

# Introduction

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Since 2004, the EU has been redefining its relationship with the African, Caribbean, and Pacific (ACP) States following the end of the long-running banana litigation at the multilateral level. Preserving this special relationship has required the shift from preferences toward asymmetric reciprocity through the Economic Partnership Agreements (EPAs). The EPAs were originally conceived of as North-South Regional Trade Agreements (RTAs) through which the comprehensive liberalisation of trade in goods, services, investment, procurement, competition, and intellectual property would be negotiated. However, to date, only one comprehensive EPA has been concluded between the EU and the Caribbean States (CARIFORUM).

Defined as partnerships for trade *and* development, the EPAs have been projected as regimes for the promotion of sustainable development *through* trade. It is the purpose of this book to analyse the extent to which development ideals will be promoted through these North-South RTAs. The focal point of this theoretical inquiry is the EPA between the EU and the Southern African region (SADC EPA States). Signed on 10 June 2016, the SADC EPA negotiations that have lasted for over ten years have finally come to an end. Marking the first trade agreement of its kind between the EU and a regional economic community in Africa, the SADC EPA sends a signal to the rest of the world that EU-Africa cooperation is as strong as it has ever been. However, the journey toward the conclusion of this agreement has been laborious, and at various stages throughout the negotiations it was feared the conclusion of the EPA would not be realised. In part, this book seeks to understand why the outcome of the EPA negotiations has fallen short of original expectations.

Regionalism presents both opportunities and challenges to the multilateral trading system and the broader international order. While RTAs offer 'speed and flexibility' in trade liberalisation,<sup>1</sup> they operate in a

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<sup>1</sup> R.V. Fiorentino, J. Crawford and C. Toqueboeuf, 'The Landscape of Regional Trade Agreements and WTO Surveillance' in R. Baldwin and P. Low (eds), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009), 29.

global order that has become increasingly differentiated. The international economic order is now characterised by both 'integration and fragmentation'<sup>2</sup> as non-state actors such as institutions, private organisations and civil society have penetrated the activities and functions which were traditionally assumed by the State. The function of the State has shifted from being the dominant political structure to being one of many polities operating in the global system. As a result, the structure of the global order now consists of many layers and can be described as a 'complex, multilevel political structure, in which the State assumes different functions'.<sup>3</sup> As the world globalises in accordance with neo-liberal principles, the concern that liberal democracy has become subordinate to economic globalisation leads to a sense that the significance of the nation-state has diminished. The rise of RTAs, which are legal regimes and make governance beyond the state possible, mark an interesting shift in the global economy.

This book offers a critical reconstruction of regions as social spheres of action integrated *through* law. Understanding the significance of regionalism as a trade strategy and as a form of social interconnection requires an understanding of transformations of the modern global political economy. As societies have become increasingly differentiated and pluralistic there is little doubt that the role of the nation state, traditionally understood as the main actor in the international order, is declining. Embedded within regions are the political, social, and economic qualities that were once associated only with states and it is this cosmopolitan transformation of the global order that draws into question the way in which society integrates through the legitimate institutionalisation of the market and power namely, as this book asserts, *through* law.

In placing the law at the heart of its inquiry, and drawing insights from both the rationalist and constructivist schools of international political economy (IPE), this book offers a unique and interdisciplinary contribution to the literature on regionalism. Through a critical analysis of the EPAs this book makes two claims. The first claim is that regions represent spheres of social action integrated through law. With reference to the Habermasian paradigm of *law as discourse*, this book asserts that regions are best understood as legal regimes through which the economic

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<sup>2</sup> M. Farrell, B. Hettne and L. van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Ann Arbor, MI: Pluto Press, 2005).

<sup>3</sup> F. Söderbaum, 'Exploring the Links between Micro-Regionalism and Macro-Regionalism' in M. Farrell, B. Hettne, L. van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Ann Arbor, MI: Pluto Press, 2005).

and political systems are institutionalised. Only law that has been created through the correct democratic procedure, which requires participation and deliberation among all those who will be affected by the law, can make a normative claim to legitimacy. Law, as an expression of *ideology*, is a structural *sine qua non* of the global system and of regional integration. As an ideal type of law, the discourse theory provides a grand narrative on how legitimate law should be created. Although this paradigm of law is highly-abstracted and idealised, it does have explanatory potential particularly in the context of the EPAs which, as legal regimes, have been modelled on the Habermasian paradigm of law-making through deliberation and participation of various stakeholders.

Formally, the legal architecture of the EPAs set out in the Cotonou Partnership Agreement supports participation and deliberative democracy. Article 8 of the CPA provides that the EPA States “shall regularly engage in comprehensive, balanced, and deep political dialogue leading to commitments on both sides” which “shall contribute to peace, security, and stability and promote a stable democratic political environment.” Dialogue should “focus on specific political issues of mutual concern” but may be “formal or informal” and conducted “within and outside the institutional framework.” The EPAs have, therefore, been conceived of as discursive spaces to promote political dialogue and deliberation among state and non-state actors with a view to creating what I have termed a ‘development-friendly’ trade agreement. It follows that the construction of the EPAs in these (Habermasian) terms should result in a partnership of equals.

The second claim set out in this book relates to the shift toward *interregionalism*, or the creation of region-to-region spaces integrated through law. While interregionalism remains relatively under-researched, it is a claim of this book that where a power asymmetry exists between the two regional partners, which is often the case in North-South RTAs like the EPAs, the potential for a discursive space for deliberation and argumentation to emerge is reduced. As the discursive space diminishes, the potential for a partnership of equals to materialise seems increasingly implausible. Through a Gramscian lens, this book proposes that inter-regional relationships between unequal partners may facilitate the reproduction of hegemonic ideology through legal regimes. This book seeks to critique power in North-South RTAs, drawing insights from Gramscian hegemonic theory, to argue that these forms of RTAs are *hegemonic* legal regimes through which the norms of the dominant partner can potentially be exported. However, it is submitted that the success of norm exportation hinges on the existence of a ‘discursive fit’ or ‘resonance’ between

the ideologies of the interregional partners.<sup>4</sup> This book puts forth a theory of law as *ideology* and, in the context of North-South RTAs, law as hegemonic discourse that regulates material production and reinforces power asymmetry through interregional legal regimes. To this end, it will be argued that the EPAs were crafted as hegemonic legal regimes that reinforce the EU's position of dominance vis-à-vis the ACP States.

Analysing the EPAs through discourse theory provides an opportunity to reflect upon how interregional relationships affect our understanding of modern global society and an interrogation of the claim that the EPAs constitute hegemonic legal regimes reveals interesting and unexpected shifts in the political economy of the ACP-EU relationship. This book will show that the implementation of the only full agreement in place, the CARIFORUM EPA, has failed to materialise in accordance with original expectations. Arguably, the implementation deficit in the CARIFORUM group signals a normative shift, albeit an incremental one, away from traditional EU dependency. Furthermore, the conclusion of the SADC EPA as a 'goods only' agreement has fallen short of the original ambitions of the EU to conclude a comprehensive EPA with African states. From an analysis of the results of the negotiation and implementation phases of these two agreements it may be inferred that there is a lack of discursive fit or resonance between the normative ideologies of the EU and the ACP States. This book aims to show how the behavioural attitudes of the ACP countries challenge the EPAs normative claim to legitimacy. While the EPAs are framed as hegemonic North-South legal regimes, their practical application suggests that the political economy of ACP-EU cooperation is changing.

The EPAs have been designed as 'drivers of development' albeit 'development' has been defined in accordance with the EU's neoliberal conception of that term. This book contests the instrumentalist view that promotes a vision of development focused on production, efficiency, and wealth maximisation, and draws insight from the capabilities approach of Amartya Sen. Bridging the schools of ethics and economics, Sen proposes a theory of development where freedom is both the principal means and the principal end of development.<sup>5</sup> Moving against the orthodox instrumentalist assumption that economic growth presupposes other substantive freedoms, Sen argues that these values should be seen as primary goals which will in turn stimulate growth. Development is,

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<sup>4</sup> T. Hopf, 'Common-Sense Constructivism and Hegemony in World Politics' (2013) 67 *International Organisation* 317–54.

<sup>5</sup> A. Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001).

therefore, conceptualised as ‘a process of expanding the real freedoms that people enjoy’<sup>6</sup> economic growth perceived as a ‘means’ towards the realisation of those substantive freedoms. With poverty eradication as one of the stated primary objectives, the EPAs seek to translate the normative framework of the Cotonou Partnership Agreement into development-friendly regional trade agreements. Incorporating provisions on labour standards, good governance, the promotion of human rights, and the protection of the environment into the trade agreement marks a new step in the ACP-EU relationship. Rhetorically, at least, the EPAs appear to promote development as freedom. However, while ethical norms and the principle of political dialogue scaffold the commercial provisions of the EPAs, on closer inspection these appear to be nothing more than vacuous commitments devoid of meaningful substance. The ambiguous nature of the sustainable development provisions draws into question the extent to which the EPAs will promote development *through* trade. Overall, it is argued that the neoliberal economic paradigm, which is supported by a formalist legal framework, is seemingly at odds with the discourse of development as freedom.

Chapter 1 presents the main epistemological framework and ontological claims of the book and asserts that regions should be understood primarily as legal regimes. Through the marriage of material power, ideational forces, and institutions this book aims to promote an understanding of regions as fundamentally legal regimes. The law generates an assumption of the ‘right’ and ‘just’ way to live, guiding behaviour of institutions and of people through legal codification of norms. Legal philosophers are concerned with the validity of legal norms, their claim to correctness, and to understanding the reasoning and logic of the legal system while sociologically informed analyses of law seek to reveal the practical or empirically valid nature of legal norms in relation to other spheres of action, such as politics and the economy. Using the discourse theory of law, this book proposes that legitimate law is that which is normatively perceived to provide ‘good’ reasons for action. This book aims to demonstrate how legitimate law can emerge from a discursive and participative process of deliberation. It will be argued that the EPAs have created discursive spaces for deliberation albeit the inclusion of non-state actors in that process across the regional groupings has been limited. As such, the extent to which the EPAs constitute legitimate legal regimes in a Habermasian sense is questionable.

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<sup>6</sup> *Ibid.*, 3.

Chapter 2 provides a critical assessment of the legal bases for regionalism enshrined in the multilateral rules. Article XXIV of the GATT 1994 provides the legal basis for creating regional agreements, where at least one member of the regional group is a developing country. It permits derogation from the principles of MFN and non-discrimination on the assumption that trade will be increased by promoting the regional interdependence of countries, through customs unions and free trade areas. Regionalism has, therefore, been conceptualised as a means towards *economic* freedom, through closer integration between Members. Although the jurisprudence relating to Article XXIV is limited, it does offer some insight into the interpretive dimension of this provision and suggests a gradual ‘legalisation’ and rationalisation of Article XXIV.<sup>7</sup> It will be argued that this process of rationalisation seals off the potential for alternative forms of integration schemes to emerge and, in doing so, promotes the neoliberal paradigm of regionalism thus restricting the space for deliberation and participation in the construction of new regional spaces.

In Chapter 3, the normative role of the EU as a regional actor will be discussed in detail. It will be shown that the EU’s strength as an international trade partner, or ‘market power’,<sup>8</sup> has enabled it to become a ‘normative actor’, which aims to export universal values through trade.<sup>9</sup> It will be argued that the EU’s normative power in external relations hinges on its market power. As such, an analysis of the common commercial policy set out in Article 209 of the Treaty on the Functioning of the European Union (TFEU) will be presented highlighting its parallelism with the EU’s internal trade strategy. Defining the EPAs as trade *and* development cooperation agreements, this chapter will also explore the relationship between the common commercial policy and the development cooperation policy under Article 209 TFEU. If the EPAs have been built on the principles of ‘partnership’ and ‘equality’, it follows that the agreements should foster trade in a ‘development-friendly’ way. However, the remaining chapters of this book will demonstrate that the language of the legal texts suggests the primacy of

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<sup>7</sup> J. Mathis, ‘The “Legalization” of GATT Article XXIV – Can Foes Become Friends?’ in K. Bagwell and P. Mavroidis (eds), *Preferential Trade Agreements: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2011).

<sup>8</sup> C. Damro, ‘Market Power Europe: Exploring a Dynamic Conceptual Framework’ (2015) 22 *Journal of European Public Policy* 1336–54.

<sup>9</sup> I. Manners, ‘The Normative Ethics of the European Union’ (2008) 84 *International Affairs* 45–60.

economic rules over the promotion of ethical norms reinforcing the EU's neoliberal conception of development.

Chapter 4 examines the normative character of the principle of sustainable development and assesses the extent to which it constitutes a justiciable norm. Through the analysis of the jurisprudence from the WTO's Dispute Settlement Body and the UN International Court of Justice, the normative content of the principle of sustainable development will be revealed. Building on the work of Virginie Barral,<sup>10</sup> it will be argued that the principle of sustainable development has served as an important hermeneutic tool in both judicial settings, giving *colour*, *texture* and *shading* to legal rights and obligations. Given the development focus of the EPAs this finding is particularly significant because it suggests that the sustainable development provisions of the agreements lack justiciability. Simply put, it implies that the sustainable development provisions in the agreement may not be enforceable through the dispute settlement mechanisms established under the EPAs. Nevertheless, in scaffolding the commercial aspects of the agreement around the principle of sustainable development it is herein submitted that the parties must apply the EPA in a development-friendly way.

Chapter 5 marks the beginning of the analysis of the EPAs, providing a rich and historically sensitive account to the transformative nature of ACP-EU cooperation. In this chapter, the various shifts in the ACP-EU relationship will be explored which will enable a better understanding of *why* this relationship has endured for so long. For many decades, the ACP countries enjoyed non-reciprocal preferential access to the EU market under the Yaoundé and Lomé agreements. Following changes at the multilateral level, and in accordance with the recommendations of the Appellate Body in the *EC-Bananas III* dispute, the ACP countries are no longer eligible to receive non-reciprocal market access for their exports to the EU market.<sup>11</sup> Nevertheless, the EU has been keen to preserve its long-standing relationship with former colonies in the ACP and has done so by offering reciprocal, but asymmetric, preferential market access under the Cotonou Agreement and through the EPA framework. Although the primary purpose of the EPAs is to eradicate poverty and facilitate the

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<sup>10</sup> V. Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 *European Journal of International Law* 380.

<sup>11</sup> The only exception to this rule is where the country concerned qualifies for special and differential treatment.

gradual integration of ACP countries into the global economy,<sup>12</sup> these agreements mark a significant transformative shift in ACP-EU cooperation as trade facilitation and reciprocal market access now form key parts of the agreements for the first time.

Chapter 6 critically reflects upon the emergence of African regional regimes. Providing an overview of African regionalism is important for the contextualisation of the analysis of the SADC EPA. Drawing insight from the work of James Gathii, this book asserts that African regionalisms represent 'flexible' legal regimes<sup>13</sup> that pursue multifaceted policy objectives. As such, African regionalisms do not fit neatly into the straitjacket of Article XXIV legal regimes discussed in Chapter 2. Nevertheless, it will be argued that these regions constitute regimes integrated *through* law and have offered a space in which 'norms of solidarity'<sup>14</sup> or expressions of collective political will have been contested, shaped and reproduced.

Chapter 7 explores the dynamism of regionalism in Southern Africa, with a focus on the Southern African Customs Union (SACU) and the Southern African Development Community (SADC). While trading patterns long-preceded the colonial and post-colonial periods, this chapter focuses on the manner in which these regional arrangements have been historically constituted as a part of the region's development strategy through colonial rule, Apartheid, and democratisation. It will be shown that the influence of South Africa, alongside the hegemonic force of normative power Europe, has formalised the construction of the region and has restricted space for the creation of more 'flexible' legal regimes to emerge effectively.

Chapter 8 provides a critical and factual presentation of the full EPA signed between the EU and the SADC EPA States in June 2016. From the outset, it was clear that the success of the EPA negotiations would depend on the convergence between institutionalised legal norms at the

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<sup>12</sup> Article 1 Partnership Agreement between the members of the African, Caribbean, and Pacific Group of States of the one part, and the European Community of the other part, signed in Cotonou on 23 June 2000, [2000] OJ L317/3 as amended through Decision No. 3/2008 of the ACP-EC Council of Ministers of 15 December 2008, [2008] OJ L352/59 to adopt the revised provisions set out in [2010] OJ L287/3, hereinafter referred to as the 'Cotonou Partnership Agreement 2014'.

<sup>13</sup> J.T. Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: Cambridge University Press, 2011).

<sup>14</sup> L. Dirar, 'Norms of Solidarity and Regionalism: Theorising State Behaviour Among Southern African States' (2016) 24 *Michigan State International Law Review* 667–723.

WTO level (Article XXIV compatibility) and the EU's normative preferences expressed through its external trade policy in relation to trade *and* development.<sup>15</sup> Overall, the perceived desirability of the EPA would be elicited from a good discursive fit between the ideational preferences of the EU and the Southern African countries. Through an analysis of the negotiations, it will be shown that the rhetorical argumentation that took place in this discursive space enabled the Southern African negotiators to reinforce the importance of the development dimensions of the EPA. An interesting approach adopted by the SADC EPA countries, and other ACP States, has been a form of rhetorical action known as 'mimetic challenge'.<sup>16</sup> Through normative argumentation, these countries have harnessed the EU's rhetoric of the EPAs as 'drivers of development' to strategically direct the negotiations toward development objectives. The contentious issues raised in the negotiation phase will be discussed with particular reference to the MFN clause, infant industry protection, and the dispute settlement mechanism. This chapter will identify the potential interpretive difficulties that might arise on implementation and provide an overview of the implications this could have for the development potential of the SADC EPA States.

Chapter 9 presents the findings of the EU commissioned 'Five Year Report' of the EPA negotiated between the EU and the Caribbean States (CARIFORUM). As the first comprehensive EPA to be concluded and implemented since 2008, the Report offers a rare opportunity for the other EPA regions to analyse the extent to which the benefits of the agreement are being realised by Caribbean businesses. A critical deconstruction of the Report identifies an information deficit, an implementation deficit, a financial deficit, and a development deficit. There appear to be inadequate monitoring mechanisms in place to measure the effect of trade liberalisation on the promotion of sustainable development, suggesting that the commercial aspects of the EPA have been prioritised over the social aspects of the agreement. Unsurprisingly, the Report tells a cautionary tale for the other EPA groups and one to which they should listen very closely, especially in relation to non-tariff barriers to trade and financial support for the implementation of the agreements. However, in the context of CARIFORUM, it also sends a signal to the EU that the Caribbean states are seeking out other markets and this may suggest a

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<sup>15</sup> T. Heron, 'Trading in Development: Norms and Institutions in the Making/Unmaking of European-African, Caribbean, Pacific Trade and Development Cooperation' (2014) 20 *Contemporary Politics* 11.

<sup>16</sup> S. Hurt, D. Lee and U. Lorenz-Carl, 'The Argumentative Dimension to the EU-Africa EPAs' (2013) 18 *International Negotiation* 67–87.

shift away from post-colonial dependency on the EU market. Where the CARIFORUM States seek to negotiate new regional arrangements with other countries and regions, the inclusion of the MFN clause in the EPA may become particularly significant for the EU in retaining its dominant position in the global economy.