

Spurred Emulation: The EU and Regional Integration in Mercosur and SADC

By

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Abstract:

This paper addresses the EU’s influence on the design of market-building objectives and dispute settlement mechanisms in Mercosur and SADC over time. It argues that such influence has had an independent effect on the evolution of regional institutional design that is not reducible to mere functional dynamics, which dominant explanations emphasize. Instead, it suggests that EU influence is best conceived as a process of spurred emulation, according to which major political or economic crises in the regions have led to the increasing emulation of EU arrangements, spurred by the EU’s active involvement in the process. This has, however, neither led to a wholesale copying of EU institutional models nor to the adoption of EU practices, but EU templates have regularly been adapted to fit with policy-makers’ normative convictions, especially their continuing concerns about national sovereignty.

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INTRODUCTION¹

The latest wave of regionalism – understood as the state-driven integration of national economies – in Southern Africa and South America, which started in the 1980s, is distinct from most other attempts in the two continents, in that policy-makers explicitly rejected the EC template in an attempt to avoid the “fallacy of transposition”, which had plagued most of them (Langhammer and Hiemenz 1990). The Southern African Development Coordination Conference (SADCC) established in 1980 and the Economic Cooperation and Integration Programme (PICE) between Argentina and Brazil from 1986 were based on gradual and selective regional cooperation rather than across-the-board market integration and featured weak and purely intergovernmental institutions, rejecting *any* ceding of national sovereignty. Policy-makers in both regions shared the conviction that their organizations ought to follow a “deliberately business-like approach, in which institutions follow achievement” (cited in Anglin 1983: 696), and which was “built on concrete projects and specific programmes rather than grandiose schemes and massive bureaucratic institutions” (SADCC 1980: 19).

Since then, the Southern African Development Community (SADC), founded in 1991 as the successor of SADCC, and Mercosur, established in the same year as an extension of Argentina and Brazil’s bilateral cooperation efforts to Uruguay and Paraguay, have come a long way. One of the most striking features of both regions’ evolution is that they are now solidly set on a path of ambitious market integration, flanked by powerful supranational courts that curtail member state’s sovereignty. Both the market integration objectives and approaches as well as the Court’s designs are close copies of EC/EU models, which is even more puzzling given that alternative institutional models have become available in the form of NAFTA and the WTO dispute settlement procedure that seem to fit much better with policy-makers initial preferences for ‘pragmatic’ cooperation based on weak and sovereignty-preserving institutionalization. How can we account for this cross-temporal evolution, and specifically the respective institutional designs?

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Functional theories of institutional change might attribute this evolution to shifting structural conditions encountered by policy-makers, which was informed by a process of rational learning from EU institutional models (Pierson 2004). In this view, strong dispute settlement mechanisms embody an attempt to ensure the credibility of market liberalization commitments (see Smith 2000). In this article, I challenge such purely functional explanations by drawing attention to the role of EU influence on formal institutional design and evolution. More specifically, I suggest that this evolution is best conceived as a process of spurred emulation from the respective EU models, according to which major political or economic crises has led to the increasing emulation of EU models for mainly social reasons, spurred by the EU's active involvement in the process. This has, however, neither led to a wholesale copying of EU institutional models nor to the adoption of EU practices, but EU templates have regularly been adapted to fit with policy-makers' normative convictions, especially their continuing concerns about national sovereignty. Hence, while functional dynamics certainly form a part of the story, they are at best insufficient or, at worst, quite misleading.

This argument builds on a rapidly growing body of work that has started to document and explain horizontal EU influence on regional integration efforts in other parts of the world through processes of learning, emulation and persuasion (Alter 2008; Duina 2010; Jetschke 2010; Lombaerde and Schulz 2009; Yeo 2008). While these works have looked at individual instances of EU influence or have approached the topic as a series of instances based on a 'snapshot picture' (Pierson) of time (a partial exception is Jetschke 2009), this article seeks to highlight the dynamic and often cumulative effects of EU influence *across* time. The article proceeds in three parts. The first part sets the diffusion concept in the context of the literature on comparative regionalism and discusses its mechanisms and scope conditions. Parts Two and Three then trace the effects of EU influence on market-building objectives and dispute settlement procedures (DSMs), assessing the account against the null hypothesis of functional explanations. Evidence is based on extensive interviews in both regions as well as a host of primary and secondary sources.

COMPARATIVE REGIONALISM, DIFFUSION AND EU INFLUENCE: CONCEPTUAL FRAMEWORK

The bulk of the existing literature on global regionalism has almost exclusively focused on domestic factors to account for its dynamics and outcomes, often against the background of globalization dynamics (for example, Coleman and Underhill 1998; Gamble and Payne 1996). The small strand of literature that has addressed external influences in global regionalism (apart from structural changes in the world economy) has conceptualized it primarily as a form of top-down hegemonic power (see Katzenstein 2005; Robles 2008). The diffusion concept has therefore barely been applied in this literature (notable exceptions are Baldwin 1993 and some of the work cited before). It nevertheless forms an important complement to the existing literature in that it draws our attention to a form of external influence that has so far been largely neglected, namely horizontal influence (see Jetschke and Lenz 2010).

Diffusion theorists have conceptualized the temporal and spatial clustering of certain phenomena as a process of interdependent decision-making. In an important recent contribution, Simmons et al. (2006: 787) analyze situations in which “government policy decisions in a country are systematically conditioned by prior policy choices made in other countries.” According to this view, an important logic of external influence is one of indirectly affecting decision-making from the outside rather than intervening directly in the domestic politics of other countries or regions by levelling sticks (or carrots). In contrast to existing accounts of external influences in global regionalism, therefore, diffusion does not presuppose an asymmetric/hierarchical or even direct relationship between two identifiable actors, as also most of the Europeanization literature does (see Börzel and Risse 2011: 5). Such a conceptualization thus shifts analytical attention from the influence-wielder to the receiving end of external influence. In the current context, this implies understanding why governmental actors, especially in powerful member states in the two regions, were willing to shift their initial preferences increasingly towards EU-style integration objectives and DSMs. In the remainder of this section, I therefore discuss the mechanisms and scope conditions that affect the adoption (and adaptation) of EU institutional models, as outlined in the introduction.

Mechanisms

Shifting analytical attention to the receiving end of EU influence implies a turn towards the mechanisms of indirect influence. For the purposes of this article, I pitch lesson-drawing and normative emulation as alternative accounts of indirect EU influence.² Hence, to the extent that EU influence plays a role at all, the question is whether its impact is based on the rational calculation of costs and benefits or whether it hinges on socially constructed ideas about appropriate behaviour.

Policy-makers elsewhere draw lessons from the EU when they believe that it will help solve domestic problems effectively (Schimmelfennig and Sedelmeier 2005: 22). The EU has developed a host of institutional solutions to a variety of cooperation problems, thereby forming an ideal exemplar to study complex cause-effect relationships in regional integration. Given this state of affairs, lesson-drawing from the EU appears like a ‘natural’ characteristic of any process of rational policy-making in regional integration (see James and Lodge 2003). We would be surprised *not* to find it. Normative emulation, on the other hand, occurs for two broad sets of reasons. A first set has to do with cognitive constraints on information processing. When successful models are theorized in abstract and seemingly universally applicable categories, they are more likely to be emulated, especially when they are readily available ‘for download’ (McDermott 2001; Strang and Meyer 1993). EU institutional models possess all these features. Much social science research has sought to theorize EU governance in terms of general cause-effect relationships of the form ‘a supranational court leads to successful enforcement and therefore implementation’ and has widely spread these insights across the globe. A second set of reasons is of a social nature. Where actors perceive to “belong to a common social category” with the EU, emulation is more likely to occur (Strang and Meyer 1993: 490). Others might hence emulate EU institutional models because they identify with the EU, want to receive its legitimacy and recognition and, in the most extreme case, simply take EU institutional models for granted.

² The third mechanism – competition – is mainly relevant as a spur to the inception of or deepening of a regional integration process, but less useful when institutional design is the major question of interest (see Mattli 1999). It will therefore not be further considered.

The editors rightly note that lesson-drawing and normative emulation are often hard to distinguish empirically. I suggest, however, that there are at least three observable implications, which allow us to adjudicate between them, referring to trigger, process and outcome, respectively. First, lesson-drawing occurs in response to a concrete functional problem to which (institutional) solutions are sought (Rose 1991), whereas emulation forms a reaction to situations of great uncertainty about means-ends relationships and ambiguous goals (DiMaggio and Powell 1991) (trigger). Second, lesson-drawing leads us to expect ‘serious’ regional debate among policy-makers regarding the lessons that can be learned from the respective EU model, generally underpinned by a process of expert consultations or the commissioning of scientific studies as a form of prospective evaluation (Mossberger and Wolman 2003); emulation, on the other hand, occurs in the absence of such cost-benefit calculations (process). Third, lesson-drawing leads us to expect functional equivalents of EU models, given the diversity in political and institutional contexts (see Kahler and Lake 2009), whereas emulation should lead to the prevalence of wholesale copies (Strang and Meyer 1993: 500). To the extent that we do see adaptations, variance between formal EU models, on the one side, and those in Mercosur and SADC on the other reflects differences in institutional and political contexts (e.g. democracy, statehood etc) for lesson-drawing and divergences in normative convictions (e.g. attitudes about sovereignty) in the case of emulation (outcome).

Scope Conditions

The central puzzle of this article refers to variation in the degree of EU-style regional institutionalization over time in both regions. We therefore need to ask about the conditions under which the initial preferences³ for ‘pragmatic’ cooperation based on weak and sovereignty-preserving institutionalization or the respective power constellations sustaining them might shift. For the influence of two scope conditions suggested by the editors – state capacity and regime type – I seek to control largely by design. The diversity of these conditions across as well as within regions are difficult to match systematically with the broadly similar outcomes in both regions in terms of market-building objectives and DSM design (most different systems design). Domestic politics and power asymmetries, on the other hand, are highly relevant; the

³ I am indifferent to the nature and depth of these preference shifts (preferences over strategies vs. preferences outcomes).

question is how they matter. I suggest that a dynamic combination of two factors is generally sufficient to generate EU influence effects: the active promotion of such effects by actors outside of the regional decision-making arena, who have no formal decision-making power (spurring), and facilitating structural conditions.

Regarding the first, a range of actors outside the formal decision-making arenas, including external as well as non-governmental internal actors, might have an interest in affecting regional decision-making in the direction of EU-style institutional change for a variety of reasons. The EU tends to be the most active external actor in this context, deploying a range of material and ideational resources to support region-building processes in other parts of the world (see introduction). It is more likely to be successful in these endeavours, the greater the power asymmetries between both sides, i.e. the more the counterpart is dependent on the ideational and material resources the EU can offer. It is important to note, however, that such involvement, the largest bulk of which takes the form of financial and technical assistance, is never *directly* related to the outcomes of regional institutional change as such. In other words, the EU does not use material incentives in pursuit of a *specific* institutional design. For example, it might tie the negotiation of an interregional trade agreement to the condition that its goods can circulate freely across the counterpart region, as it has done in Mercosur, but this condition cannot account for a *particular* institutional arrangement (such as a specific customs arrangement) designed in response. Hence, the effects of direct EU support tend to be of a more diffuse nature in that they – consciously or unconsciously – *spur* developments in this direction rather than affect the outcomes of institutional change directly.

On the other hand, internal non-governmental actors such as advocacy groups or epistemic communities might advocate EU-style institutional change and thereby also spur EU influence effects. The extent to which these actors successfully advance their demands with governments depends on the particularities of the domestic political process such as their ability to access policy-makers and make their voice heard.⁴ The crucial point here, however, is that these groups tend to become stronger over time, as the EU actively supports the formation and strengthening of ‘EU-centred epistemic

⁴ This may, to some extent, also depend on regime type and state capacity.

communities' (Schimmelfennig and Sedelmeier 2005: 22). Therefore, once the EU gets actively involved in a region-building process, such non-governmental internal actors *ceteris paribus* tend to become more effective in spurring EU influence effects because they have more resources at their disposal.

Regarding the second scope condition, EU influence effects are unlikely to materialize in the absence of facilitating structural conditions, even when a variety of actors seeks to spur them. Deeply entrenched member state preferences and the power configurations sustaining a regional institutional equilibrium are unlikely to shift in the absence of changing structural incentives to do so (Keohane 1984). Hence, they are a necessary condition to open a 'window of opportunity' for EU influence effects to occur. However, they 'do not come with an instruction sheet' and are therefore generally indeterminate as to the specific responses they require (see Blyth 2003).

MARKET-BUILDING OBJECTIVES: EMULATING EUROPE'S COMMON MARKET MODEL

At their inception in the early 1990s, policy-makers in both Mercosur and SADC moved towards ambitious EC-style common market (CM) objectives, thereby parting with their rather shallow cooperation strategy that had dominated intra-regional relations before. I argue that this shift reflects the ambition to emulate the EC's successful market-integration model in a situation in which previous beliefs about 'pragmatic' regional cooperation strategies appeared increasingly insufficient in the face of major geopolitical and economic change in world politics.

When countries in Southern Africa started to cooperate as an economically-oriented outgrowth of the Frontline State's fight against South African destabilization, their main ambition was to achieve 'economic liberation' from their stronger and hostile neighbor. This was to be achieved through the organization of joint projects in selected sectors with the support of international donors (Tostensen and Mandaza 1994). Similarly, policy-makers in Argentina and Brazil launched a process of gradual *rapprochement* in the mid-1980s during their transitions to democracy, which aimed at overcoming deep-seated rivalries between the two countries. The PICE consisted of a series of protocols in selected sectors providing for tariff reductions and economic

complementation, which was extended in 1988 with the Treaty of Integration, Cooperation and Development envisioning the gradual establishment of a Free Trade Area (FTA) (Hurrell 1995: 253). Regional cooperation approaches in both regions were gradual and selective, strongly conditioned by the inward-oriented development models that had dominated in the two regions for decades.

These models of regional cooperation underwent fundamental change in the late 1980s, early 1990s as a result of various interrelated factors – all of which questioned and ultimately unsettled previously established convictions and changed policy-makers' calculus regarding strategies that were more firmly oriented towards trade liberalization and market integration. Internationally, multilateral trade liberalization efforts under the GATT framework had stalled in the Uruguay Round; the US started to pursue regional trade liberalization itself with NAFTA, the Free Trade Area of the Americas (FTAA) and APEC, while the EC deepened its integration endeavour with the Single Market programme (Cable 1994: 1-2; Mansfield and Milner 1999). Moreover, in both regions the foreign debt crisis reached its climax in the late 1980s and led to the widespread realization that the old development models based on the protection of national markets were unsuited for future economic well-being. In such a situation, outward-oriented trade *liberalization* (rather than mere cooperation) strategies became increasingly attractive for countries in the global South.

While the general move towards trade liberalization can thus be attributed to changing material incentives at the time, it is largely indeterminate as to the exact content this change would take. In other words, why did policy-makers adopt an EC-type CM model rather than a 'simpler' NAFTA-type FTA model? This becomes even more puzzling when we consider the wider international and ideational context at the time, characterized by the hegemony of the Washington Consensus, which betrayed deep and well-regulated economic integration endeavours of the form that the creation of a CM required. After the decision, international financial institutions were therefore quick to harshly criticize Mercosur and other regions (see Yeats 1998). In addition, policy-makers' initial preferences on regional integration seemed to tailor much better with a NAFTA-style FTA rather than EC-style CM model. Moreover, the structural realities in the two regions – limited economic complementarity and low trade interdependence, unstable economic conditions and intra-regional differences in trade

policies – seemed (and for some continue) to contradict the viability of such ambitious endeavours (see Burges 2005; Chauvin and Gaulier 2002: 50-52). Finally, existing studies have found little influence of economic pressure groups which might have affected the decision; and to the extent that they did, protection rather than offensive interests seem to have dominated (see Gardini 2006; Lee 2003). I therefore suggest that policy-makers have sought to emulate a successful and highly legitimate model from the EC, in the absence of a thorough assessment of costs and benefits, either because they identified with the EU's market-building approach (Mercosur) or because they largely took EU-type integration approaches for granted (SADC), amidst direct and indirect EU support (spurred emulation).

Mercosur: Identifying with the EC's Market-Building Approach

In South America, the depth of the foreign debt crisis brought to power new Presidents in 1989, Carlos Menem in Argentina and Fernando Collor in Brazil, who espoused a firm commitment to economic liberalization as the recipe to reverse the bad economic fortunes of their countries. They set on track an ambitious and quite revolutionary programme of unilateral trade liberalization, thereby emptying previous the previous cooperation approaches of selectiveness and gradualness of much of their meaning. When Uruguay and Paraguay joined negotiations for a common regional grouping in the Southern Cone in mid-1990, they had already decided to establish a CM (Gardini 2010: 92).

How can we know that this CM objective indeed constituted a case of EU influence? Mercosur's Treaty of Asunción uses clear EC terminology, speaking of the 'free circulation of goods, services and factors of production' through the 'elimination of customs rights and non-tariff barriers' through harmonization, the establishment of a Common External Tariff (CET) and the 'adoption of a common commercial policy' as well as the 'coordination of macroeconomic and sectoral policies' (Art. 1). The list of common policies to be coordinated under the Treaty reads like taken from the Single European Act, which was adopted only a few years earlier. Moreover, the Treaty envisaged the process to follow the classical steps of the EC model: start with the lowering of tariffs and the elimination of non-tariff barriers to trade, then establish a Customs Union (CU) and finally ensure the free circulation of other production factors to create a CM. Policy-makers directly involved in the negotiations, such as

former Brazilian Foreign Minister Luiz Felipe Lampreia clearly recall that “reference to the EU was constant” in the negotiations (Interview, 29.5.2009). Several interview partners suggested that there was a general ambition to create something similar to that which had happened in Europe before. This has to be partly seen against the background that policy-makers in the region perceived the EC as “stronger and more radiant than ever, and much less dependent on the outside world” (cited in Vasconcelos 2007: 167). But there was also a more general identification with the EC integration process, which trumped that of NAFTA, as an Argentinean policy-maker formulates: “there was a predominant sense of identification with the EU ‘community’ approach to economic integration, as opposed to the more ‘market-oriented’ models of NAFTA and the FTAA” (Bouzas 2003: 15-16).

However, this decision to pursue an EC-style CM model was hardly based on a thorough calculation of cost and benefits. The Asunción Treaty’s ambition to complete the CM within four years attests to a clear lack of serious assessment of what such a process entails, which one policy-maker in Mercosur confirms: “If we go to the documents or to the minutes of the discussions between Brazil and Argentina, nowhere can you find a very detailed study concerning the technicalities of a customs union or a common market. You just have political enthusiasm” (Interview with Paulo Roberto de Almeida, 3.6.2009). Once the Treaty had been adopted and Mercosur representatives were eager to seek recognition and support from Brussels, active EU support was quickly forthcoming. The Council held its first informal ministerial meeting in 1992 and the Commission initiated various cooperation projects worth 24 million Euros between 1992 and 1995 aimed primarily at supporting Mercosur’s institutionalization (for a complete list, see Botto 2009: 185-86). Moreover, it trained officials and built epistemic networks, versed in EU ways of doing things, through the establishment of a Training Centre for Regional Integration (CEFIR) in Montevideo, Uruguay, and the Institute for European-Latin American Relations (IRELA) in Madrid.⁵

This support, as well as more general identification with the EU approach to regionalism, turned out to be decisive in sticking to agreed commitments in the early

⁵ The former organized 30 activities with around 1500 participants between 1993 and 1995 (CEFIR information leaflet).

years of Mercosur. In the run-up to the adoption of the Ouro Preto Protocol in 1994 and the establishment of a Common External Tariff (CET) at the end of 1995, various powerful actors in Brazil and Argentina advocated abandoning the CU and CM commitments to be able to negotiate FTAs with important external trade partners, especially the US (see Nogueira Batista 1994). They mobilized in favour of a ‘shallow integration paradigm’ that would not include the harmonization of policies and a CET. However, among the academic publications in the period from 1991 to 1995, 82 percent made implicit or explicit reference to an EU deep integration paradigm, whereas only 18 percent referred to a NAFTA- or FTAA-style approach (Botto 2009: 12), indicating the overwhelming academic consensus of the desirability of the former. Moreover, the EU’s technical support, its creation of epistemic networks and the promised negotiation of a trade agreement with Mercosur *as a bloc* rather than individually also contributed in important ways to maintaining previous commitments.

SADC: Taking the EC’s Market-Building Approach ‘for Granted’

The Windhoek Treaty originated in the desire of Heads of States ‘to formalize SADCC’, agreed upon at the Harare Summit in 1989. However, it soon became clear that steps towards regional economic integration needed to form an integral part of a new treaty in order to counter Africa’s marginalization in view of the decisive moves towards regionalism in other parts of the world. However, both a NAFTA-style FTA model as well as an EC-style CM model were deemed compatible with these realities, as a preparatory document by the SADCC Secretariat to the Council of Ministers meeting in August 1991 suggested: “In the face of the region’s realities, and the current international tendencies toward the establishment of economic blocks, the region must accept to transform itself into an economic block similar to the proposed North American free trade zone or the European Economic Community” (SADCC Secretariat 1991b: 361).⁶ Without any serious debate in the region⁷, an EC-style CM model soon started to be favoured by most Heads of State, with the 1991 Council concluding that the new framework must provide “for crossborder investment, trade

⁶ Both models were also deemed compatible with the pan-African ambition to form an African Economic Community (see SADCC Secretariat 1991a).

⁷ The SADCC records mention no single study conducted to weigh the costs and benefits of the two potential options for regional economic integration. In fact, a 1986 intra-regional trade study still concluded that tariff reductions “are likely to have little or no effect on the volume of intra-regional trade” (SADCC Secretariat 1986: 109).

and labour and capital flow across national boundaries” (SADCC Council of Ministers 1991: 16). The Windhoek Treaty, adopted at the Summit in August 1992, subsequently codified the new objective of establishing an Economic Community – using EC terminology – through ‘the progressive elimination of obstacles of the free movement of capital and labour, goods and services, and of the peoples of the region generally’ and by harmonizing ‘political and socio-economic policies’ (Art 5[2]). The list of coordinated policies under the Treaty also contains most of the policies the EC’s Treaty of Rome also foresaw. These similarities might not come as a surprise given the fact that an EC-paid European lawyer assisted in drafting the Treaty (Interview with Stephen Kokerai, 9.11.2009).

Despite the new objective, however, little progress was made in implementing market liberalization measures as member states continued to fear decisive market opening. As an emulation account would expect, the market integration objective remained a dead letter for most of the 1990s, while member states continued with the previous practice of coordinating sectoral policies through the negotiation of sectoral protocols. However, the adoption of an EC-CM objective had raised increasing hopes among SADC’s International Cooperation Partners (ICPs) for enhanced economic integration, not least with the EU which strengthened relations with the grouping after the accession of South Africa in 1994 (Holland 1995). When these hopes were increasingly disappointed, they started to voice their dissatisfaction with the lack of progress. As early as 1993, the SADC Secretariat expressed its fear that “SADC is losing credibility and risks losing the support of cooperation partners” (SADC Council of Ministers 1993: 39). This externally induced legitimacy crisis of the organization continued as progress remained slow. The Dutch entirely abandoned their support in 1998 and the Consultative Conference, hitherto “the most important event in the SADC’s calendar of activities” (Sidaway 1998: 564), did not take place for the first time in the same year. At the same time, the organization was confronted with rumors that the EU, its most important benefactor, would restructure its cooperation with Africa and possibly abandon its Regional Indicative Programme (SADC Council of Ministers 2000: 82) – just as consultations on the new Programme were about to start. Given that external donors provide almost 60 percent of SADC’s

budget⁸, this legitimacy crisis, which reached its peak towards the end of the decade, by then commanded decisive action to improve SADC's performance.

In response, policy-makers quickly engaged in a fundamental restructuring of SADC institutions, which also entailed a more precise and detailed plan on how to achieve the CM objective. This led to further emulation from the EU, heavily spurred by active financial and technical support offered by the Commission and other European donors. The Regional Indicative Strategic Development Plan (RISDP), adopted in 2003, outlines a roadmap for economic integration, detailing the move from a FTA via a Customs Union towards a CM, a Monetary Union and finally the adoption of a common currency (SADC Summit 2003). It reads like taken from an EU integration manual condensing Europe's long integration experience into a 15-year period. Some inspiration was taken also from the EU's Lisbon agenda with its detailed targets and time limits. The transport chapter envisages, for example, to 'liberalize regional transport markets' and 'harmonize transport rules, standards and policies' as well as to remove 'avoidable hindrances and impediments to the cross border movement of persons, goods and services'. The RISDP was prepared by a team of experts from the region, which was embedded in a wider network of actors that clearly formed an EU-centered epistemic community. The head of the project was Angelo Mandlane, who received a PhD in economics from the University of Sussex; the Norwegian and UK development agencies NORAD and DFID primarily financed it; and EU-financed consultants actively participated in the process throughout (Interview with Ian Rossiter, 2.11.2009). While the details of the RISDP are based on extensive consultations with a variety of actors, including several studies by research institutes in the region indicating a process of lesson-drawing from different integration schemes, the broad outlines of the envisaged process hint at 'unquestioned' emulation. When asked why the RISDP seems to draw extensively on the EC integration experience, the 'father' of the RISDP replied that he wouldn't call it the EC model but rather the "standard model of economic integration" (Interview with Angelo Mandlane, 13.11.2009).

⁸ SADC Executive Secretary, 'Talking Notes for the Post-Council of Ministers Diplomats Briefing', February 2006; available at: www.sadc.int (figure is for 2006/07).

DISPUTE SETTLEMENT MECHANISMS: EVOLUTIONARY EMULATION FROM THE ECJ MODEL

In the course of legalizing world politics, DSMs have become a central element in economic integration processes to ensure the credibility of trade liberalization commitments. Institutional options range from diplomatic dispute resolution based on direct negotiations between the parties to legalistic forms based on independent third-party review (Smith 2000). However, multilateral dispute resolution arrangements under the GATT and later WTO have essentially served as a baseline for regional DSMs concerning trade liberalization, at least for GATT/WTO members.

In line with their modest ambition in terms of economic cooperation and their firm commitment to national sovereignty, policy-makers in both regions initially rejected *any* formal stipulations on dispute settlement, relying instead on direct negotiations between governments. When they endorsed trade liberalization commitments in the early 1990s, as we have seen in the previous section, both regions soon endorsed more formalized DSMs. While this move can be accounted for by functional theories, they are indeterminate as to their strength and specific design features. Indeed, despite very similar initial trade liberalization commitments on paper, SADC opted for a permanent Tribunal right away, whereas Mercosur originally settled upon a weakly institutionalized GATT-type arrangement based on negotiation, mediation and ad hoc panels. Since then, both regions have gradually moved towards an ECJ-style DSM. While SADC already features a supranational ECJ copy, Mercosur governments have recently agreed to establish a supranational ECJ-style Mercosur Court of Justice, the details of which remain to be worked out.

This development poses a puzzle: Why did policy-makers increasingly opt for ECJ-style DSMs when their concerns about sovereignty and their initial rejection of strong regional institutionalization suggest that GATT/WTO-style arrangements would have been better suited? Especially the new WTO DSM might be viewed as similarly ‘functional’ in addressing the underlying cooperation problem of monitoring

compliance with incomplete contracts (Garrett 1992).⁹ As we will see below, there are few indications that DSM design was based on explicit member state calculations, which thoroughly weighed the costs and benefits, e.g. sovereignty costs vs. anticipated benefits of deeper integration or treaty compliance benefits vs. policy discretion costs (Mattli 2000; Smith 2000). Moreover, my research revealed a negligible role of private operators, which might have prodded their governments towards stronger DSMs to ensure the legal certainty of their investments. Instead, I suggest that conscious emulation from the ECJ model reflected an attempt to gain credibility with ICPs, whose continued material support to the broader project seemed to be in danger at various points during the 1990s (SADC), or the increasing traction of emulation arguments advanced by a variety of regional actors in a context of increasing attempts to revive the integration process in the wake of a major economic crisis (Mercosur).

SADC Tribunal: Emulating the ECJ amidst Credibility Concerns

The Windhoek Treaty established a permanent Tribunal with the power to ‘give advisory opinions’ and whose decisions were to be ‘final and binding’ (Art. 16); with further design features to be left to a separate protocol. This Protocol was adopted in 2000 and gave the Tribunal a range of powers, which makes it even stronger than the ECJ. It is a clear ECJ copy, sharing with it *all* major attributes of institutional design (see Karen Alter’s article in this issue): compulsory jurisdiction (Art 15c, Protocol on Tribunal), exclusive competence to constitutional and administrative review, private access and a preliminary rulings procedure (Art 16), which is a literal copy of Art 177 of the Treaty of Rome. It even goes beyond the ECJ’s design in that non-compliance suits cannot only be brought by other treaty organs (Art 17) but also by individuals when all other domestic remedies have been exhausted (Art 15b) (for a good overview, see Ruppel and Bangamwabo 2008). How can we explain this emulation from the ECJ?

As we have seen before, the move towards market integration in SADCC started to be discussed in the late 1980s. In 1991, an expert team made recommendations on a

⁹ The SADC Trade Protocol, for example, explicitly states that disputes are settled through negotiation and ad hoc expert panels – a GATT-type arrangement – rather than being subject to the SADC Tribunal per se (Art. 32).

revised institutional structure in light of the envisaged integration agenda. It argued that its institutions ‘are adequate and effective generally’, mentioning only in a side note (not in the list of institutions to be *officially* included in the new Treaty) that “settlement of disputes shall be by arbitration, and an arbitration tribunal or committee shall be provided for” (Malima et al. 1991: 379). The two considered options – Tribunal or committee – essentially reflect the institutional alternatives available internationally, a permanent ECJ-type or an ad hoc GATT-type adjudication mechanism. But these two options were merely mentioned, without any discussion of their respective advantages and disadvantages, and their implications for national sovereignty. Even the theme document for the 1992 Consultative Conference with SADC’s ICPs, which was prepared by a group of experts and for the first time seriously engaged justifications for different approaches to economic integration in the region, was largely silent on the issue. It merely noted that a regional development community requires “mechanisms of mediation and arbitration, to which all agents of integration – governments, business, civil associations and individuals – can seek justice” (SADCC 1992: 41-42). Hence, when the decision was taken to establish a Tribunal with the Windhoek Treaty, no real discussion on the costs and benefits of each option had taken place at the regional level.

However, around the same time, it became increasingly clear that the geopolitical changes of the Cold War, especially the rapid turn of Eastern European countries to market capitalism, would mean increasing competition over scarce resources supplied mainly by Northern industrialized countries. The SADCC Summit of 1991 shared the Secretariat’s fear, for example, that “the existing patterns of net resource flows are likely to, at best, stay the same in real terms, in the face of keen competition for aid and investment from the other parts of the world, notably Eastern Europe” (SADCC Summit 1991: 7). Given SADC’s dependence on both aid and investment from the EU and other regions, these fears quickly elevated investment market integration and the mobilization of own resources for the operation of SADC to the top of the regional agenda (SADCC Council of Ministers 1992b: 2-3). This was also against the background that the main impact of the envisaged CM was to be expected in stimulating ‘new types of investment’ rather than increasing intra-regional trade (SADCC Council of Ministers 1992a: 2).

In this context, retaining the credibility and legitimacy with external aid and investment partners, most of whom were able to transmit their views at the annual Consultative Conferences, was paramount. In other words, SADC needed to ensure that important external partners believed that SADC was worth their continued engagement and investment. In this situation, member states drew on the credibility of the ECJ model to signal to their partners that the new integration effort justified their continued support by establishing a Tribunal that evoked similarity. The Treaty stipulations remained vague, however, which allowed SADC Ministers to ‘believe’ shortly before the treaty was signed that it “only fully provides for the central *intergovernmental* organs of the community, i.e. the Summit, Council, Standing Committee of Officials, the Secretariat and the Tribunal” (SADCC Council of Ministers 1992b: 35, my emphasis).

With South Africa’s accession to SADC in 1994, the issue of sovereignty became imminent (Schoeman nd: 8). It had concerns that the Tribunal would challenge its strong Constitutional Court – concerns that were eventually overcome in principle [REF]. When member states finally started work on the Protocol in the late 1990s, the context of SADC integration had changed again in two important respects. First, with the transition from GATT to the WTO a new institutional DSM model had become available, which was perfectly compatible with original Treaty stipulations on the Tribunal, including the mention of ‘advisory opinions’. It remained less institutionalized than the ECJ and seemed more suited to a legal environment characterized by sovereignty concerns and lack of direct effect of treaty stipulations. Second, ICPs had grown increasingly dissatisfied with the performance of SADC and threatened to cut their funding, as we have seen before. In particular, they posited doubts about the ability to improve the record of the organization without an enhanced DSM that could push member states to abide by their commitments (see SADC Council of Ministers 1999: 112).

There is little evidence in the records that a WTO-type model was ever seriously considered. Instead, an EC-financed British judge formed part of the experts who drafted the Protocol and he contributed his views on ‘what an effective and credible DSM ought to entail’ (Interview with Stephen Kokerai). In an attempt to ensure such credibility towards the outside amidst serious legitimacy constraints, designers readily

emulated central ECJ features and even went beyond it in allowing private parties to bring non-compliance suits under specific circumstances and explicitly providing for the development of ‘Community jurisprudence’ by the Tribunal (Art 21b).¹⁰ However, they capped the Tribunal’s potential encroachment on national sovereignty by stipulating that the Summit, acting by unanimity, would retain the final decision over sanctions in case of non-compliance with a ruling. Moreover, even a preliminary rulings procedure and private access, which has been so consequential in Europe’s legal revolution, is much less likely to be sovereignty-encroaching in the absence of direct effect (Keohane et al. 2000: 467-78). As long as member states do not incorporate rules into their domestic legal corpus, they do not constitute a claimable right among citizens. Given the notoriously low compliance rates in SADC, these features may well turn out to be a ‘toothless tiger’ by implicit design (see Frimpong Oppong 2008).

Mercosur: Gradual Emulation from the ECJ

Mercosur’s first DSM, adopted in 1991 with the Protocol of Brasilia, was purely intergovernmental DSM and designed along GATT lines. It was barely used as member states preferred to deal with disputes directly through bilateral negotiations.¹¹ Towards the end of the decade, however, it drew increasing criticism from academics as well as civil society actors in the region. The problem lied less in its inability to settle disputes between member states, there simply were few; it had more to do with its failure to ensure compliance with Mercosur legislation. Compliance rates were (and continue to be) generally low because it often takes member states years to incorporate secondary legislation into their domestic legal systems in view of parliamentary or bureaucratic resistance (Interview with Evandro Didonet, 4.6.2009). However, in the absence of other member states bringing complaints to the ad hoc Adjudication Tribunal, this situation could not be mitigated through the DSM. An increasing number of actors therefore started arguing at the time that a supranational court was “sorely needed” (see Araujo 2001: 35). This was also the main claim advanced by an advocacy coalition, which emerged at the time. It features a series of

¹⁰ Designing such an ambitious DSM in the face of severe financial constraints to operate it was possible because member states assumed that ICPs would contribute to its financing (see: <http://www.sadc.int/tribunal/organisation.php>).

¹¹ Between 1991 and 2002, the year when a new arrangement came into force, member states had made 10 references to the DSM.

high-profile legal experts from the region such as Alejandro Perotti or Deisy Ventura, many of whom had studied in Europe and/or written doctorates on the European legal system and its applicability to Mercosur (see Perotti, A. 2004). They have, over time, become quite consequential in pushing for an ECJ-style DSM in Mercosur, in tandem with the smaller Mercosur members Uruguay and Paraguay, who have shared this objective from the start.

In the wake of the Brazilian/Argentinean financial and economic crisis, which hit the region harshly in the late 1990s and early 2000s, the entire integration process plunged into crisis. Conflicts between member states over the application of Mercosur rules started to proliferate as Argentina sought protection from cheap Brazilian imports by erecting barriers to the free flow of goods, threatening to unravel the entire project (Gomez Mera 2005). This opened a ‘window of opportunity’ for these groups to advance their claims with increasing vigor. Even though member states continued to deal with the fallout of the crisis quite effectively through ‘presidential diplomacy’ rather than recourse to the DSM (Malamud 2003), they nevertheless decided to strengthen it with the 2002 Olivos Protocol, which established a Permanent Review Tribunal (PRT) modeled on the WTO. However, in a further attempt to ensure the continued credibility of the integration process, they also contained a provision on ‘consultative opinions’ from the PRT (Art 3). Elaborating it in Decision CMC No 37/03 and Decision CMC No 02/07, member states emulated the wording of Art 177 of the Treaty of Rome, but did neither allow national courts nor the Mercosur Secretariat to request such opinions, thereby clearly protecting national sovereignty.

However, the aforementioned crisis eventually brought to power new governments in most Mercosur countries, among which the election of Lula da Silva in Brazil in 2002 was the most consequential for this process. He announced that he would seek to ‘relaunch’ the integration process *inter alia* by strengthening Mercosur institutions. Before his election, one of his foreign policy advisors had already announced that Mercosur’s future would have to entail the creation of supranational institutions along EU lines (REF). Shortly thereafter, member states began discussions on a complete revision of Mercosur’s institutions 10 years after the Ouro Preto Protocol. In these negotiations, Uruguay tabled a proposal for the establishment of an ECJ-style Mercosur Court of Justice that would hold compulsory jurisdiction over all economic

integration matters in Mercosur, be endowed with an exclusive competence to constitutional and administrative review, have a more effective preliminary rulings procedure, and extend direct access to other treaty organs and private persons (Interview with Elbio Rosselli, 9.7.2009). Nevertheless, the larger member states rejected these demands, with Brazil arguing that the Brazilian Constitution does not allow for a legal body that constrains its Supreme Court (Interview with Reinaldo Salgado, 9.6.2009). Nevertheless, these ECJ-style institutional features constituted cornerstones in the debate on legal integration in Mercosur up to the highest governmental levels.

Since then, the ECJ-focused advocacy coalition has continued to grow and has sought to hold Brazil to its general willingness to consider supranational institutions. This has set in motion a process that seems to currently succeed in overcoming remaining resistance to the establishment of a full-fledged ECJ-type supranational Court of Justice. The advocacy coalition has, often with the financial support of the EU and other European actors, stepped up its activities through a series of events where institutional reform is discussed and policy-makers confronted with ‘basic elements for the constitution of a Mercosur Court of Justice’ (Perotti, A. D. 2009). It increasingly joins forces with other powerful actors and Mercosur’s own institutions. The Supreme Courts in Mercosur, organized in an epistemic network, announced their general openness to the possible creation of a Mercosur Court (see Perotti, A. D. 2009: fn 1), while the PRT regularly cites ECJ rulings in its own judgments, indicating their clear relevance to the Mercosur integration process. The newly created Mercosur Parliament has also been advocating its creation in the so-called ‘political declaration’, which the member states endorsed in October 2010 (Decision CMC, 28/10). While the exact design features remain to be worked out, the member states have now committed in principle to the establishment of a supranational Mercosur Court of Justice.

CONCLUSION

This article has explored the dynamics of EU influence on regional integration in Mercosur and SADC. It has argued that EU influence has played an important role in central areas of both regions’ integration process, thereby confirming this volume’s

general assumption that diffusion theories provide useful tools to examine the effects of European Integration far beyond its own borders. More specifically, I suggested that EU influence has been the result of emulation dynamics, which were spurred by direct and indirect EU involvement amidst facilitating structural conditions. Spurred emulation, however, has seldom led to a wholesale copying of EU institutional models nor to the adoption of EU practices or behaviour, but EU templates have regularly been unpicked and adapted to fit with policy-makers' normative convictions, especially their concerns about national sovereignty. While functional dynamics have thus played a role in facilitating and in some cases driving EU influence, they are alone insufficient, and sometimes quite misleading, to explain why policy-makers have increasingly opted, over time, for EU-type rather than NAFTA- or WTO-type models.

Other more 'constructivist' motivations have certainly played an important role in conditioning EU influence, but these can hardly be generalized across the two regions. Whereas the need to retain credibility and legitimacy in the eyes of ICPs, on whose support the organization is highly dependent, is an important source of EU influence and regional dynamics more broadly in SADC, institutional choices in Mercosur are influenced much more strongly both by an identification of policy-makers with the EU as well as the – partly EU-financed – activities of EU-centered epistemic and advocacy networks. Hence, the ways in which emulation effects are spurred by a variety of actors may vary between regions and over time. In both cases, however, the EU's direct influence through 'intervention' into the domestic politics of member states plays only a secondary role.

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