generates different production costs. This, in turn, distorts trade flows.

RTA officials have been well aware of the problem of disparate worldviews. To resolve it, they have turned to regional law. A quick look at RTAs throughout the world shows officials veering towards one of two types of solutions. The first is the erection of very complex legal systems seeking to standardize in definitional and normative terms vast areas of economic life and beyond. We may call this approach interventionist. The second approach is far more minimalist. It emphasizes the principle of mutual recognition, according to which the member states are asked to accept each other's standards. The resulting regional legal system is far 'thinner': with far less being subject to standardization, the number of laws is much smaller and their content far less ambitious. Not all RTA officials have clearly chosen between these two models, of course. Some hybrid approaches exist.

These differences in law are of great importance. Even if RTA law is partly implemented (as is often the case), it subjects countries to enormously different pressures. The interventionist model pushes market participants towards a conceptual, formal harmonization of their worldviews. The minimalist approach is certainly less intrusive. But it is imposing nonetheless: citizens and producers in any given member state must accept multiple worldviews – more specifically, the products that embody them – as valid. Their own beliefs, values, and ways of doing things are challenged by the coexistence of alternatives. Minimalism, in other words, brings about the challenge of pluralism.

The problem of adjudication follows the erection of standardizing legal systems. Disputes over compliance with law always arise. Thus, we see that RTA officials have designed resolution mechanisms to deal with such disputes. Once again, they have typically chosen between two very different options. The first is the establishment of courts staffed with permanent judges and support personnel housed in dedicated physical spaces (offices with libraries, archives, etc.). These courts represent a commitment to sorting out regularly over time the meaning of regional law – and, therefore, the expectation that there will be frequent disputes over standardization brought to these courts. The second option is reliance on *ad hoc* panels asked to resolve disputes as they arise. The composition of these panels changes with each case. Support in terms of human resources and physical infrastructure is minimal. A choice to rely on such panels indicates a general belief that recourse to official adjudication will be infrequent – either because of the low likelihood that disputes will arise or, perhaps more often, because other less formal mechanisms are expected to resolve problems.

Though less immediately obvious than is the case with law, these choices in the judicial realm are also of profound consequence. Permanent courts, by way of institutionalizing conflict resolution and initiating a *corpus* of rulings, have the potential to broaden the presence of regional law in the public sphere. They 'amplify' or add a further layer to the legal system. Along with other permanent bodies, they also help RTAs become concrete, tangible entities in society. *Ad hoc* panels achieve the opposite effect. With their more modest profile, they add little to regional law or the presence of RTAs in the public eye.

Social scientists have so far been surprisingly silent about the incomplete nature of the integration model available in world society, and the legal and judicial differences among RTAs. Yet, given their consequences in their respective member states, those differences deserve explanation. From a policy perspective, accounting for them will also highlight the existence of multiple paths to integration.

One could attempt to explain differences among RTAs in a rationalist fashion. But such an approach is unlikely to bear much fruit. RTAs all aim to liberalize trade. From the point of view of efficiency, one would expect that there be a single formula for the basic characteristics of

regional law and the required dispute resolution mechanisms. The fact that RTA officials have opted for drastically different formulas suggests that what is efficient in one place is not efficient in another. Immediately, we would find ourselves exploring the question of context: what factors make one approach efficient in some RTAs but not in others? The answers would most likely have little to do with rationality. It is also the case that the legal systems and judicial mechanisms of RTAs have often functioned and evolved in ways not predicted by their designers (Alter 2001; Duina and Buxbaum 2008; Pierson 1996). Problems of compliance have in turn partly undermined their impact (Falkner et al. 2005; Malamud 2005). Such developments would undermine any rationalist account for the *raison d'être* of those systems and mechanisms.

I thus propose an altogether different explanation. Our attention should turn to frames and scripts. In line with sociological and social-psychological research, by *frames* I mean collectively shared and accepted ways of interpreting situations and problems in life. Frames help individuals simplify and make sense of the world (Benford and Snow 2000: 614). When it comes to RTA officials in particular, frames determine how those officials approach the problem of market building and misalignment in worldviews. How do they understand and make sense of that problem? What sorts of solutions are they likely to envisage? Put differently, what do they know and feel comfortable with? What is instead outside their worldviews?

By *scripts*, in turn, I mean socially available, specific instructions or codes for how to behave in certain situations or respond to particular problems as they arise. Scripts are less about interpreting the world and more about responding to it. They make navigating through life easier by providing already formulated answers to challenges and by endowing adherents with a certain degree of legitimacy (Scott and Meyer 1994; Jepperson 1991). Thus, once problems are identified – through frames – and particular types of solutions entertained as acceptable, scripts provide attractive, detailed answers for actors. Recent work in economic sociology in particular has shown how given answers to economic problems ‘diffuse’ across regions of the world (Simmons, Dobbin, and Garrett 2008).

Let us now consider the question of law. What determines whether RTA officials opt for interventionism or minimalism? In many cases, the answer has to do, first and foremost, with the legal traditions that are in place in the member states. In any given RTA, officials typically come from countries sharing one of two types of legal environments: civil law or common law. Those in the former (primarily countries in continental Europe and their former colonies in Latin America, Africa, and Asia) are accustomed to codification and regulation as the appropriate responses to the challenges inherent to social life. State intervention through law in this sense is a positive matter: a way of enabling things and not only restraining and punishing. Those RTA officials operating in common law traditions (as found in the United Kingdom and most of its former colonies throughout the world) are instead accustomed to the state laying down basic regulatory principles, allowing social life to unfold, and then dealing with conflicts as they arise. *A priori* state intervention is looked upon with suspicion at best.

These legal environments provide the ‘frames’ through which RTA officials view the problem of misalignment in worldviews. When coming from civil law traditions, officials are inclined to respond by thinking of it as a legal challenge that calls for a legal response. They will talk about the need for ‘harmonization’ of disparate regulatory regimes. And they will accordingly engage in the production of extensive definitional and normative legal principles at the regional level. The choice will not be a matter of much reflection. It will be, instead, an almost instinctive reaction. In foundational agreements and treaties, officials will simply

recognize the need for legal intervention. When probed, they will admit that alternative choices were hardly entertained.

In RTAs where common law is the legislative tradition of the member states, officials understand the problem of worldview misalignment in quite different terms. In their eyes, the problem before them does not require harmonization: differences in national legal traditions can coexist within a single marketplace. The task is therefore to ask market participants to embrace the principle of mutual recognition. They will accordingly craft a non-intrusive legal system at the regional level. Foundational treaties will not mention the problem of harmonization. And when asked about their choices, these officials will recognize that alternative choices were simply not considered.

But specific ‘scripts’ also influence the work of RTA officials. Once the problem of misalignment is understood, by way of frames, as requiring an interventionist or minimalist response, officials ‘scout’ the world for specific, detailed answers. These are the treaties and specific laws already in place in other, usually successful, RTAs – in particular, the EU itself. Borrowing and transplanting those scripts is a matter of expediency but also a quick way of acquiring legitimacy – much like what happens in organizational fields more generally with the practice of mimicry and the resulting high degree of isomorphism (DiMaggio and Powell 1983). RTA officials will therefore look at what their counterparts in other RTAs have crafted. These ‘exchanges’ will be made all the easier by modern technology as well as formal and informal channels of communication between RTAs.

Similar dynamics affect the choice of judicial mechanisms. Why do some RTAs exhibit highly institutionalized courts and others RTAs ephemeral *ad hoc* panels? Officials usually tackle judicial matters after the legal ones. As they do, they continue to operate with the same frames in mind. They will therefore opt for a judicial solution that complements the legal one. Permanent courts with professional staff ready to process large number of cases can be expected in interventionist RTAs rich with legal principles intended to harmonize national differences. *Ad hoc* panels are instead the appropriate answer in those RTAs where officials, in line with national traditions, have chosen not to engage in extensive codification and normative regulation of the world – in RTAs, that is, where conflict over law is expected to be relatively less frequent.

But, again, scripts also matter here as well. Officials pay close attention to other RTAs, and the EU especially, for inspiration and outright borrowing. They model their courts or panels after the more successful examples. This again is a matter of convenience as well as legitimacy. Transplanting a system that has proven to work elsewhere is easier than devising an entirely new one. It is also rather difficult to criticize.

Now, the world is a complex place. Any given explanatory model thus requires refinement and flexibility. The framework outlined here is no exception. The first, and quite important, caveat is that there of course exist RTAs where the founding member states have conflicting legal traditions. This is the case for NAFTA, for example, where only Mexico is a civil law country, as well as EFTA, whose seven founding member states included the United Kingdom but also Portugal and other civil law countries. In those RTAs, *power differentials* determine the final choice of legal system. Whichever countries enjoy more power will project their national traditions at the regional level. There are, nonetheless, RTAs where there is no clear power differential among member states with conflicting traditions. What happens in such cases? What tradition is likely to prevail? Here, we will see RTAs exhibiting a blend of approaches – with heavy standardization present in some policy areas and not others. Such a blended legal system can be supported by either permanent courts or *ad hoc* panels.

We should then acknowledge that late entrants can bring different legal traditions. This has been the experience of the EU, for instance, with the arrival of the UK and Ireland. We are bound to observe the new countries exerting some pressure to shape things in their direction. Depending on their level of influence, this may impact the evolution of regional law and the work of courts and panels.

The third caveat concerns exclusivity. Frames and scripts are not the only variables shaping influencing national representatives as they design their RTAs. Other factors – such as member states’ concerns with preserving sovereignty, for instance, and even a good amount of calculation and strategic thinking – are also at work. The point here is one of relative importance: frames and scripts are key variables that drive outcomes in many, very important cases. They need to be a central part of any account of regional integration.

Finally, we should clarify something about objectives. A tempting explanation for differences in legal and judicial approaches centers on the ambitiousness of the RTA in question: does it extend beyond goods, for instance, to include services, capital, and labor? Within any given realm – goods, for instance – does it seek to liberalize the flow of most things or just some? It seems reasonable to think that heavier legal systems and adjudication mechanisms will be present in more ambitious RTAs. This idea is actually flawed. Differences in approaches are very much visible when the comparison is direct and fair: when, in other words, we consider the trade of goods (which is an objective of all RTAs) and, within that, of the same sorts of goods, or any other sector of the economy. A focus on objectives will not help us understand why this is the case.

Evidence

What sort of evidence would support the claim that frames and scripts (EU ones especially) matter for the legal and judicial design of RTAs? First, in terms of frames, we would expect to see a systematic *correspondence* between the dominating type of national legal traditions (civil law versus common law) in a given group of countries and the type of legal and judicial design in the resulting RTAs (interventions with permanent courts versus minimalist with *ad hoc* panels). Second, in terms of scripts, we would expect to see significant *instances* of cross-RTA *borrowing*, both in terms of law and judicial mechanisms, with the EU playing a special role as a model to be emulated. Third, with regards to both frames and scripts, we would expect RTA officials to reveal something – in *statements* made to the press, in treaties, and other venues – about the factors influencing their choices of law and adjudication mechanisms as well as their own efforts (especially in the case of the EU) to export their perspectives to other RTAs.

In this section, I present evidence on all three fronts. Attention turns to NAFTA, CAN, and Mercosur in the Americas, the EU and EFTA in Europe, ASEAN in Asia, and COMESA in Africa. Future studies can consider additional RTAs and examples.

Correspondence

There is indeed a clear and striking correspondence between dominant national legal traditions *and* the legal and judicial design of RTAs. Table 2 shows this for the seven selected RTAs:

Table 2: Dominant National Traditions and the Design of RTAs

		<i>RTA Law and Dispute Resolution Mechanisms</i>		
		Minimalist	Mixed	Interventionist
<i>Dominant National Traditions</i>	Common Law Dominance	NAFTA (<i>ad hoc</i> panels) EFTA (<i>ad hoc</i> panels)		
	Mixed Traditions		ASEAN (<i>ad hoc</i> panels) COMESA (Court of Justice)	
	Civil Law Dominance			EU (Court of Justice) Mercosur (Permanent Review Court) CAN (Court of Justice)

Consider the three cases where all of the founding members shared a civil law tradition: the EU, Mercosur, and CAN. The EU alone has over time accepted new member states with common law traditions: the United Kingdom and Ireland. But these countries joined late (1973), when EU law was well established and in full development, and despite attempts by the United Kingdom to ‘water down’ the legal structure of the EU they have had little influence on the overall character of the EU legal system. Since their inception, Mercosur and CAN have only included civil law countries.

Now, in all three cases RTA officials have engaged in massive amounts of legal standardization. Anecdotes about the EU’s zealous drive to legislate abound, of course. Though often bordering on the amusing, they reflect the far more serious extent to which EU officials have sought to harmonize the worldview of market participants. Despite their younger age, much the same can be said of Mercosur (launched in 1991) and CAN (launched in 1969). Indeed, all three have created relevant bodies charged with this task (the Commission in the EU, the *Grupo Mercado Común* and the *Consejo del Mercado Común* in Mercosur, and the *Comisión* in CAN).

We can measure legislative production (and its harmonizing content) in a number of ways. One of the best is simply to look at the number of laws. All three RTAs have foundational treaties which foresee the extensive use of secondary legislation for the purpose of market building. There are tens of thousands of pages of directives and regulations in the EU. In the case of Mercosur, there exist over 500 decisions and over 1,000 resolutions. In CAN, we see around 700 decisions and 1,150 resolutions. The vast majority of these provide standardizing definitions and normative judgments for countless objects, activities, and actors related to a huge array of goods, services, investments, and labor issues.

For a more precise assessment, we can estimate how many definitional (i.e., spelling out the essential characteristics of an object, activity, or agent) and normative (i.e., stating the desirability of something) passages exist in these legal systems. This can be done by selecting key policy areas and, within that, a random and statistically meaningful number of laws for

coding. We need not do this for all three RTAs. A focus on the EU, the most important, and either Mercosur or CAN will suffice to get a sense of what has been happening. Table 3 reports the findings for the EU (between 1959 and 2000) and Mercosur (between 1991 and 2000)² in the areas of economics, the environment, and public health.³

Table 3: Standardizing Passages in EU and Mercosur Law in Select Policy Areas

		Economics	Environment	Public Health	Total
EU	# with definitional content	2,137	283	84	2,504
	# with normative content	13,217	687	561	14,465
Mercosur	# with definitional content	6,638	56	1,550	8,244
	# with normative content	11,813	140	8,739	20,746

Source: Duina (2006)

The numbers speak for themselves. RTA officials in both the EU and Mercosur have been very busy answering the challenges presented by integration. A closer look at these passages would reveal countless aspects of reality being targeted.

As we would expect, we then see that this intensive legal production has been accompanied by the establishment of permanent courts in all three RTAs. CAN set up its Court of Justice from 1979 to 1984. The EU did the same much earlier, in the 1950s. Mercosur officials did not immediately create a permanent institution. But in 2002 with the Olivos Protocol they established a permanent court – the *Tribunal Permanente de Revisión* – to handle disputes.

The situation in NAFTA is quite different. The United States and Canada both have federal common law systems. All states (in the US) and provinces (in Canada) with the exception of Louisiana and Quebec have common law systems. Only Mexico, the poorest and weakest member state at the bargaining table, has a civil law tradition – though, interestingly, at the federal level it also exhibits elements of common law as well. Mexico, we should note as well,

² The size of the sample for each policy area was based on a margin of error of $\pm 10\%$, a confidence level of 95%, and a p value of .5. I controlled for time (decades for the EU, years for Mercosur), given that RTA officials tend to produce different sorts of laws as integration progresses.

³ The EU classifies its laws by policy area. I used that classification to identify the relevant laws. Mercosur officials do not classify laws in the same way. I therefore assigned to them a policy area depending on their content. Laws related to economic life were those concerned with the production and exchange of goods, labor, capital, and services. For the environment, they were those related to the preservation of natural habitats, animal life, eco-systems, and natural resources. For public health, they were laws related to the wellbeing of human populations.

joined Canada and the United States late: NAFTA in fact builds on CUSFTA, a free trade agreement between the United States and Canada signed in 1988.

What choices did NAFTA officials make regarding law? They did not envision the production of an extensive system of secondary law. Instead, the only legal texts are the foundational agreement itself and two side agreements – the NAALC on labor and the NAAEC on the environment. If we code the content of these agreements for passages that have definition and normative content, we quickly realize the absence of any serious efforts to standardize reality. There are only 282 definitional passages and 628 normative ones (Duina 2006). Most cluster around a few policy areas – such as the national treatment of and market access for goods (Chapter 3), agriculture (Chapter 7), and government procurements (Chapter 10). These numbers obviously represent a tiny fraction of those we saw in the EU and Mercosur in only three policy areas.

In line with our expectations, NAFTA relies solely on *ad hoc* dispute resolution panels that do little to strengthen, from an institutional perspective, the legal system or NAFTA as a whole. The panels' composition and functions are spelled out in different chapters of the treaty (chapter 11 for investments, 14 for financial services, 19 for antidumping and countervailing duty matters, and 20 for most trade issues). For labor-related matters, the NAALC has its own provisions, while the NAAEC does the same for the environment. All are similar, however, in being temporary and in issuing rulings that do not set precedents.

EFTA resembles NAFTA. It has no secondary system of law, and its founding 1960 convention is very brief. A few annexes to the original convention added very little by way of harmonization. Revisions to the convention in 2001 and the adoption of several other, short, annexes changed little in terms of the basic approach to regulation. Simply put, the main preoccupation of the original member states was with tariff removal. Wide use is made of the principle of mutual recognition. As to adjudication, EFTA relies on *ad hoc* arbitration panels. There is an EFTA court but, crucially for our analysis, it has the responsibility of dealing with claims related to the incorporation of EU law in the three member states (Norway, Iceland, and Liechtenstein) which, starting in 1993, decided to adopt most EU law as it is produced (for purposes of easing trade with the EU).

What, then, are the national legal traditions of the EFTA member states? Membership has varied greatly over the years. For our purposes, we should consider the founding members. Here we find a dominant common law country, the United Kingdom, accompanied by a series of smaller and politically uncoordinated countries with primarily civil law traditions, namely Denmark, Norway, Sweden, Austria, Switzerland, and Portugal. For all intents and purposes, EFTA was the brainchild of the United Kingdom, as it moved to take an explicit stance against the interventionist model of integration found in the EU model. The United Kingdom finally left EFTA in 1973, but by then the legal and judicial architecture had been set.

ASEAN and COMESA provide us with yet a third picture of integration. Both are RTAs with a great variety of national legal traditions. Of the five founding countries of ASEAN, two – Malaysia and Singapore – have common law systems. But the other three – Thailand, the Philippines, and Indonesia – have civil law traditions. In COMESA, Egypt, Ethiopia, and Congo (among others) have civil law traditions. But Kenya, Zambia, and Zimbabwe have (among all others) common law traditions. The strong presence of religious law in Libya and Sudan adds a further dimension of difference.

What legal frameworks can we observe in ASEAN and COMESA? We can see mixed systems characterized by a combination of mutual recognition and standardization. In ASEAN,

for example, the member states issued in 1998 the *Framework Agreement on Mutual Recognition Arrangements*. This was deployed in a variety of industries, ranging from electronics to cosmetics. At the same time, by August 2003, the same member states had also developed very detailed harmonized standards for 20 priority products groups, including items such as motors, engines, condoms, and medical rubber gloves. A large number of procedural and safety standards were also developed for the medical and drug industries. The adoption of ASEAN's *Policy Guideline on Standard and Conformance* in 2005 provided further impetus for harmonization. Without question, then, ASEAN's legal system displays a rather mixed response to the challenges of standardization.

COMESA officials followed a similar path. The foundational treaty foresees the production of harmonizing secondary law, but only in certain policy areas, such as economic and social development. In other areas, such as pharmaceuticals and certain aspects of quality standards for all kinds of products, member states are asked to respect the principle of mutual recognition. In practice, this has meant extensive standardization in certain policy areas and not others. In 2004, for instance, the member states agreed to a wide range of standardizing principles in the area of competition (anti-competitive behaviors, mergers and acquisitions, and consumer protection). But in other areas, such as energy for example, mutual acceptance of standards and practices is expected. As is the case for ASEAN, then, we observe a rather mixed legal approach in COMESA.

As to judicial arbitration, officials in ASEAN have chosen to rely on *ad hoc* dispute resolution mechanisms while their counterparts in COMESA on a permanent court of justice established in 1994. Given the mixed legal system of each RTA, either system of adjudication would have been in line with the framework for integration set out in this paper.

Borrowing

On numerous and important occasions, RTA officials have 'borrowed' extensively from each other. The faithful, sometimes *verbatim*, adoption of texts and directions for the functioning of RTAs suggests that expediency and a desire to 'look' legitimate by resembling another, successful, RTA – rather than a careful, exploration of what might serve an RTA best – have driven officials in their efforts to liberalize trade. I will focus here on some of the most telling instances: how officials from COMESA, CAN, and Mercosur copied directly from the EU to set up their RTAs' legal and judicial systems.

Let us turn to COMESA first. There, despite operating in dramatically different conditions, officials have *directly* copied the EU when it comes to both law and adjudication. Article 10 of the COMESA founding treaty establishes three types of secondary laws. Exactly as it happens in the EU, these are 'regulations', 'directives', and 'decisions' (Article 249 of the Treaty of the European Union [TEU]). The characteristics of each are, in turn, *identical* to those of the EU. More specifically, regulations are binding in their entirety on all member states, effective on the date of their publication in the *Official Gazette of the Common Market* (in the EU, the equivalent is the *Official Journal of the EU*). Directives are binding as to their results, but not their means. The member states can choose how to implement them. And decisions are binding upon the entities being addressed. These are very specific types of legal instruments. COMESA officials could have certainly opted for different legal instruments. Instead, they turned without hesitation to the EU.

The direct borrowing continued with the court of justice. The jurisdiction and function of the COMESA court are laid out in article 23-30 of the founding treaty. In most respects, they are the same as for the European Court of Justice (ECJ). Both courts have the overall function of ensuring adherence to law in the interpretation and application of the founding treaties (COMESA Articles 23 and TEU Article 220). To that end, both courts have the power to hear references *from member states* against one another or the regulatory/executive institutions of each RTA in case of suspected legal infringements (COMESA Article 24 and TEU articles 227 and 230). Both courts can hear a *reference from the executive institutions* of their RTA against a member state believed not to be observing its obligations as concerns the treaty or secondary law (COMESA Article 25 and TEU Article 226). Both courts also have the power to hear a reference *from a person* who is a resident of a member state concerning the legality of a national law (in light of RTA law) or an RTA law (COMESA Article 26 and TEU Article 230). And the decisions of both courts are superior to those of national courts.⁴

Officials from CAN have followed a similar path. They have devised a secondary legal system akin to that of the EU. Like EU regulations, there are resolutions “which will be directly applicable in Member Countries as of the date they are published in the Official Gazette of the Agreement, unless they indicate a later date.” And as is the case with EU directives, in CAN there are decisions, which (when stipulated) require incorporation into national law (Article 3 of the *Treaty Creating the Court of Justice of the Cartagena Agreement* [TCJ]).

CAN officials then set up a court of justice that, in terms of jurisdiction, is almost a carbon copy of the ECJ. Article 17 of the TCJ gives the court the power to hear grievances from the member states about community law. Article 23 gives the court the power to hear claims from the General Secretariat about non-compliance by a member state. Article 24 grants the court the power to hear grievances from a member state about another member state’s failure to comply with community law. Article 25 recognizes the court’s power to hear claims from individual citizens of the member state as they relate to community law. And Article 35 states that national courts must adopt the court’s interpretations of community law in their sentencing. This is not an inactive court, we might add. It is the third most active international court, after the ECJ and the European Court of Human Rights. It is also a very effective court, at least in the realm of intellectual property, with over 1,200 consequential rulings (Helfer, Alter, and Guertzovich 2008: 1-2).

As it happened, Mercosur officials did not transpose the EU’s judicial model in their RTA. For instance, individuals cannot bring their claims to Mercosur’s tribunal. Nor did they lay out a system of secondary laws that faithfully resembles that of the EU. For example, according to Article 40 of the Treaty of Ouro Preto, both decisions and resolutions require incorporation in the legal systems of the member states. But emulation has nonetheless happened. It has taken a more specific sort of form: the *verbatim* copying of sections, or the entire text, of EU directives and regulations.

An illustrative example is Mercosur Resolution 54/92 of 1992, which lays out in great detail the safety requirements of toys. The resolution covers every possible aspect related to safety, including physical, chemical, and electrical risks. It lists exceptions (such as Christmas decorations). In every regard – specific language and words, number and order of articles and sub-articles in the relevant annex, section titles, quantitative restrictions and guidelines (for instance, about lead or mercury), requirements for warning labels, and so on – it is an *exact*

⁴ This is explicitly stated in COMESA Article 29. In the case of the EU, this has been established not by treaty but by way of several court cases (the most important being *Costa vs. ENEL*, 1964).

replica of EU Directive 88/378 of 1988. Of course, borrowing is often done best when done discreetly. Hence, the resolution makes no reference whatsoever to the EU directive.

Statements

Have RTA officials revealed, in their statements, something about the frames and scripts guiding them in their choices of law and adjudication mechanisms? If active in influencing officials in other RTAs, have they openly described their initiatives?

Let us consider frames first. Canadian and American officials certainly made it clear from the outset that they would approach the problem of misalignment in worldviews in NAFTA with only one possible solution in mind: mutual recognition (Fried 1994). They were open, vocal, and matter-of-fact about the impossibility of following the European example (Baer 1991: 148). Some politicians and activists did push for uniformity in health, safety, and environmental regulations. But “officials in all three countries” working on drafts of the texts were “insist[ent] on the limited nature of NAFTA” (Baer 1991: 148). Standardization was simply *not an option*. When asked directly about their mindset in an interview with the author, an attorney working in the United State Trade Representative Office during the NAFTA negotiations answered as follows:

It would have been unrealistic for us to achieve anything like the EU legal structure in North America . . . we did not think about it much because it was not a possibility in North America . . . it wasn't in the cards; it wasn't even a choice . . . the non-interventionist nature of the NAFTA text made it a lot easier for the US government to proceed – it implied that the US did not have to make too many legal changes . . . that was a positive thing: that NAFTA did not require much changing of US law.⁵

This limited perspective, we should note, did not escape the attention of journalists and academics alike. As Glenn, a legal scholar of trade law, observed, most of North America “adheres to the common law tradition . . . there would be no need, because of North American circumstances, for a central policy of uniformization or harmonization of laws . . . the design principle of NAFTA would really be that of subsidiarity.” In NAFTA, Glenn continued, it was therefore “necessary” for officials to ensure that the law would allow for a “dynamic between the general and the particular” (Glenn 2001: 1791-1792).

We can contrast the assertions of the US attorney with the words of Manuel Olarreaga⁶ – a central player in the evolution of law in Mercosur – during an interview with the author. When asked why he thought an interventionist approach was needed, he replied with slight annoyance at having to address such an obvious matter:

It was necessary for us to have laws at the Mercosur level. It was not a question. If you have a single economic market, you need to introduce *uniformity*, to *harmonize*, you must have laws to coordinate and regulate the action of participants . . .

⁵ Telephone interview with the author, February 2004. The attorney requested that his name not be used.

⁶ Director of the *Dipartimento de Normativa* (Law Department), Secretaría del Mercosur. The interview took place in Montevideo, Uruguay, in July 2003.

otherwise there is chaos, and the will of the stronger prevails. It would be absurd not to have laws for us, simply absurd (*italics added*).

The passage could not capture better the mindset of the civil law legislator, whose distinctive preoccupation is to bring order to society. This is a special kind of order, of course, one that is necessitated by the conflicts that arise when thick national legal traditions are brought together in a single geographic space. Olarreaga's perspective was echoed by María Juana Rivera, an important player in shaping Mercosur laws in a large number of industrial and agricultural sectors, during an interview with the author.⁷ In her view, integration has highlighted differences in quality, safety, health, environmental, and other standards across the four member states, with Argentina typically sporting the most stringent approaches. "Those differences have posed problems, they have acted as obstacles to commerce among the member states," she noted, "and we must continue to work towards their elimination."

We can find no clearer evidence of the civil law mindset of Mercosur official, however, than in the very opening of the founding Treaty of Asunción. In Article 1, in a passage that we could not possibly find in the NAFTA text, we read that "the Member States commit themselves to the harmonization of their laws in the pertinent areas, so as to strengthen the process of integration."

We find very similar language in the EU and CAN founding documents. How did EU officials understand the problem before them? Article 10 of the original version of the Treaty of the European Economic Community (TEEC) of 1957 gives legislative powers to the Commission on the following bases: it can propose laws whenever "it finds that a *difference* between the provisions laid down by law, regulation, or administrative action in the Member States is distorting the conditions of competition in the common markets and that the resultant distortion needs to be *eliminated*" (Article 101 of the TEEC, *italics added*). Differences, then, between national legal systems are problematic and must be addressed through "the approximation of the laws of Member States to the extent required for the proper functioning of the common market" (Article 3 of the TEEC).

The term 'harmonization' appears, in turn, throughout CAN's Cartagena Agreement. In a document that is approximately 36 pages, we find 17 direct references to the term or its derivative 'harmonizing'. An entire chapter is titled "Harmonization of economic policies". A number of passages resemble Article 54, where we read that "the Member Countries shall coordinate their development plans in specific sectors and shall gradually harmonize their economic and social policies, with a view to achieving the integrated development of the area through planned actions." Indeed, CAN's parliament is established with a clear, primary mission: "to promote the harmonization of Member Country legislation" Article 42(f). There is no doubt that CAN officials brought their civil law frames of mind with them as they set out to build a single market across their countries.

What about scripts? RTA officials have been understandably hesitant to acknowledge borrowing from other RTAs. But on occasion they have revealed their reliance on readily available instructions and models. EU officials, in turn, have openly discussed their efforts to encourage adoption of their standards abroad. We consider here a few representative examples.

⁷ National Coordinator for Argentina for Mercosur's Subgrupo de Trabajo N°3 (Technical Regulation and Evaluation of Conformity). Mercosur's various subgroups aid the Grupo Mercado Común in drafting resolutions. The interview took place in Buenos Aires, Argentina, August 2003.

Recall COMESA's court of justice. As we saw, despite the enormous differences between the African and the European settings, it was made nearly identical in jurisdictional terms to the ECJ. Did COMESA officials ever acknowledge their extensive reliance on the EU model? Not in 1994, when the basic design of the court was set. But they did so in 1997, when COMESA Acting Secretary Erastus Mwencha informed the public that the member states' ministers of legal affairs and attorneys would be meeting later in the week to finally decide on the day-to-day operations of the court. As he stressed, the delegates would not be starting from scratch. A ministerial "task force" (led by the Chairman of the COMESA Council of Ministers of Justice and several national attorney generals) had already visited the EU to 'study' how its court operated (*Africa News* 1997). The president and the members of the ECJ actually hosted the task force (EU Press Release No. 67/97).⁸ Their report, Mwencha added, would be examined closely prior to deliberations later in the week. It is of course important to see exchanges such as these as part of a broader relationship between the EU and COMESA, where the former has regularly contributed money and technical expertise to the latter for what it calls 'institutional strengthening'.⁹

Officials in CAN have also openly recognized their reliance on the EU for guidelines and instructions. In 2004, for instance, Andean Community Secretary General Allan Wagner Tizón emphasized in a speech given at the opening of a 'workshop' on integration sponsored by the European Commission his hope that CAN "can continue to count on very important European collaboration in the deepening of our integration movement and the perfecting of our institutions."¹⁰ Indeed, following the adoption of the 1993 Regional Framework Agreement for Cooperation, they described on many occasions the EU's willingness to provide them with "technical assistance to the Andean regional construction process" (BBC Summary of World Broadcasts 1997). EU officials themselves have been forthcoming about their efforts to shape things in CAN. The EU is the leading donor in the region (pouring in almost half a trillion euros during 2002-2006 alone). Some of those funds have gone directly into influencing legislation. For instance, as the EU Commission's External Affairs Internet site reports, in 2004 €4 million of aid to CAN was approved for the "the setting up of a common agricultural policy, harmonisation of legislation and of statistical information instruments, and the implementation of convergent standards."¹¹

Mercosur officials have in turn quite openly welcomed the EU's input into standardization. In 2004, like their CAN counterparts, they accepted €4 million as part of the EU program on Harmonisation of Technical Standards, Technical Regulations and Conformity Assessment Procedures. In 2003, they accepted €2 million to help them develop appropriate statistical tools. EU officials themselves have been open about their policy to pressure Mercosur officials to copy EU law. Consider this passage from a recent report by the EU Commission's Latin America Directorate (Mercosur Desk) strategy for increasing EU-Mercosur trade during the period 2002-2006:

⁸ Available at <http://curia.europa.eu/en/actu/communiqués/cp97/cp9767en.htm> (accessed April 9, 2008).

⁹ See, for instance, the EU Commission's report annual report on external assistance for 2004 (Commission of the European Communities 2005: 22-23)

¹⁰ For the text of the speech, see CAN's Internet site (accessed on April 9, 2008): <http://www.comunidadandina.org/ingles/press/speeches/wagner7-6-05.htm>

¹¹ See (accessed on April 9, 2008): http://ec.europa.eu/external_relations/la/news/ip04_63.htm

In the area of competition the EU is *stimulating Mercosur to adopt legislation on competition which is basically inspired by the EU competition policy*. Mercosur will create the Competition Authority and in our negotiation for the Association Agreement a co-operation will be established between the two authorities. A [sic] technical assistance could be provided to Mercosur (Commission of the European Communities 2002: 24, emphasis added).

And Mercosur officials have also admitted to taking advantage of far simpler tools to learn and borrow from the EU as well as elsewhere. Thus, when asked by the author about Mercosur legal passages that fully replicate EU passages, María Juana Rivera recognized her and her colleagues' strong interest in what is available in world society. As she put it, "yes, we look around, especially with the Internet, and study different regulatory approaches in different parts of the world; we then borrow from the EU but also other international organizations, adapt them to our own circumstances, and then use them." This approach may be seen by some as the most efficient way of crafting the best legislation to build a common market. When it translates into direct replication, however, it more likely signals preference for expediency over what may be optimal for the RTA in question.

Reflections

Regional integration presents formidable challenges. No guidebook exists for how those should be met. This is especially the case for the problem of misalignment in the worldviews of market participants. RTA officials have accordingly responded in dramatically different ways. Some have engaged in extensive legal standardization and have established permanent courts for judicial arbitration. Others have adopted a far more minimalist approach, both in terms of law and adjudication mechanisms. A third group shows a more mixed approach. These differences have real and far reaching consequences for life in those RTAs.

I have offered a sociological account for the observable differences in the legal and judicial architectures of RTAs. I paid special attention to frames – specifically, the existing legal traditions in the member states of an RTA, which shape and limit officials' views of what should be done to address disparate worldviews – and the borrowing of scripts from others RTAs, especially the EU.

This paper, then, is a rebuttal to rationalist interpretations of RTAs emphasizing calculation, bargaining, and the clairvoyant pursuit of self-interest. RTAs offer continuity with what is in place in a specific region and remind us of the powerful human tendency to mimic what others are doing. RTAs are like trees with deep roots in the ground. And they are social products, designed by people who receive their inspiration from, and are influenced by, what surrounds them.

Any non-rationalist interpretation of integration efforts is bound to raise questions about their *raison d'être*. If they are not instrumental in maximizing their creators' interests, why should they exist? Institutional and neofunctionalist arguments about the EU and other international organizations have already tackled this question. Their insights apply to most RTAs. First, we must question the presumed presence of coherent and well articulated national interests. What if there are multiple, conflicting, and unclear interests in any given member state? There might not be a set of preferences that, in the first place, need satisfaction. Second, organizations almost always take on a life of their own after their establishment. In

the process, they start fulfilling new needs and objectives – ones that are often not aligned with the interests of their creators. They unquestionably serve a function, therefore, though not the one envisioned by rationalists. And, third, let us recall that most institutions in society amount to compromises between logic and the complexities of social life. No institution exists in a vacuum. RTAs are no exception. We should therefore not question their existence on the bases of their ‘irrational’ qualities.

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