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

TOBIAS LENZ

This article analyses the EU's influence on regional institutional change in Mercosur and the Southern African Development Community from a diffusion perspective. Focusing on market-building objectives and dispute settlement mechanisms, it addresses the puzzle that policy-makers in both regions have, over time, increasingly adopted EU-style institutional arrangements even though alternative institutional models more suitable to their preferences for 'pragmatic', sovereignty-preserving cooperation have been available at various critical junctures of institutional evolution. The article makes two main arguments. First, it suggests that EU influence has affected outcomes in several specific ways that are irreducible to, and quite different from, mainstream functional accounts of economic regionalism. Second, it contends that the diffusion of EU institutional templates can be understood as a process of spurred emulation, when regional policy-makers emulate EU institutional models under conditions of uncertainty and promoted by EU-oriented domestic actors as well as the EU's direct involvement in the process.

The latest wave of regionalism – understood as the state-driven integration of national economies – in Southern Africa and South America has witnessed an enormous institutional evolution from its inception until today. While it began with gradual and selective regional cooperation (rather than across-the-board market integration) based on weak and purely intergovernmental institutions in the 1980s, member states in the Southern African Development Community (SADC) and Mercosur are now pursuing ambitious market integration objectives flanked by supranational courts – both of which are (emerging) copies of EC/EU models.¹ While policy-makers deliberately rejected EU-style integration initially (see Campbell *et al.* 1999; Lee 2003: 47), they are increasingly adopting EU-style formal institutions in more recent periods. This is puzzling because alternative institutional models – e.g. North American Free Trade Agreement

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(NAFTA) and World Trade Organization (WTO) dispute settlement procedure – that appear more suitable to policy-makers’ original preferences for ‘pragmatic’ cooperation based on weak and sovereignty-preserving institutions have been available at various critical junctures of institutional evolution (Alter 2012). How can we account for successive waves of formal institutional change at the regional level?

Functional theories of institutional change might attribute this evolution to shifts in (powerful) member states’ preferences induced by altered structural conditions. In this view, patterns of economic interdependence determine the ambition and form of market liberalisation commitments, while regional institutions and especially dispute settlement mechanisms (DSMs) are designed accordingly to ensure their credibility (see Mattli 1999; Moravcsik 1998; Smith 2000). In this article, I build upon but depart in important ways from such mainstream functional explanations with their rather deterministic conceptualisation of the relationship between functional pressures and institutional change, drawing attention to the indeterminacy of functional pressures and their interaction with diffusion dynamics associated with the EU. I make two main arguments. First, I suggest that EU influence is most likely to matter at those moments in time when there is a strong functional demand for institutional change. However, functional pressures are generally compatible with different viable institutional arrangements; hence, policy-makers face the question of institutional choice. I therefore contend, second, that EU influence affects these choices in that EU-oriented domestic actors and the EU’s active material support induce policy-makers to emulate EU-type institutional models under conditions of uncertainty – a dynamic process I term ‘spurred emulation’. Such influence has, however, not led to a wholesale copying of EU institutional arrangements, but EU templates have regularly been adapted to fit with policy-makers’ normative convictions, especially their continuing concerns about national sovereignty.

These arguments build upon a growing body of work that has started to document and explain EU influence on regional integration efforts in other parts of the world through processes of learning, emulation and persuasion (see Alter 2008; Duina 2010; de Lombaerde and Schulz 2009; Yeo 2008). While these studies have largely looked at individual instances of EU influence or have approached the topic as a series of instances based on a ‘snapshot picture’ of time (Pierson 2004), this article seeks to highlight the dynamic and often cumulative effects of EU influence *across* time and their interaction with functional dynamics. 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 scope conditions and mechanisms. The next two parts then trace the gradual diffusion of EC market-building objectives and the European Court of Justice (ECJ) model. Evidence is based on interviews as well as primary and secondary sources.

Comparative Regionalism and Diffusion from the EU: Conceptual Framework

The mainstream literature on global regionalism has focused almost exclusively on domestic factors to account for its dynamics and outcomes, and has a strongly functional flavour. It depicts the proliferation and shape of regionalism since the early 1990s as the result of member states' rational responses to changing structural circumstances in the world economy, conditioned by domestic constellations of power, interests and institutions. The diffusion concept has the potential added value to address head-on the impact of external influences on regionalism, while not presupposing an asymmetric/hierarchical or even direct relationship between two identifiable actors, as much of the Europeanisation literature does (Börzel and Risse 2012). It thereby shifts analytical attention from the influence-wielder to the receiving end of external influence (see Jetschke and Lenz 2011). In the current context, this implies understanding how especially powerful member state governments were increasingly willing to endorse EU-style institutional change through a process of spurred emulation. In the remainder of this section, I discuss scope conditions and mechanisms drawing on the theoretical framework outlined in the introduction (Börzel and Risse 2012).

Scope Conditions

Under what conditions can we expect the gradual diffusion of EU institutional models to affect regional institutional change elsewhere? I suggest that a functional demand is necessary for change to happen, while EU influence then is conditioned mainly by domestic politics and power asymmetries between both sides. Regarding the first point, EU-style institutional change is highly unlikely in the absence of facilitating structural conditions. Changes in external structural conditions need to combine with a major political or economic crisis that throws previous established practices into discredit and leads to institutional negotiations under conditions of high uncertainty in order to unsettle entrenched member state preferences, originally opposed to EU-style regional integration, and the power configurations sustaining an existing regional institutional equilibrium (Widmaier *et al.* 2007; see also Jetschke and Murray 2012). Such situations create a demand for institutional change by revealing a fundamental mismatch between existing institutional arrangements and functional needs. However, functional pressures for change are generally compatible with various institutional arrangements that are not easily distinguishable in terms of effectiveness and sometimes even in their distributional consequences (see Garrett and Weingast 1993). They thereby provide policy-makers with a situation of institutional choice and open a 'window of opportunity' for the diffusion of EU models.

Even then, the diffusion of EU models is not 'automatic', but requires its active promotion by various actors in the political process, thus being

strongly conditioned by domestic politics. For one thing, many advocacy groups and epistemic communities actively spur EU-type institutional change, often supported by EU funding (Jetschke and Murray 2012). The existence of the EU, with its widely perceived success, gives their claims a priori legitimacy especially in regions like Mercosur and SADC, where policy-makers share ‘the cultural understanding that [their] social entities belong to a common social category’ with the EU in the sense that they are all engaged in broader processes of Community-building rather than mere trade liberalisation (Strang and Meyer 1993: 490). In short, it empowers them vis-à-vis more powerful actors that might be opposed to such change. The extent to which they successfully advance their demands with (powerful member state) governments depends on the particularities of the domestic political process such as their ability to access policy-makers, which to some extent depends on regime type and state capacity.² However, at a more general level, we should expect the diffusion of EU-style institutional arrangements *ceteris paribus* to be more likely than potential alternatives to the extent that they are more actively spurred.

Moreover, spurring processes from below are often reinforced through EU financial and technical assistance to region-building processes across the world, with EU-style institutional arrangements receiving more material support than potential alternatives. To the extent that regional organisations depend heavily on outside funding, and are unable to compensate potential loss of EU assistance from other sources, this material support forms an important form of leverage that has a significant influence on regional dynamics (see below). Given SADC’s greater material dependence on the EU than Mercosur, we would expect EU influence *ceteris paribus* to be more important there than in the Southern Cone (degree of power asymmetry).

Mechanisms

The various mechanisms are not mutually exclusive (Börzel and Risse 2012). In fact, I suggest that the distinction between direct and indirect diffusion mechanisms often blurs in practice, as active EU support and local emulation interact in complex ways to produce particular outcomes. So how are we to understand them in the current context? The EU’s material support changes policy-makers’ incentives for action, under the conditions mentioned before, but its provision is never conditional upon the adoption of EU-type regional institutions. Hence, the effects of direct EU support on processes of regional institutional change tend to be of a more diffuse nature in terms of institutional choice, affecting mainly the timing of institutional action, i.e. condition the demand side of institutional change. Attempts at socialisation and persuasion by EU actors do occur informally, as interviews revealed, but are less likely to affect the *broad* institutional picture that this article focuses on. Regional institutional change is thus driven primarily by dynamics at the receiving end and through various emulation mechanisms.

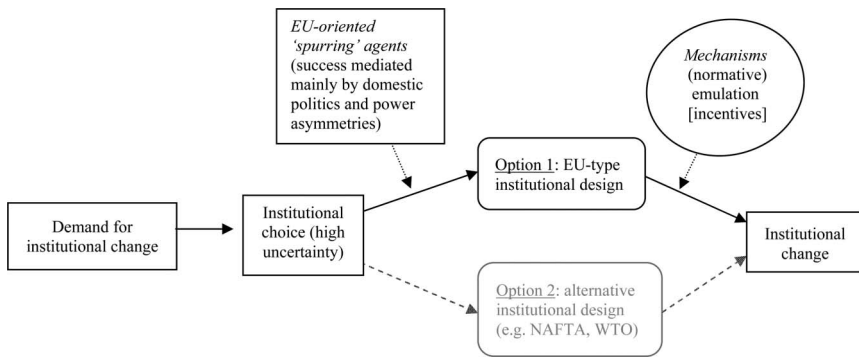
The first one – competition – is less useful in understanding EU-centred diffusion processes. It suggests that different institutional arrangements are readily distinguishable in terms of their effectiveness in reaching the developmental objectives policy-makers pursue through regional integration, i.e. that they are able to undeniably identify ‘best practices’. Yet has the EU been more effective or efficient than NAFTA in spurring economic growth through the integration of national economies? The answer is far from obvious.

This does not, however, preclude that actors seek to draw lessons from different institutional arrangements in order to learn about underlying cause–effect relationships in view of their own specific conditions. As the editors rightly note, the question then is how we can distinguish empirically between this mechanism and normative emulation, especially given that the ‘EU model’ is widely regarded as successful and has been theorised in abstract and seemingly universally applicable categories – and is hence easily justified as a rational choice (Strang and Meyer 1993). Drawing this distinction will therefore always remain difficult empirically, but I nevertheless maintain that they each suggest distinct implications, which are, at least potentially, observable. First, lesson-drawing occurs in response to a concrete functional problem to which (institutional) solutions are sought, whereas normative emulation forms a reaction to situations of great uncertainty about means–ends relationships and ambiguous goals (DiMaggio and Powell 1991). Second, lesson-drawing leads us to expect a process of thorough evaluation concerning the lessons that can be learned from the respective EU model, observable for example by the organisation of expert consultations or the commissioning of scientific studies; normative emulation, on the other hand, usually occurs in the absence of such assessment. Third, lesson-drawing ought to lead to functional equivalents of EU models given the diversity in political and institutional contexts in the EU and elsewhere (see Kahler and Lake 2009), whereas normative emulation should lead to the prevalence of wholesale copies (Strang and Meyer 1993: 500). To the extent that we do see adaptations, variation 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 normative emulation. The analytical argument is depicted in Figure 1.

Market-Building Objectives: Emulating Europe’s Common Market Model

Economic cooperation approaches in Southern Africa and South America throughout the 1980s were gradual and selective, strongly conditioned by the inward-oriented development models (import substitution) that had dominated in the two regions for decades, before shifting towards ambitious EC-style common market objectives in the early 1990s. The reasons for this

FIGURE 1
REGIONAL INSTITUTIONAL CHANGE AND SPURRED EMULATION



Note: I thank one anonymous reviewer for initial ideas on how to depict the causal argument graphically.

step-change in economic cooperation are manifold, closely related to changes in material incentives that policy-makers faced at the time (for an overview, see Mansfield and Milner 1999). However, while these commonly cited material incentives – increasing economic interdependence, stalemate of the Uruguay Round, increasing hegemony of the Washington Consensus, democratisation etc. – might be sufficient to account for the general move towards trade liberalisation strategies at the time, they are indeterminate as to the exact direction this shift would take. In other words, why did policy-makers adopt an EC-type common market objective rather than a ‘simpler’ NAFTA-type Free Trade Agreement (FTA)? I argue that these decisions constitute an attempt to emulate the EC’s successful market integration model in order to ensure the continued viability of the respective community-building projects in a situation in which they had come seriously under threat by various changes in the external environment.

Mercosur

Decisive moves towards market liberalisation started in 1989 with the election of two neoliberal-minded presidents, Carlos Menem in Argentina and Fernando Collor in Brazil, who radically liberalised their economies unilaterally. They had been swept into power by the foreign debt crisis, which reached its height in the late 1980s and generated major economic instability. Trade in capital goods – the ‘demonstration’ sector of the 1986 Economic Cooperation and Integration Programme – dropped by about 20 per cent between 1980 and 1988, while debt and inflation rose enormously (Manzetti 1993: 104). This crisis triggered great uncertainty regarding the future of regional cooperation and robbed the previous selective and gradual approaches of much of their meaning. Moreover, the US’s

announcement in June 1990 of an Enterprise Initiative for the Americas, intended to liberalise hemispheric trade and review debt obligations, threatened to dilute or make superfluous the incipient integration process between Brazil and Argentina (Wrobel 1998: 556). Continued unilateral liberalisation, embedded in wider hemispheric liberalisation to enhance the credibility of commitments, seemed to constitute an economically 'rational' response to the situation, in line with the presidents' neoliberal economic policy preferences.

However, just one month after the US's announcement, they decided to form an EC-style common market, thereby subjecting narrowly commercial considerations to the broader quest for 'survival'. They saw the regional 'community-building process' as an important end in itself given the countries' historic rivalries (see Menem 1996). In this context, adopting the EC common market model not only appeared a solid economic choice, given that policy-makers perceived the EC amidst its aspiration to complete the Internal Market by 1992 as 'stronger and more radiant than ever, and much less dependent on the outside world' (cited in Vasconcelos 2007: 167). But because of their wider community-building ambition, the EC common market model also seemed more appealing than its institutional alternative, as a former 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 [Free Trade Area of the Americas]' (Bouzas 2003: 15–16).

Thus, the Treaty of Asunción, which established Mercosur on 26 March 1991, uses clear EC terminology to describe the new objective, speaking of the 'free circulation of goods, services and factors of production' by pursuing the 'elimination of customs rights and non-tariff barriers', the establishment of a common external tariff 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 as if it were taken from the Single European Act 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 and finally ensure the free circulation of other production factors to create a common market. 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 May 2009). Several interview partners similarly suggested that there was a general ambition to replicate Europe's successful economic integration process.

However, this decision was hardly based on a thorough calculation of costs and benefits. The Asunción Treaty's ambition to complete the common market within four years attests to a clear lack of serious assessment of what such a process entails. Policy-makers themselves, who have strong incentives to over-report their efforts, even admit: '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, Brazilian diplomat, 3 June 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 by 1995 the Commission had initiated various cooperation projects worth €24 million aimed primarily at supporting Mercosur's institutionalisation (for a complete list, see Botto 2009: 185–6). 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 in Madrid. This support was crucial in retaining initial commitments. In the run-up to the adoption of the Ouro Preto Protocol in 1994 and the establishment of a common tariff at the end of 1995, various powerful actors in both countries, such as influential Brazilian ambassador Nogueira Batista and Argentina's Minister of the Economy Domingo Cavallo, advocated abandoning the customs union and common market commitments to be able to negotiate FTAs with important external partners, especially the US. They mobilised in favour of a 'shallow integration paradigm' that would not include the harmonisation of policies and a common external tariff. However, 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 contributed in important ways to maintaining previous commitments (see Botto 2009).

SADC

Similar to South America, countries in Southern Africa were also affected by the foreign debt crisis of the 1980s, which led to a sweep of economic liberalisation through the conditionality programmes of international financial institutions. While the general costs of domestic liberalisation had thus decreased significantly in most countries by the end of the decade, economic adjustment programmes threw great uncertainty on the continued viability of the regional cooperation process as the organisation's Programme of Action bound major resources and therefore threatened to enhance countries' difficulties to serve their debt obligations (SADCC Council of Ministers, 22 July 1987, Vol 1: 67). Moreover, the end of the Cold War meant additional uncertainty regarding the continued willingness of foreign donors to provide essential resources to an organisation, which depended for up to 90 per cent of its budget on external funding, yet had lost its geostrategic importance (see Adelman 2008: 7; SADCC Council of Ministers, 28 January 1991: 51). In this situation, policy-makers felt that

steps towards regional economic integration were necessary to counter Africa's marginalisation 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 common market model were deemed compatible with these ambitions (SADCC Council of Ministers, 28 August 1991: 361).³

Without any debate in the region on the advantages and disadvantages of each arrangement,⁴ an EC-style common market model soon started to be favoured by most heads of state, with the 1991 Council concluding that the new framework must provide 'for cross-border investment, trade and labour and capital flow across national boundaries' (SADCC Council of Ministers, 28 August 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 harmonising '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. It thus appears to be an instance of emulation. I found little evidence to suggest that active EU diffusion efforts were causal for this decision; despite the fact that an interview partner mentioned that an EC-paid European lawyer assisted in drafting the Treaty (Interview with Stephen Kokerai, former legal advisor to Zimbabwean government, 9 November 2009). However, the diffusion story does not end here.

As a result of this increasing ambition and the accession of South Africa, the EU strengthened relations with SADC in 1994 (Holland 1995). Yet little progress was made in actually implementing market liberalisation measures. Fearing decisive market opening, member states continued with the previous practice of coordinating sectoral policies through the negotiation of protocols, as an emulation account would expect. The EU and other international cooperation partners, who had increasingly placed their hopes on the organisation, thus 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 cooperating partners' (SADC Council of Ministers 2 September 1993, Vol. 1: 39). This externally induced legitimacy crisis of the organisation continued as progress remained slow. The Dutch entirely abandoned their support in 1998 and in that year 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. At the same time, the organisation was confronted with rumours that the EU, its most important benefactor, would restructure its cooperation with Africa and possibly abandon its Regional Indicative Programme (SADC Council of Ministers, 4–5 August 2000: 82) – just as consultations on the new programme were about to start. Given that external donors still provide almost 60 per cent of SADC's budget (SADC Executive Secretary 2006), 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 roadmap on how to achieve the common market objective. This led to further diffusion from the EU. Even though the EU never made continued funding conditional upon the adoption of further EU-type institutional change, the Regional Indicative Strategic Development Plan (RISDP), adopted in 2003, essentially emulates the Community's Maastricht Treaty. It details the move from a FTA via a customs union towards a common market, a monetary union and finally the adoption of a common currency (SADC Summit, 25–26 August 2003: 5). The transport chapter, for example, plans 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' – similar in wording and spirit to EU policy integration.

Not only did the EU thus provide the incentives to act at that particular moment in time, it also spurred emulation regarding the content of resulting policy changes. European donor agencies largely funded the RISDP's elaboration and European consultants were involved in the process throughout. Their exact role, and thus the underlying causal mechanism, is open to debate, though. The head of the regional expert team, which drafted the document, claims to have written the main proposal based on what he describes as the 'classic model' of economic integration (Interview with Angelo Mandlane, 13 November 2009). Another interviewee deeply involved with regional affairs recalled 'a senior SADC official once telling me that the RISDP was written by European consultants and they basically just took the Maastricht Treaty and adapted it and put it in the language of the region' (Interview, 27 November 2009). The causal mechanism might thus be either emulation or persuasion/socialisation in this particular instance, yet the overall outcome was in any case strongly conditioned by the broader material dependence of SADC on the EU.

Dispute Settlement Mechanisms: Emulation from the European Court of Justice

These new market-building objectives then required DSMs to ensure their credibility. As members of the General Agreement on Tariffs and Trade (GATT) and later WTO, the adoption of the multilateral DSM in the regional context was a perfectly rational response to this functional requirement (Alter 2012). Yet governments in both regions have since the early 1990s gradually strengthened their DSMs beyond the multilateral baseline, emulating (elements of) the ECJ model, despite their concerns about the delegation of sovereignty. Why? I argue that EU influence played a crucial role. In SADC, these decisions constituted an attempt to retain

credibility with the EU and other international cooperation partners, whose continued material support to the broader project seemed to be in danger at various points during the 1990s; whereas in Mercosur they reflect the increasing traction of demands for the establishment of an ECJ-style court 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. I will speak of an ECJ-style DSM when we see two main features: a preliminary rulings procedure that enables national courts to ask the court for opinions on community-related rulings and an administrative and constitutional review authority that allows not just states, but community organs and private litigants to challenge community acts in front of the court (Alter 2012).

SADC Tribunal

Discussions on a new dispute settlement mechanism for SADC began in the early 1990s in light of the newly envisioned integration agenda discussed in the previous section. In 1991, an expert team made recommendations on a revised institutional structure arguing 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’ (cited in SADCC Council of Ministers, 28 August 1991: 379). This proposal thus suggested an intergovernmental GATT-type DSM, thereby reflecting member states’ reluctance to delegate sovereignty. Even the theme document for the 1992 Consultative Conference, which 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: 41–2). Hence, when the decision was taken to establish a Tribunal with the Windhoek Treaty, no real discussion on the costs and benefits of different options had taken place at the regional level.

However, this decision was taken in a particular context marked by uncertainty regarding the continued commitment of external partners to the organisation. 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 industrialised countries. The 1991 Summit 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, 26 August 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 mobilisation of own resources for the operation of SADC to the top of the regional agenda (SADCC Council of Ministers, 14 August 1992: 2–3). This was also against the background that the main impact of the envisaged common market was to be expected in stimulating ‘new types of investment’ rather than increasing intra-regional trade (SADCC Council of Ministers, 27 January 1992: 2).

This context of external dependence constrained policy-makers’ choices. It was paramount for them to retain the credibility and legitimacy with external aid and investment partners and signal to them that the new integration effort justified their continued support. One of the ways to do this is to draw on the credibility of established models, especially those favoured by external partners, by ‘visibly’ emulating (some of) its central features, while retaining a more sovereignty-preserving institution ‘in practice’. This is what the Tribunal stipulation in the Windhoek Treaty did. It envisaged the establishment of a permanent Tribunal with compulsory jurisdiction and the power to ‘give advisory opinions’ over all matters of the Treaty and subsidiary instruments (Art. 16); yet member states were clear internally that it was to be among ‘the central *intergovernmental* organs of the community’ (SADCC Council of Ministers, 14 August 1992: 35, emphasis added). Given the vagueness of the stipulation, it was left for further elaboration in a separate protocol.

With South Africa’s accession to SADC in 1994, the issue of sovereignty came to the fore again (Schoeman n.d.: 8). As by far the largest member of the organisation, it shared other members’ protective attitude concerning national sovereignty and had concerns that the Tribunal would challenge its strong Constitutional Court – concerns that were eventually overcome in principle. Nevertheless, when member states started work on the Tribunal Protocol in 1997, sovereignty concerns and the lack of direct effect of Treaty stipulations strongly pointed towards the adoption of the new WTO-type DSM in the regional context, which was fully compatible with original Treaty stipulations, including the mention of ‘advisory opinions’. However, as we have seen before, SADC’s international cooperation partners had grown increasingly dissatisfied with its performance and voiced that dissatisfaction openly. In this general context of uncertainty, they posited particular doubts about the ability to improve the record of the organisation without an enhanced dispute settlement mechanism that could push member states to abide by their commitments (see SADC Council of Ministers, 10–11 August 1999: 110). Once again, there is no evidence that EU actors (or others) ever explicitly connected continued funding with a particular type of DSM. However, on various occasions, EU-oriented actors conveyed their views about ‘what an effective and credible dispute settlement mechanism ought to entail’, as one of my interview partners recounted of an EC-financed British judge who formed part of the expert group drafting the Protocol (Interview with Stephen Kokerai). Moreover, the prospect of international donors contributing to the financing of the new institution mitigated potential distributive conflict between member states.⁵

In an attempt to ensure credibility towards the outside amidst serious legitimacy constraints, designers thus adopted the central ECJ features, but mitigated its potential intrusiveness – a pattern that once again follows an emulation logic. On the one side, the Tribunal Protocol, adopted in 2000, features exclusive competence to constitutional review (Art. 17), private access (Art. 15, 18) 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 competences by stipulating that non-compliance suits can be brought directly by individuals when all other domestic remedies have been exhausted (Art. 15b) and by explicitly providing for the development of 'Community jurisprudence' (Art. 21b) (for a good overview, see Ruppel and Bangamwabo 2008). On the other hand, policy-makers carefully circumscribed the Tribunal's competences. The protocol thus stipulates that sanctions in case of non-compliance with a ruling could only be imposed by the Summit, acting as always by unanimity. Moreover, in the absence of a direct effect doctrine and a preliminary rulings procedure that does not require national courts of last instance to refer cases to the Tribunal, as in the EU, private access and even preliminary rulings are much less likely to be sovereignty-encroaching. As long as member states do not incorporate rules into their domestic legal corpus, they do not constitute claimable rights among citizens. Given the notoriously low compliance rates in SADC, these features may well turn out to be a 'toothless tiger', at least in enforcing economic integration commitments (see Frimpong Oppong 2008).⁶

Mercosur Court of Justice

Unlike the SADC Tribunal, the evolution of Mercosur's DSM has been much more gradual with a significant strengthening of institutionalisation over time and in a context in which material dependence on the EU is largely absent. Mercosur's first dispute settlement mechanism, adopted in 1991 with the Protocol of Brasília, was purely intergovernmental and designed along GATT lines. It was barely used as member states preferred to deal with disputes directly through bilateral negotiations. Towards the end of the decade, however, the dispute settlement system drew increasing criticism from academics as well as civil society actors in the region. The problem lay less in its inability to settle disputes between member states, of which there were few; it had more to do with its failure to ensure compliance with Mercosur legislation and reflected a broader dissatisfaction with the continued tight political control of the Mercosur integration process and the lack of strong regional institutions. In this context, the creation of an ECJ-style Mercosur Court of Justice was seen by many as 'sorely needed' (see de Araujo 2001: 35) and an 'indispensable guarantee for a community of states based on the principles of economic inequality and legal equality', as Uruguay's Foreign Minister Didier Oppertti formulated (cited in Pimentel 2004: 148) – a position that Uruguay, increasingly supported by

Paraguay, had been taking since the beginning of the integration process. These calls were increasingly supported by an influential advocacy coalition, consisting of high-profile legal experts, who had on various occasions occupied positions in Mercosur institutions and even national governments, such as Alejandro Perotti or Deisy Ventura. Many of them had studied in Europe and/or written doctorates on the European legal system and its applicability to Mercosur (see Perotti 2004).

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 demands to be increasingly attended to. Even though member states continued to deal with the fallout of the crisis quite effectively through ‘presidential diplomacy’ rather than recourse to the Adjudication Tribunal (Malamud 2003), they nevertheless decided to strengthen it with the 2002 Olivos Protocol, which established a Permanent Review Tribunal modelled on the WTO. However, further piecemeal reform subsequently even went beyond the WTO arrangement in addressing these demands. Elaborating the provision on ‘consultative opinions’ in the Protocol (Art. 3) in Decisions CMC/37/03 and CMC/02/07, member states emulated the wording of Art. 177 of the Treaty of Rome, yet they protected national sovereignty by making them non-binding and allowing neither lower-level national courts (they have to act through their national Supreme Courts) nor the Mercosur Secretariat to request such opinions. The DSM thereby largely continues to lack the embeddedness that characterises the ECJ (Alter 2012).

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 declared that Mercosur’s future would have to entail the creation of supranational institutions along EU lines. 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 once again tabled a proposal for the establishment of an ECJ-style Mercosur Court of Justice (Interview with Elbio Rosselli, Former Director of Mercosur at Uruguay’s Ministry of Foreign Affairs, 9 July 2009). Nevertheless, the larger member states rejected these demands due to concerns about national sovereignty (Interview with Reinaldo Salgado, Director of Mercosur Division at Brazil’s Ministry of Foreign Affairs, 9 June 2009). Nevertheless, since then the establishment of an

ECJ-type court has firmly constituted the cornerstone of the debate on legal integration in Mercosur up to the highest governmental levels.

The coalition voicing this demand has since continued to expand and has sought to hold Brazil to its general willingness to consider supranational institutions. This has set in motion a process that seems to be at the brink of overcoming remaining resistance to the establishment of such an institution in the Brazilian government. The aforementioned advocacy coalition has 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 2009). It increasingly joins forces with other powerful actors and Mercosur's own institutions. The Supreme Courts in Mercosur, organised in an epistemic network, announced their general openness to the possible creation of a Mercosur court (see Perotti 2009: fn. 1), while the Permanent Review Tribunal 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'. In October 2010, the member states, including Brazil and Argentina, endorsed this declaration by Decision CMC/28/10, thereby committing, in principle, to the establishment of a supranational Mercosur Court of Justice.

Conclusion

Focusing on market-building objectives and regional courts, this article has analysed the diffusion of EU institutional models to Mercosur and SADC at various critical junctures of regional institutional evolution. In accounting for the puzzle that policy-makers have, over time, increasingly opted for EU-type rather than NAFTA- or WTO-type institutional arrangements, which appear more suitable to their overall preferences for 'pragmatic' and sovereignty-preserving cooperation, I offered an explanation of the dynamic process of EU influence – termed 'spurred emulation' – that is rather different from functional explanations of economic regionalism and regional institutional change.

I highlighted two main factors that condition diffusion from the EU. The first one is a functional demand for institutional change emanating from a serious regional crisis, which unsettles previous preferences and leads to decision-making under conditions of high uncertainty (see also Jetschke and Murray 2012). As policy-makers struggle to ensure the 'survival' of their regional grouping, this decision-making context opens a 'window of opportunity' for diffusion to occur and renders emulation rather than lesson-drawing (or competition) the more likely mechanism. While these windows of opportunity were associated mainly with dynamics unrelated to the EU in the case of Mercosur, uncertainty about continued EU funding propelled action on various occasions in SADC. The latter's high degree of

material dependence on EU support, a form of power asymmetry, has thus been an important source of diffusion dynamics. However, material support is never conditional upon the adoption of EU institutional arrangements.

The second factor emphasises the importance of domestic politics. A window of opportunity is only likely to lead to the actual diffusion of EU institutional models when domestic actors actively spur such diffusion. The very success of European integration, as well as direct EU support, empowers these actors in calling for EU-style institutional change. For Mercosur, the story is mainly about the empowerment of domestic advocacy coalitions and epistemic communities, including the two smaller member states and regional institutions, whereas in SADC it has to do more with the influence of EU-oriented (and often EU-paid) consultants. While state capacity and regime character also play a role in conditioning EU diffusion processes, they seem less critical to understanding the broad dynamics of EU influence on regional institutional change that this article focuses on.

Finally, it has to be noted that this article has focused mainly on broad similarities between Mercosur and SADC attributable to the dynamics associated with diffusion processes from the EU. However, it is important to note that important differences remain between the two regions and that the diffusion of EU institutional templates is 'incomplete' to the extent that it has seldom led to their wholesale copying or to the adoption of EU practices or behaviour. Instead, EU models have regularly been unpicked and adapted to fit with policy-makers' normative convictions, especially their continued concerns about national sovereignty. It thus remains a formidable challenge to account more systematically for such variation in EU diffusion processes and its effects on subsequent practices.

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Notes

1. The discussion of the Mercosur Court of Justice is still somewhat speculative, as the court's establishment has only been agreed 'in principle', but no concrete steps have been taken in this direction.
2. However, these scope conditions lead to indeterminate expectations regarding the likelihood of diffusion from the EU across the two cases as they cut in opposite directions. We would expect weaker state capacity and a higher democratic quality of regimes to be associated with a higher likelihood because the activities of (non-governmental) 'spurring' agents are more

likely to resonate. While state capacity is weaker, on average, in SADC than in Mercosur, the democratic quality is, on average, higher in the latter.

3. Both models were also deemed compatible with the pan-African ambition to form an African Economic Community (see SADCC Council of Ministers, 22–23 August 1991: 33–5).
4. SADC records at the time mention no single study conducted to weigh the costs and benefits of the two potential options.
5. See <http://www.sadc.int/tribunal/organisation.php> (accessed 14 June 2011).
6. However, in the area of human rights a 2008 Tribunal ruling on Zimbabwean President Mugabe's land reform (*Campbell case*) has sparked huge controversy and triggered a debate about curtailing the Tribunal's mandate; see <http://www.zimbabwedemocracynow.com/2011/05/26/sadc-tribunal-rights-watch-statement/> (accessed 14 June 2011).

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