

1. Integration through law

This chapter offers a critical reflection on the conceptualisation of regions expressed in the dominant rationalist tradition and aims to reconstruct an understanding 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 significance of the nation state, which has been traditionally understood as the main actor in the international order, has diminished. Where the rationalist and hegemonic stability theories of state action once dominated the discourse on legitimate authority, global governance has increasingly become a focal point of theoretical inquiry. 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.

The dominant modern Western world view, reflected in the state-centric theories of (neo)realism and (neo)liberalism, is rationalistic and conceptualises social action as a form of ends-oriented materialist rationality. From this perspective, regions have emerged from neofunctional beginnings as constructs guided by economic imperatives. Rationalist theories subscribe to the idea that ‘behaviour can be adjudged objectively to be optimally adapted to the situation’,¹ looking at the world as it *is*, rather than how it *ought* to be and in this regard it is not seeking to make normative claims about behaviour. Presenting a statist vision of the world, and one which emphasises the ‘constraints on politics imposed by human nature and the absence of international government’,² they abstract social action away from the normative

¹ H.A. Simon, ‘Human Nature in Politics: The Dialogue of Psychology with Political Science’ (1985) 79(2) *American Political Science Review* 293–304, 294.

² J. Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000), 9.

content of practical reason, or 'good' reasons for action, and instead conceive of action as inherently materialist. In other words, the historical motivation for coming together as a regional order of states is conceived of as driven by strategic and short-termist capitalist goals. Rationalist theories nevertheless provide a useful framework to understand the materialist orientations of state behaviour at the multilateral and regional levels but they do not go far enough in explaining the *ideas* that shape the pursuit of strategic capitalist action.

With the end of the Cold War and the rise of neoliberal political and economic ideology, the global order has become increasingly differentiated. The international economic order is now characterised by both 'integration and fragmentation'³ 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'.⁴ Constructivism is concerned with revealing not only material interests but ideational or ideological interests that shape the spheres of social activity between these different actors. In placing the emphasis on the different state and non-state actors involved in the construction of regions, the material and non-material ideational forces that shape trade policy in trade negotiations can be revealed. From this perspective, it is submitted that the negotiation process represents a discursive space of argumentation through which values, norms, and interests are shaped, contested, and reproduced.

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 Economic Partnership Agreements (EPAs) negotiated between the African, Caribbean, and Pacific (ACP) countries and the European Union (EU), this book makes two claims. The first claim is that regions represent spheres of social action integrated through law. With reference

³ M. Farrell, B. Hettne and L. van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2005).

⁴ F. Söderbaum, 'Exploring the Links between Micro-Regionalism and Macro-Regionalism' in M. Farrell, B. Hettne and L. van Langenhove (eds), *Global Politics of Regionalism: Theory and Practice* (Ann Arbor, MI: Pluto Press, 2005).

to the Habermasian paradigm of *law as discourse*, this book asserts that regions are best understood as legal regimes through which the economic and political systems are institutionalised. According to this theoretical perspective, 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 cast as spaces which should promote political dialogue and deliberation among state and non-state actors. An important caveat to the epistemological claims of this book is that it would be absurd to assume that each and every free and equal legal person who may be affected by the EPA can or should engage in the performative argumentation of trade policy formulation. Rather, it proposes that trade policy should be shaped by the participative deliberation of State and non-state actors in a meaningful way in order that a partnership of equals can emerge.

Seeking to govern the social space in which they operate, Regional Trade Agreements (RTAs) are historically situated, temporal and transformative concepts. Regions are constructed realities that are steeped in historicity but not fixed in space or time. Understanding the role that law plays in shaping these social spaces and stabilising behavioural expectations within these spaces is the central theoretical focus of this book. Challenging the assumptions implicit in the dominant neoliberal rational theories, this chapter aims to demonstrate the law's function as a medium of integration. Through a reconstruction of law, this book aims to situate material and non-material ideational forces that have influenced social changes in the EU's relationship with the ACP countries and, in particular, with the Southern African region in the SADC-EPA negotiations.

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 the claim of this book that where a power asymmetry exists between the two regional partners, and this is typically the case in North-South RTAs like the EPAs, the potential for a discursive space for deliberation and argumentation to emerge may be reduced. Through a Gramscian lens, this book proposes that interregional relationships between unequal partners facilitates the reproduction of hegemonic ideology through legal

regimes. The claim that the EPAs are hegemonic legal regimes that serve to reinforce the EU's position in the global economy will be the subject of interrogation throughout this book.

Adopting an interdisciplinary approach to the analysis of region formation serves to fill some of the conceptual gaps left by the rationalist schools of thought. In the first section of this chapter, the rationalist conception of regions will be presented with a view to explaining the different waves of regionalism that have emerged over time. In the second section, the constitution of regions through ideology will be examined identifying the material and non-material interests that underpin the (re)construction of regional spaces. The third section shifts the focus of this inquiry toward law as a medium of regional integration and through discourse theory highlights the interconnections between law, politics and economics. The final section presents the claim that North-South RTAs are *hegemonic* legal regimes. Extending the constructivist approach to an analysis of regions as legal regimes through discourse theory enables a better understanding of the ways in which the law institutionalises political ideology and economic imperatives in social spheres.

THE POLITICAL ECONOMY OF REGIONALISM

A useful starting point for the theoretical inquiry of this book is to examine the rationalist understanding of regionalism, how regions are formed, and for what purpose. Jagdish Bhagwati has written extensively on regionalism, and he has identified three 'waves' of regionalism which neatly set out distinct phases or bursts of regional activity that correspond to economic and political shifts in the global polity and enables a better understanding of the next phase of the regional project, *interregionalism*.

Waves of Regionalism

The first phase of regional activity, known as 'first regionalism' or 'old regionalism' is characterised by the post-war industrialisation and the widely adopted import substitution (IS) policies. Import substitution industrialisation (ISI) policies encourage high tariffs on imported products in specific sectors on the assumption that this will result in economic growth in the domestic industry. Historically, this was considered to be a favourable and suitable approach for developing countries that lacked comparative advantage across the manufacturing sectors. Adopting a free trade model was considered to be inappropriate for promoting economic

growth in developing countries as it was feared that adopting liberal trade policies would 'trap' them into being primary commodity producers indefinitely.⁵ ISI strategies were developed and introduced to promote industrialisation through infant industry protection because capital accumulation for manufacturing was believed to be at the heart of economic development in these economies.

Although the ISI policy was intended to be a temporary measure, it became a more permanent feature in developing countries and resulted in their industrial sectors becoming increasingly inefficient.⁶ Since ISI by its very nature implies protection, it is at odds with the liberalist approaches to trade which stress reliance on international market forces and free trade. Placing power in the hands of bureaucrats would mean that decision-making, in relation to which industries should be encouraged and prioritised, would no longer be subject to market forces. While Western financial institutions promoted ISI policy as their preferred economic development strategy, an alternative trade strategy was being implemented on the other side of the globe. In South East Asia, the popular ISI policy was abandoned in favour of outward-orientated export approaches to trade.⁷ Taiwan, Korea, Hong Kong and Singapore – collectively known as the East Asian 'Tigers' – encouraged trade growth through higher exports coupled with measures to protect the domestic industries. Arguably, the economic gulf that exists today between the ACP countries and the East Asian Tigers is in part attributable to the different economic strategies pursued in each region.

For a number of decades, the outward-orientated export approach remained popular, but by the 1990s the project of regionalism was revived. Marking the 'second wave' of regional integration, the number of RTAs being used as trade strategy began to increase. From a rationalist approach, when considering whether or not to join a RTA, each country will consider the economic welfare benefits and the political viability of such an arrangement. In essence, the government of that country will be pursuing a well-defined objective, or strategic motivation, albeit one that

⁵ A.O. Krueger, 'Trade Policy and Development: How We Learn' (1997) 87(1) *The American Economic Review* 1–22, 3.

⁶ S. Edwards and M. Savastano, 'Latin America's Intra-Regional Trade: Evolution and Future Prospects' in D. Greenaway, T. Hyclack and R. Thornton (eds), *Economic Aspects of Regional Trading Arrangements* (London: Harvester Wheatsheaf, 1989), 190.

⁷ H.J. Bruton, 'A Reconsideration of Import Substitution' (1998) *Journal of Economic Literature* 903–36.

is economic, political, social or cultural. Multilateralism, and regionalism, presupposes cooperation among states. However, states may have strong, and even conflicting, preferences where trade policy is concerned. Game theory is a useful tool for unravelling state behaviour particularly in the context of trade negotiations, as it explores cooperation and conflict between states. It is a cooperative strategy where a state takes into account the interests of other players but it assumes that those state actors are rational, conscious, goal-seeking actors.

Understanding cooperation from a realistic perspective, with reference to game theory, enables us to focus on the state as it has been historically constructed: as the sole actor in multilateral negotiations. While there are inevitably shortcomings with this approach insofar as it assumes actors to be *rational*, *self-interested*, and *goal-seeking*, it is a useful tool for analysing behaviour at the state level. A game commonly used to infer preferences from bargaining positions is the Prisoner's Dilemma.⁸ Within the Prisoner's Dilemma model there are four possible outcomes: exploiting another; mutual cooperation; mutual defection; or being exploited. In international trade, strategic action is usually described in the binary form of liberalisation through a free trade model (F) or protectionism (P). Table 1.1 outlines the four scenarios that exist within the cooperative game:

Table 1.1 Scenarios in a cooperative game

Country A	Country B	Outcome
P	F	Country A – Gain Country B – Exploited
F	F	Mutual Cooperation – Both gain
P	P	Mutual Defection – No gain
F	P	Country B – Gain Country A – Exploited

Game theory is a rationalist approach that allows us to predict behaviour. However, forecasting the welfare effects of FTA is, for the most part, problematic because they create complex economic impacts for each member. Different economic actors may be affected in different ways.

⁸ For an extensive discussion of the Prisoner's Dilemma and the Nash Equilibrium model see: M. Osborne, *An Introduction to Game Theory* (New York: Oxford University Press, 2004).

While a RTA may be welfare enhancing for a producer who exports to the new trading partner it may also adversely affect domestic producers who will lose out to cheaper competitors as a result of the new RTA coming into force. An interesting political economy explanation for the rise in RTAs during the 'second wave' is presented by economist Richard Baldwin in the 'domino theory'.⁹ Domino theory proposes that the deepening of integration among existing RTA members will increase the incentive for non-members to join the RTA. As integration among RTA members deepens, so too does the divide between members and non-members. The widening chasm results in trade diversion and loss for non-members which, in turn, incentivises the non-members to become members of the RTA. As the membership of the RTA grows, it becomes ever more attractive to non-members. Membership and accession increases the pressure for non-members to join the RTA since it is no longer politically optimal to remain an outsider.¹⁰

Building on this idea, Bhagwati extended the Vinerian analysis of RTAs through his articulation of the 'dynamic' approach to the role of RTAs in the multilateral system. His theoretical framework questions whether RTAs will act as 'stepping stones' or 'stumbling blocks' to the WTO's agenda for a trading world without tariffs.¹¹ In essence, the dynamic time path theorem examines the extent to which RTAs accelerate or hinder multilateral liberalisation. This approach goes beyond the analysis of the immediate, or static, effects of forming a RTA and instead considers the dynamic dimension of the RTA itself. If economic integration is endogenous there is likely to be both reduced protection for members and a correlative increase in the level of external protection for non-members.¹² This exemplifies the concept of 'inclusion/exclusion' within the RTA framework where members will benefit from freer trade within the boundaries of the regional arrangement whilst maintaining external tariffs to non-members. In any situation, it is necessary to quantify the payoffs relative to maintaining the status quo. What will a

⁹ R. Baldwin, 'Multilateralizing Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade' (2006) 29(11) *The World Economy* 1451–518, 1467.

¹⁰ *Ibid*, 1468.

¹¹ J. Bhagwati, *The World Trading System at Risk* (London: Harvester Wheatsheaf, 1991), 36.

¹² R. Findlay and A. Panagariya, 'A Political-Economy Analysis of Free Trade Areas and Customs Unions' in J. Bhagwati, P. Krishna and A. Panagariya (eds), *Trading Blocs: Alternative Approaches to Analyzing Preferential Trade Agreements* (Cambridge, MA and London: MIT Press, 1999), 334.

country gain from choosing to protect its market rather than liberalise its tariffs? Maintaining the status quo will not render any improvement and has zero welfare gain. From the information available, each actor will need to establish their 'best response' in relation to the actions of other actors.¹³ Agricultural trade is a good example of trading partners choosing the 'best response' policy. The EU has for many years pursued a dominant strategy of protection through its Common Agricultural Policy (CAP) which is often mimicked by the subsidised policies implemented by the USA.¹⁴ As illustrated in Table 1.1, if Country A openly chooses to adopt a protectionist strategy in agricultural trade it will come as no surprise that Country B will also choose that approach. In short, protectionism will be met with protectionism. To do otherwise would leave Country B open to exploitation from Country A in the trade of agricultural goods. As more players enter the game, the bargaining process becomes more complex and this game becomes entirely anti-theoretical to the liberal agenda of free trade.

If we accept that the developed countries such as the EU and the USA often choose defection (P) over cooperation (F), we must question whether the developing nations can afford to bear the costs of mutual defection. Dambisa Moyo categorises countries as either 'winning globalisers', 'non-globalisers' or 'losing globalisers'.¹⁵ Winning globalisers, such as the developed Western countries, have embraced liberalisation and witnessed economic growth. On the other hand, losing globalisers have liberalised but have not experienced growth while non-globalisers have not sought to liberalise and consequently have not experienced growth. The ACP countries, on which this book focuses, tend to fall within the 'losing globalisers' category. Let us now consider the game theoretic example in the context of agricultural negotiations using Country A (a developed country) and Country B (a developing country). If Country A decides to protect its agricultural market by using subsidies and sourcing from regionally situated countries, can Country B afford to operate in a similar way? Or in other words, can African countries

¹³ G. Harrison and E. Ruström, 'Trade Wars, Trade Negotiations and Applied Game Theory' (1991) 101 *The Economic Journal* 420–35, 423.

¹⁴ The EU's CAP was established as a mechanism to ensure food security in times of crises. See G. Skogstad, 'Ideas, Paradigms and Institutions: Agricultural Exceptionalism in the European Union and the United States' (2002) 11 *Governance* 463–90 and J.S. Ingram, P. Ericksen and D. Liverman, *Food Security and Global Environmental Change* (London: Taylor & Francis, 2010).

¹⁵ D. Moyo, *Dead Aid: Why Aid is Not Working and How There is Another Way for Africa* (London: Penguin, 2010), 114–15.

(Country B) compete with the subsidy schemes operated in the EU (Country A)? With most developing countries in crippling debt as a result of implementing policies promoted by the international financial institutions,¹⁶ they are not in a financial position to compete with this level of investment in protecting their agricultural market. Protecting their markets in this way has enabled developed countries to become 'winning globalisers' while the ACP countries, which remain producers of primary commodities, remain 'losing globalisers'.

That said, between 2000 and 2010 the African continent achieved a real rise in GDP of 5.4 per cent. Such significant growth, in a period when the rest of the world was feeling the effects of the global recession, led to the African economies being described as 'lions on the move'.¹⁷ While the 'economic lions' have witnessed a decline in real GDP over the past five years, the African continent nevertheless grew by 3 per cent over the past ten years. Therefore, with the appropriate infrastructure and removal of capacity constraints, the African economies have the potential to become 'winning globalisers'.

To avoid reaching a negotiating stalemate, trade concessions are made on a reciprocal basis. Reciprocity, or symmetry, is a fundamental principle of multilateralism in avoiding the Prisoner's Dilemma and a mechanism to avoid protectionism.¹⁸ In the absence of reciprocity countries could liberalise on an *à la carte* basis, choosing to cherry-pick those sectors to liberalise on a global MFN basis and those to exclude from liberalisation altogether. Bagwell and Staiger define reciprocity in general terms as referring to 'the ideal of mutual changes in trade policy that bring about equal changes in import values across trading partners'.¹⁹ In this respect, reciprocity builds fairness and equity into the

¹⁶ Liberals would contest this point, as they would argue that developing countries were already bankrupt when they came to the international financial institutions. For an example of how the international financial institutions have tried to implement policies to encourage investment in African developing countries see, J.D. Sachs and A.M. Werner 'Sources of Slow Growth in African Economies' (1997) 6 *Journal of African Economies* 335–76.

¹⁷ McKinsey Global Institute, 'Lions on the Move: The progress and potential of African Economies' (June 2010) Report of McKinsey & Company available online at <http://www.mckinsey.com/global-themes/middle-east-and-africa/lions-on-the-move>.

¹⁸ D. Das, *Regionalism in Global Trade* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2004), 101.

¹⁹ K. Bagwell and R. Staiger, 'Will Preferential Agreements Undermine the Multilateral Trading System?' in J. Bhagwati, P. Krishna and A. Panagariya (eds),

world trading system, reinforcing the idea that all members are equal. In lowering tariff levels reciprocally, members should enjoy higher welfare gains.²⁰

A significant political factor was the dissolution of the former USSR and Former Yugoslav Republic (FYR) which resulted in fragmentation and uncertainty for the countries in Eastern Europe. In order to protect their industries and to promote sustainable development after many years of protracted violence, these transition economies sought regional cooperation with the EU and European Free Trade Area (EFTA) states. This has been described as a process of 'action-reaction' whereby:

... the creation of discriminatory arrangements by one country is matched by an equal reaction (often defensive) by other countries, [and] seems to have become irreversible, almost as if RTA proliferation has reached a critical point from which there is no turning back.²¹

Other considerable geopolitical factors have also acted as a catalyst for the proliferation of RTAs.²² In the mid-1980s there was growing concern among the contracting parties of the GATT that the Uruguay Round negotiations would collapse. RTAs were perceived as an insurance measure for trade in the event that the multilateral system failed to overcome the negotiating impasse. There is almost a sense of *déjà-vu* in today's global economy, as the struggle to conclude the Doha Round rumbles on almost 16 years after it began. Without doubt, the perceived failure of the Doha Round has acted as stimulus toward RTA proliferation in this time period. With the conclusion of the Uruguay Round and the mass proliferation of RTAs generally, we are now in the 'third wave' of regionalism.

Trading Blocs: Alternative Approaches to Analyzing Preferential Trade Agreements (Cambridge, MA and London: MIT Press, 1999), 515.

²⁰ See generally Richard Baldwin's political economy 'juggernaut' model of reciprocity: Baldwin (n. 9) and R. Baldwin, '21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules', WTO Staff Working Paper ERSD-2011-08 (2011).

²¹ Baldwin, '21st Century Regionalism' (n. 20), 46.

²² R. 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), 44.

Collectively, the second and third waves have been coined as 'new regionalism'.²³ New regionalism is characterised by overlapping membership and an increasingly complex cartography of regional organisations, from which the question of 'who governs' becomes more difficult to discern. Countries are often party to more than one RTA and the systemic problem of overlapping membership and complicated tariff negotiations has resulted in the phenomenon aptly referred to as 'spaghetti bowl' regionalism or the 'noodle bowl' effect.²⁴ This analogy refers to the criss-crossing tariff commitments and non-harmonised rules of origin (ROO) that results from multiple membership. Naturally, as a country joins more than one RTA particular products will be subject to varying tariff levels depending on the terms of each RTA. Not only are new regional arrangements being negotiated, but previously abandoned RTAs across the globe have been revitalised, such as the Andean Pact in Latin America and the Common Market for Eastern and Southern Africa (COMESA) on the African continent. The scope of regionalism now seems to be shifting toward a more ambitious and inclusive trade policy, liberalising trade in goods, services, competition and procurement as evidenced in the negotiations of the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and the Trade in Services Agreement (TISA), to name but a few. A comprehensive approach to liberalisation has also been adopted in the CARIFORUM EPA, which will be examined in Chapter 9 of this book.

The significance of the rationalist accounts of regionalism should not be understated as they offer important insight into the materialist strategic orientations of states engaged in the negotiation process. However, in doing so, the normative content of action becomes further abstracted. It is the purpose of this book to present an account of the materialist and non-materialist ideational forces that come to shape strategic action.

²³ Bhagwati (n. 11), 58; B. Hettne, 'Beyond the 'New' Regionalism' (2005) 10 *New Political Economy* 543–71. Drawing on the work of Ernst Haas, Björn Hettne describes the 'new' wave of regionalism as being related to, and a reaction to, globalisation whereas the 'old' wave of regionalism was more concerned with the functional approach to integration. The New Regionalism Theory, on the other hand, is a critical theory that is used as a problem-based approach to the study of the ideas, beliefs and norms that have shaped regional processes within a globalising world.

²⁴ Introduced by President Haruhiko Kuroda, cited in Bhagwati (n. 11), 63.

CONSTRUCTING REGIONS THROUGH IDEAS

While conventional rationalist theories recognise that non-economic factors and non-state actors may influence regional processes, a critical constructivist approach perceives international trade to be a specific type of 'social interaction' through which social orders are created. For constructivist analyses, the international economic order spreads:

... knowledge, norms, and values through traders who often cross boundaries and settle into new communities and by the content of the products or services purchased by the members of different communities. Socio-cultural factors do not necessarily support international economic relations, and resistance to the expansion of global economic integration is often based on socio-economic concerns.²⁵

It is the emphasis on different actors, and their role in shaping international trade policy, that is perhaps the most distinguishing feature of these approaches to international economic law. Economic sociology, of the type developed by Mark Granovetter, considers economic activity as 'embedded' in social life and in social action. It is an explicit response to 'over-socialised' or 'under-socialised' accounts of economic behaviour provided by other schools of thought.²⁶ While the neoclassical economic position outlined in the previous section envisages economic actors as individual rational utility maximisers, for economic sociologists:

Actors do not behave or decide as atoms outside a social context, nor do they adhere slavishly to a script written for them by the particular intersection of social categories that they happen to occupy. Their attempts at purposive action are instead embedded in concrete, ongoing systems of social relations.²⁷

Cooperation is also a focal point for constructivists, but the analysis goes further than game-theory by exploring what constitutes cooperative relations among states. Of particular significance to sociological accounts of international trade is the intersubjective nature of trade and the role of interpersonal trust between parties involved in economic transactions.

²⁵ M. Hirsch, 'The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Trade Agreements in the World Trading System' (2008) 19 *European Journal of International Law* 227–99, 281.

²⁶ M. Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91(3) *American Journal of Sociology* 481–510.

²⁷ *Ibid*, 487.

Granovetter proposes that the trust that facilitates economic activity is found in social relations and not in institutional arrangements or generalised morality. Since social relations penetrate different sectors of economic life in different ways and to different degrees, this allows room for distrust, opportunism and disorder. Economic sociology highlights the ways in which economic activity is coordinated by groups, such as firms, rather than rational, self-interested states, as the rationalist model leads us to believe.²⁸

Since 1995, the WTO has acted as the multilateral forum in which this game is played, with members striving to secure a balance between progressive trade liberalisation and protectionism. In return for market access, a member must offer trade concessions on a reciprocal basis. For this ‘dance of contradictory impulses’²⁹ to move fluidly, there must exist rules, norms and practices at the institutional level to support the game. Governance and regulation set the boundaries in which the members can play/dance. Actors involved in trade negotiations across the different spatial levels are not mere automatons – they are active participants who develop a ‘feel for the game’ that guides and influences their policy choices. It is through their social interactions that government officials and trade professionals co-construct international economic law. Their interpretations of the text give meaning to its provisions.³⁰

From a Habermasian perspective, trust is derived from the legal rules themselves. Kent Jones highlights a more subtle dimension of trust within the WTO system, based on ‘fair bargaining’.³¹ While members will seek to maximise utility during negotiations, we must remember that these negotiations are led by human beings, who will be sensitive to the nuances of the game. This is particularly the case in asymmetric partnerships, where countries will continually strive to strengthen their bargaining positions at the next round of negotiations by ‘shaping the

²⁸ M. Granovetter, ‘Problems of Explanation in Economic Sociology’ in R. Eccles and N. Nitin (eds), *Networks and Organisations: Structure, Form and Action* (Boston: Harvard Business School Press, 1992).

²⁹ K. Jones, *The Doha Blues* (New York and Oxford: Oxford University Press, 2010), 6.

³⁰ A. Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011), 164–5.

³¹ Jones (n. 29), 11–12.

negotiation agenda ... exploiting particular issues and forming coalitions'.³² This type of behaviour is evident in the WTO's dispute settlement system, which will be discussed at greater length in the next chapter.

A constructivist approach that emerged during the wave of 'new regionalism' is that of New Regionalism Theory (NRT). Developed principally by Bjerne Hettne and Fredrik Söderbaum, NRT encourages a focus on 'by whom, for whom and for what purpose' regions are created.³³ Inherently intersubjective in character, NRT seeks to critically reconstruct the rationalist, positivistic tendencies of conventional theories of regionalism. Conceiving of rationalist theories as being both 'overly concerned' with methodology and 'under-concerned' with the 'socio-economic circumstances and historical context of regionalism', this theoretical school offers an alternative lens through which regional processes can be interrogated and understood.³⁴

Transcending the traditional approaches that treat the state as if it is 'the ontological and moral equivalent to individual persons',³⁵ NRT focuses on the interaction of various actors across different spatial levels. Scholars of New Regionalism understand regionalism as a historically situated, multidimensional process in which regions are constructed, deconstructed and reconstructed; intentionally and/or unintentionally; for negative and/or positive purposes, by informal and formal actors. As the international order has become differentiated, so too has the space they occupy. Institutions may emerge at different levels within, alongside and across the space occupied by the state. The different actors in the global system may have overlapping, competing and even conflicting interests, goals, policies and projects. NRT does not prioritise formal or informal regionalism; rather it seeks to highlight the involvement of all actors that may influence the construction, deconstruction and reconstruction of regional space. In the context of this book, the focus is primarily on state and regional actors in the EPA negotiations. However, reference will be made to the non-state actors that have played a role in steering the negotiation process. Non-state actors shape the interests pursued at the state level through formal and informal networks and therefore the focus should be on all actors operating within the formal inter-state framework.

³² *Ibid.*, 12.

³³ F. Söderbaum, *The Political Economy of Regionalism: The Case of Southern Africa* (Basingstoke: Palgrave MacMillan, 2004), 2–3. Emphasis added.

³⁴ *Ibid.*, 193.

³⁵ Söderbaum, 'Exploring the Links between Micro-Regionalism and Macro-Regionalism' (n. 4), 89.

A significant obstacle to a full analysis of the way in which norms are shaped by both state and non-state actors is the lack of transparency, particularly in the context of the EPA negotiations. Much like other trade negotiations, very little has been made publicly available and therefore gathering data presents notable challenges. Beyond the limited information made publicly available through the EU or ACP sub-regional groups which might indicate the motivations of the state actors to enter into these agreements, a sense of the public reaction to the new trade and development regimes can be discerned through statements from civil society organisations and media reports.

From a constructivist perspective, actors both construct and are subjects of the region. These actors are constantly engaged in processes of interaction that can construct and de/re-construct spatial boundaries. Under this theoretical framework, the region is perceived to be a social construct with regionalism being what the actors make of it:

Individual countries ... are not islands in the sea of globalism, but interact with close neighbours in ways that impact upon both their own national development and global interactions. Within each region, the character of interaction helps to define the possibilities of each national development. Regions are shaped by the world order and reciprocally, reshape that world order.³⁶

In identifying the different actors involved it is important to acknowledge that they do not operate in a mutually exclusive way. A distinguishing feature of new regionalism is the emergence of global actors. The region can itself be both an arena in which actors engage in processes of regionalisation and an actor participating in regional activity. It is both an author and a subject of the region. Drawing insights from critical political economy, this book conceives of the EU as a *normative* global actor that actively seeks to export universal norms through its regional trade strategy. The idea that a region can become an actor, capable of articulating transnational interests, emphasises the cohesiveness and coherence required to become an actor. Agency is given a broad interpretation with a regional actor being defined as that which 'takes part – consciously or unconsciously – in activities on a regionally defined area'.³⁷ Agency of regional actors, with the exception of the EU, is

³⁶ C.B. Thompson, 'Regional Challenges to Globalisation: Perspectives from Southern Africa' (2000) 5 *New Political Economy* 43.

³⁷ B. Hettne, 'EU Foreign Policy: The Interregional Model' in F. Söderbaum and P. Stålgren (eds), *The European Union and the Global South* (Boulder, CO: Lynne Rienner, 2010), 20–8.

relatively under-researched, but it will be shown in Chapter 3 that the EU has used its regional presence to effect an external policy that parallels its internal policies.

LAW AS A MEDIUM OF INTEGRATION

The rationalist and constructivist schools provide rich and interesting theoretical views of regionalism although the significance of law as a medium of integration is obscured. The following section aims to fill the conceptual gaps of these theoretical perspectives and asserts that regions represent spheres of social action that are integrated through law. In order to ground this claim it is first necessary to explore the concept of social action, which has long been the subject of sociological inquiry.

Reclaiming Rationality

The first, and arguably one of the most significant theories of social action, was articulated by German sociologist, Max Weber. In his paradigm of action theory, Weber identified four types of social action, or rationality, and three forms of legitimacy, which are inherently intersubjective and ‘oriented to the past, present or expected future behaviour of others’.³⁸ Weber conceptualised action as oriented toward four types of rationality: *instrumentally rational*, *value-rational*, *affectual* and *traditional*.³⁹ Instrumentally-rational social action is oriented towards achieving a particular end, with the actor knowingly choosing a behaviour regardless of the costs to those and to others. It is determined by ‘expectations as to the behaviour of objects in the environment and of other human beings; these expectations are used as ‘conditions’ or ‘means’ for the attainment of the actor’s own ‘rationally pursued or calculated ends’.⁴⁰ By contrast, value-rational action is determined in accordance with the ‘conscious belief in the value for its own sake of

³⁸ M. Weber, *Economy and Society: An Outline of Interpretive Sociology* Vol. 1, G. Roth and C. Wittich (eds) (Berkeley, CA: University of California Press, 1978), 22.

³⁹ Social action oriented of the *affectual* kind is determined by the actor’s “feeling states” while the *traditional* orientation is determined by “ingrained habituation”. See Weber (n. 38), 25.

⁴⁰ Weber (n. 38), 24.

some ethical, aesthetic, religious or other form of behaviour, independently of its prospect of success'.⁴¹ One of the earliest articulations of a *strategic* form of rationality is found in the Aristotelian concept of teleological action – that is, the way in which an actor chooses a particular action in order to attain a particular end 'guided by maxims and based on interpretation of the situation'.⁴² Teleological action can be extended to a strategic or instrumental form of rationality, in which actors choose a particular path among alternatives in pursuit of a particular goal or desired state and are guided by utilitarian principles. Both teleological and strategic action share a common framework which presupposes the relationship between the actor and the 'objective world', or in other words, between an individual and their understanding of the state of affairs in the external world.

It is submitted that social orders go beyond the individual rationalist strategic action of state actors:

the content of a social relationship [will] be called an order if the conduct is, approximately or on the average, oriented toward determinable 'maxims'. Only then will an order be called 'valid' if the orientation toward these maxims occurs, among other reasons ... because it is in some appreciable way regarded by the actor as in some way obligatory or exemplary for him.⁴³

These determinable maxims, or norms, provide reasons for action which individuals feel compelled, or obligated, to accept. In general, the word 'norm' refers to 'a standard of appropriate behaviour for actors with a given identity'.⁴⁴ This definition can be expanded to the legal system to define *legal* norms as providing a *legal* standard of appropriate behaviour for actors with a given identity or, simply put, norms that constitute 'legal reasons for action'.⁴⁵ It is generally accepted among legal scholars that valid legal norms prescribe reasons for action backed by some form of coercive measure. Legal norms are limited by historical time and social space, applying only to the legal actors in the particular territory defined by law, and are valid until such a date that they are repealed. Of course,

⁴¹ *Ibid.*

⁴² J. Habermas, *The Theory of Communicative Action: Reason and the Rationalisation of Society*, Vol. 1, T. McCarthy (trans.) (London: Beacon Press, 1984), 85.

⁴³ Weber (n. 38), 31.

⁴⁴ M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organisation* 887–917, 891.

⁴⁵ T. Spaak, 'Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification' (2003) 16 *Ratio Juris* 469–85.

not all norms within a social space are legal norms. Within any given social order there may be a multiplicity of norms that are cultural, traditional, ethical, political or economic in character. Theories of social action aim to discover the normative bases of social orders to explain *why* individuals conform to certain patterns of behaviour. From a social theory perspective, the function of the law is that of social integration. Understanding *why, for whom, and for what purpose* regional and interregional spaces are constructed through law is a central theme of this book.

Sociological theories of law have long sought to explain the integrative function of the law through social contract, utilitarianism and individualistic theories. One of the earliest integrative theories is found in the writings of Emile Durkheim, who presented a sociological theory of law conceived of as an expression of the conscience collective from which the individual is born.⁴⁶ In identifying two forms of social solidarity, mechanical and organic, Durkheim sought to construct an understanding of the law's integrative function. Mechanical solidarity is exhibited in homogenous societies where law is repressive in terms of its punishment for non-compliance. As the division of labour is not pronounced in this type of society, there are strong societal bonds based on a common belief system and the expression of a conscience collective is strong since there is little room for individualism. As societies modernise and the division of labour becomes increasingly differentiated, social bonds begin to disintegrate, leading to a weakened sense of 'common' identity. Organic solidarity is associated with modern societies in which there is a clear division of labour and individuals take on specialised roles within the economy. However, individualism comes at the cost of losing the sense of belonging to a more homogenous or common group. While the law in this type of society is less repressive in terms of punishment it nevertheless serves an integrative function to prevent a state of *anomie*, wherein common values, norms and morals are no longer understood or accepted.⁴⁷ *Anomie* represents a state of *normlessness* where common bonds have weakened without new norms having emerged to guide societal expectations. It is the function of the law to prevent the state of normlessness by sealing off, or closing, society through a process of (re)integration.

Admittedly, there are a number of shortcomings with Durkheim's rather simplistic theory but it does offer an interesting platform from

⁴⁶ E. Durkheim, *The Division of Labour in Society*, W.D. Halls (trans.) (New York: The Free Press, 1984).

⁴⁷ E. Durkheim, *Suicide: A Study in Sociology* (Abingdon: Routledge, 2002).

which other notable sociological theories of law have emerged. These theories aim to capture the complexity of modernity and problematise social action through a critical lens, highlighting the shift from pre-modern to modern societies. In pre-modern societies, social behaviour was influenced predominantly through religious ideology with the clergy representing the 'most colossal utopia'.⁴⁸ Over time, the dominating ideology in the West has shifted toward a rationalist bureaucracy in secular societies with the logics of economics, law and politics as structural pillars of the system. Replacing the role of religion, the law operates as a 'unity-creating ideological institution', especially in capitalist societies.⁴⁹ Both Weber and contemporary German philosopher Jürgen Habermas conceive of the law as a sphere of social action that is open to formal rationalisation; and with an increasingly complex institutional framework of society, the law 'becomes more and more indispensable as the moral sources that supply the necessary motives to the occupational system dry up'.⁵⁰ Weber's writings in the *Protestant Ethic and Law and Economy*, demonstrate how the anchoring of modern law has marked a shift from metajuristic to juristic principles, which have nothing more than a hypothetical status. Anchoring the law in juristic principles reinforces the autonomy of the law but nevertheless retains the relationship between law and extra-legal contexts. As society has become increasingly bureaucratised, the law has become ever more rational. Weber explored different archetypes, or 'ideal types', of law which would support and facilitate economic production and noted that the *rationalisation* of law created a more predictable and stable environment. By contrast, a lack of rationality implies a state of chaos under which capitalism would collapse resulting in a state of *anomie*. Central to Weber's thesis is the concept of authority, and in the legal-rational typology of law authority is found in the impartiality of legal rationality where officials act with 'formalistic impersonality'. Deconstructing the concept of authority provides an explanation of why we feel obligated to respect the law, even in the absence of coercive forces. Although Weber provided one of the most influential contributions on the rationality of modern law he expressed ambivalence toward the dominant discourse of rationality as 'it threatens to dehumanise our existence and confine us to

⁴⁸ A. Gramsci, *Prison Notebooks*, J. Buttigieg (ed.) (New York: Columbia University Press, 1992), Q4 §45.

⁴⁹ S. Buckel and A. Fischer-Lescano, 'Gramsci Reconsidered: Hegemony in Global Law' (2009) 22 *Leiden Journal of International Law* 437–51, 441.

⁵⁰ Habermas (n. 42), 251.

an *iron cage of rationality*'.⁵¹ Habermas sought to reclaim rationality as a standpoint from which we can understand the differentiation between the *system*, a term used to broadly refer to the complex institutional framework governing society at the national, regional and international levels, and the *lifeworld*, a term which refers to society in general. While he was critical of the dominant discourse, he nevertheless (critically) supported the project of rationalisation on the basis that the realisation of the projects of rationality and modernity could be achieved through an alternative epistemological approach.

Habermas offers a theory that is both sociological and historical, with a focus on how law operates in modern society, providing a normative account of legitimate law as a medium that integrates society. Recognising that modernity has broken down long-established traditions, such as religion, he asserts that we are now living in an increasingly *functionally differentiated* world. Conceiving of society as a system of interconnected spheres of social action, Habermas places rationality at the heart of the discursive process showing that modern law reintegrates societies that have become increasingly individualistic and normless. In order to coordinate our actions in a world that lacks common understandings we must engage in deliberative processes to reach consensus on particular issues. Law fosters integration in an increasingly fractious world because it sets default rules for interaction and therefore creates reliable expectations. Drawing insights from John Rawls' political philosophy, Habermas proposes that positive (enacted) law must be concerned with redistributive justice in society to ensure that all free and equal legal persons are entitled to the same rights. These expectations are not only underpinned by threats of punishments sanctioned by the law but through the mutual agreement between free and equal legal persons, engaged in a performative process of argumentation, to be bound by legal rules. Through his discourse theory and deliberative democracy model, Habermas conceives of law as an indispensable condition of society through which political ideology and economic imperatives are institutionalised. It will be recalled that this is an *ideal* type of law but it nevertheless has explanatory value particularly in the context of the EPAs, as these trade agreements are anchored in a deliberative democracy model.

⁵¹ E.O. Eriksen and J. Weigård, *Understanding Habermas: Communicative Action and Deliberative Democracy* (London: Continuum, 2003), 2.

A Discourse Theory of Law

To contextualise the discourse theory of law it is worthwhile briefly considering Habermas' earlier writings. In *A Theory of Communicative Action*, Habermas grounds his theory in a participant-centred discourse of intersubjective communicative capabilities and proposes an alternative form of rationality⁵² that is constituted through subject-to-subject interaction between individual actors. Through this process of intersubjectivity, individuals can make claims to correctness based on the procedure through which we reach certain decisions and conclusions. Communicative action presupposes a background knowledge which is intersubjectively shared by the participants of a particular community.⁵³ Much like the Gramscian concept of 'common-sense', background knowledge represents an uncritical philosophy that is generally accepted by society. Interpretation, which involves the negotiation of definitions of terms and reaching consensus, is central to the concept of communicative action. Habermas conceives of the *lifeworld* (society) as constituting the interconnecting complexity of cultural traditions, social orders, and the individual identities of actors. Inherent to the theory of communicative action is the supposition that the actors possess the requisite ability to understand the linguistic and interpretive medium in which the deliberation should take place. However, the conclusions drawn from these deliberations must be open to interrogation: they are not infallible.

The significance of law as a medium of integration in modern societies is unmistakable when contrasted with social action in pre-modern societies wherein the individual was socialised through familial, religious and cultural networks of reciprocal social relations. As a result, the individual was not conceived purely as an autonomous entity but rather their identity was intertwined with relationships of mutual recognition and

⁵² While Habermas identifies four modes of action that are either *strategic*, *normatively regulated*, *dramaturgical*, or *communicative* in orientation, this book is predominantly focused on the manner in which strategic and normatively regulated actions interfere with the spheres in which communicative action *should* take place. Normatively regulated action refers to the compliance of a community with norms in order to fulfil a generalised expectation of behaviour. Habermas extended Weber's analysis to show that different rationalities can affect the ability to achieve communicative action through the process of procedural rationality. Of most importance to this book is the notion of purposive or instrumental rationality which is strategic and ends-focused and the way in which this form of rationality can inhibit communicative rationality. See Habermas (n. 42), 87.

⁵³ Habermas (n. 42), 11.

reciprocity. This sense of common identity grounds the law in a real way and it is the 'symbolic construction' of 'a people' that transforms the modern state into a nation-state.⁵⁴ As societies modernise, the relationships that were once defined by personal bonds become abstracted relationships between strangers who agree to be bound together by legal rules that both guarantee their freedom and inhibit their liberty:

Growing pluralism loosens ascriptive ties to family, locality, social background, and tradition, and initiates a formal transformation of social integration. With each new impulse toward modernisation, intersubjectively shared life worlds open, so that they can reorganise, and close once more.⁵⁵

As society becomes increasingly differentiated and pluralistic the law plays a normative regulatory role in reintegrating society. In doing so, the law acts as a hinge between the system and the lifeworld to fill the gaps where the integrative capacities of social orders have become 'overtaxed'. Habermas asserts that law is the only medium in which moral obligated relationships of mutual respect between strangers can be achieved.⁵⁶

In *Between Facts and Norms*, Habermas seeks to provide an account of modern societies through which the enforcement of positive law (facticity or empirical efficacy) is intertwined with the law's claim to legitimacy (validity). Modern law, Habermas submits, is 'Janus faced' and enables actors to choose between two distinct paths toward the law: facticity and validity.⁵⁷ Individuals can conceive of the law as factual constraints on social action and adopt a strategic rational approach in their behaviour. Legitimate law is that which satisfies the *discourse principle* which requires the assent of all participants in rational discourses that might be affected by the legal norm. Conceiving of legal subjects as both authors and addressees of law, Habermas asserts:

As legal subjects, they must anchor this practice of self-legislation in the medium of law itself; they must legally institutionalise those communicative presuppositions and procedures of a political opinion- and will-formation in which the discourse principle is applied. Thus the establishment of the legal code, which is undertaken with the help of the universal right to equal

⁵⁴ J. Habermas, *The Postnational Constellation: Political Essays*, M. Pensky (trans.) (Cambridge: Polity Press, 2007), 64.

⁵⁵ *Ibid*, 83.

⁵⁶ J. Habermas, 'Postscript' in *Between Facts & Norms*, W. Rehg (trans.) (Cambridge: Polity Press, 1996), 460.

⁵⁷ *Ibid*, 448.

individual liberties, must be *completed* through communicative and participatory rights that guarantee equal liberties for the public use of communicative liberties. In this way, the discourse principle acquires the legal shape of a democratic principle.⁵⁸

Legal norms must be seen as having a dual character, both to protect our freedom and to prevent interference with our freedom. This is particularly true of capitalist societies, wherein modern law has been constructed around a liberal conception of freedom which places emphasis on individual and property rights. By way of example, my individual right to liberty free from the interference of others is a freedom which is guaranteed by the law and this serves to protect my individual liberty while simultaneously constraining the liberty of others. Coercion, in a legal sense, is justified as protecting each individual's right to liberty from the encroachment on that liberty by other actors. Habermas identifies an internal connection between coercion and freedom as law's claim to legitimacy derives from its guarantee to liberty. This leads Habermas to conclude that 'legal norms are at the same time but in different respects enforceable laws based on coercion and the laws of freedom'.⁵⁹ Drawing insights from Kant's idealism, Habermas identifies the dual character of law's validity from the perspective of social action theory. If the law's validity is both coercive and liberating in nature then this gives the individual actor a choice of action orientation – either to respect the normative constraint on action to ensure that the liberty of others is preserved, or to encroach on another person's liberty and face the penalty for non-compliance with that particular legal norm. Alternatively, individuals can adopt a *performative* attitude to the law in which they view legal norms as conditions for behaviour and obey these norms out of sheer respect for the law. The law's claim to legitimacy is achieved through the acceptance of the population by a discursive democratic process that the law is normatively 'good' and 'just'.

Modern society is characterised by social integration of institutions at the macro-level through power (democracy) and economics (the market). Using counterfactuals, Habermas strives to illustrate how the legitimacy of law is derived from the 'self-imposed' will of individuals. In other words, Habermas seeks to explain why individuals obey the law beyond reasons of bare coercion. Law serves as the binding structural force between the two competing social interests of power and money. His

⁵⁸ *Ibid.*, 458.

⁵⁹ J. Habermas, *Between Facts & Norms*, W. Rehg (trans.) (Cambridge: Polity Press, 1996), 29.

analysis of the *system* is expressed in his discourse theory, an idealised and multi-dimensional paradigm that bridges Habermas' interest in political theory and rationality. It rests on the assumption that actors possess the capacity to recognise the intersubjective quality of normative claims and can reach a mutual understanding on what is *good* for the whole of that social order. Cooperation is therefore rooted in validity claims, the content of which Habermas recognises to be rational and cognitive in character. From a Habermasian perspective, the *philosophy of consciousness* tells a tale of rationality in the Cartesian sense, in which the actor seeks to interpret facts and events through a predominantly cognitive form of reason. In doing so, the actor attempts to rationally understand these facts and events against an ever changing environment to achieve his/her goals or subjective preferences. Rationality, through this process of consciousness, becomes instrumental.

Participation in this process is not merely an empirical practice, it is *performative* in character. As a discursive process it entails the presentation of counterfactual 'pragmatic presuppositions' through which each individual has an equal opportunity to present arguments and the best argument is that which is most persuasive in line with rational argumentation. Legitimate norms, or *good reasons for action*, are those which have been achieved through a mutual understanding of the participants. In other words, all actors accept that their behaviour should be guided by a particular norm, and agree to be bound to that norm, because it is rationally the most persuasive. This leads to the neo-Kantian conception of obligation that actors agree to a form of social coordination as a matter of their 'free will'.

As an abstracted, highly idealised and multi-dimension paradigm Habermas strives to demonstrate how discourse theory can be used to critically reflect upon the real-life institutional choices taken in complex, modern societies. He does so through the *discourse principle* wherein the validity of a norm is derived from the consent of all actors to whom the norm affects, provided that the consensus is achieved through reasonable discourse that is free from coercive forces. However, far from seeing the law as an autonomous sphere of social action detached from other spheres of social action like systems-theorists, Habermas conceives of law as a medium of social *integration*. The social spheres of economics and politics are institutionalised through legal procedures and regulations, which in turn is socially integrated through communicative action in the lifeworld. Anchoring the economic and political systems *in* law, Habermas argues that law bears the task of holding society together. It is through the creation of the administrative state, a subsystem of society which is constituted through binding positive law, that collectively

binding norms are created. As a specialist subsystem, the administrative state is separate from society and this serves to institutionalise the market through private property rights.⁶⁰ One effect of this differentiation between system and society is that markets appear to be self-regulated, impersonal and abstracted from society.

In a globalising world order, the validity of republican autonomy loses its critical strength as the significance of nation states begins to diminish. Faced with a complex social order comprised of global and regional institutions, nation states and regional arrangements, the idea that societies are able to democratically self-direct becomes the focal point of critical inquiry. In seeking an alternative theory through which the democratic self-legislation of individuals in society can be credibly realised, Habermas does not propose a 'self-dismantling' of neoliberalism but rather a way to transpose the existing democratic process beyond a nation-state analysis.⁶¹ The only legitimate democratic process is one which allocates rights fairly and equally. Although his theory is anti-majoritarian, in the context of law Habermas proposes that bargains may be reached among the participating actors who the law might affect. The struggle of reaching consensus among large groups is certainly evident in the WTO. Having been originally created as the GATT in 1947 by just 23 Contracting Parties, the WTO is now an organisation of 164 members. Since 1947, the legal text of the GATT has constituted the legal rules governing the reduction of tariffs in trade and goods and has remained unchanged to this day. As demonstrated through the protracted Doha Round negotiations, it is difficult to achieve consensus among the existing 164 members and it is unlikely that they would all share the vision of the original 23 members.

Social action in modern Western society is inexplicably driven by a capitalist logic which can be harmful to private autonomy and, therefore, it is of paramount importance that the democratic constitutional state provides safeguards and social conditions that mitigate against the infringement of private autonomy. Redistributive justice becomes a key concern for the state, and social welfare emerges from the dialectic between legal equality and factual inequality, or between formal equality and substantive equality. To guarantee liberty and the law's claim to legitimacy, human rights must be available to all legal persons in order to prevent disadvantages for minority groups. It is the social intervention of the state that 'expands the self-legislation of the citizens of a nation-state

⁶⁰ Habermas (n. 54), 61.

⁶¹ *Ibid.*

into the democratic self-steering of a nation-state society'.⁶² Applying the discourse principle to the international level results in a cosmopolitan theory wherein the state guarantees individual freedoms in the form of human rights, which Habermas defines as 'legal norms with an exclusively moral content'.⁶³ Human rights circumscribe the strategic orientations of political orders, namely democracies, within which political and economic institutions operate often in a materialist and strategic manner.

Recognising that there is an internal relation, and not merely a historical association, between law and democracy, the reconstructive paradigm of law is rooted in democratic proceduralism, providing an account of how free and equal legal individuals associate in a society constructed through positive law. Where an actor acts in a purposively rational manner toward others, it is primarily with a view to achieving a self-serving goal. Much like Weber, the Habermasian critique perceives rationality as inherently 'one-sided' with the focus on material production and coercion over other interests. However, it is important to note that the expansion of rationality reflected in the increasing complexity of action systems does not necessarily result in an increasing rationalisation of the actor's orientations in the lifeworld.⁶⁴ If we observe the ongoing complexities of modernity characterised by the rise of bureaucratic institutions and their separation from political control, the fissure between societal expectations and bureaucratic goals becomes pronounced. It is this division between the bureaucratic institutions and the social sphere, the *system* and the *lifeworld*, which becomes a discursive space for challenge and contestation.

To prevent the law becoming a tool of domination by the bourgeois, Habermas conceives of the public sphere of the mass media as a potential space for discursive deliberation. The mass media has the potential to play a critical role for enabling the deliberative potential of democracy to be realised.⁶⁵ Today's world is increasingly interconnected through technology, and a symptom of the technological age is the creation of a 'commodified homogenous culture'.⁶⁶ Rationality is lost as mass culture comes to dominate the 'common sense' of society, leading to an

⁶² *Ibid*, 65.

⁶³ *Ibid*, 108.

⁶⁴ Habermas (n. 42), 145.

⁶⁵ J. Habermas, 'The Crisis of the European Union in Light of a Constitutionalization of International Law' (2012) 23 *European Journal of International Law* 335–48, 347.

⁶⁶ Habermas (n. 54), 75.

increased expression of apathy and disengagement among the people. Popular sovereignty is institutionalised through civil society, wherein free and equal legal persons voluntarily associate in civil society organisations and non-governmental organisations. As distinct institutions from the state and the economic institutional order, they play an important role in challenging the decisions taken by political elites. Reclaiming the discursive space requires the media to be responsive to participatory processes, and if it does so, the role of the media in presenting counter-arguments and opposition to the rationally motivated actions of political elites could prove to be powerful. However, if structural social inequalities exist within a legally defined space, be it a nation-state, region, or interregional arrangement, then the discursive potential is undermined.⁶⁷

ECONOMIC PARTNERSHIP AGREEMENTS: TOWARD INTERREGIONALISM

Conceiving of regions as legal regimes, and using the discourse theory of law to interrogate the EPAs, provides an alternative conceptualisation of regionalism. The rise of RTAs, which are legal regimes and make governance beyond the state possible, mark an interesting shift in the global economy. It is the constitutionalisation of international law,⁶⁸ the willingness to be bound as nation-states by a supranational legal order, that enables a common political ideology and economic imperatives to become institutionalised at a regional level. As the EU continues to exhibit strength as a *normative* regional actor, an analysis of *regional governance* becomes increasingly important. The discourse theory can be expanded to analyse regional agency and examine the extent to which such action is legitimate.

If we accept that social relationships are mediated through law, then development is both normatively *constrained* by law but nevertheless realised *through* law. The Habermasian concept of social justice relies on the application of a deliberative democratic process from which the law derives its normativity. However, when the political and economic asymmetry of the EU and ACP is taken into account, our frame of analysis must be reconstructed to accommodate for a discourse that conceives of law as an integrative function that facilitates the diffusion of hegemonic doctrine. Although the study of interregionalism is relatively

⁶⁷ Habermas (n. 65), 348.

⁶⁸ *Ibid*, 348.

under-researched, region-to-region interaction appears to be the next logical step in the neoliberal turn of modern society. This is expressed through the transformation of ACP-EU relations, as the non-reciprocal preferences of Lomé have been abandoned in favour of an inclusive trade and development cooperation framework. ACP-EU cooperation under the EPAs is now ‘underpinned by a legally binding system’ characterised by ‘equality’, ‘ownership of the development strategies’, and ‘participation’.⁶⁹

Executed at an interregional level, the EPAs are modelled on the Habermasian paradigm of law and democracy that acknowledges ‘a political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance is part and parcel of long-term development.’⁷⁰ Collectively, the EPA countries commit to a programme of interregionalism *through* law that gives ‘the process of globalisation a stronger social dimension’.⁷¹ Social integration in the new interregional space is encouraged through wider participation beyond state actors:

apart from central government as the main partner, the partnership shall be open to ACP parliaments, and local authorities in ACP states and different kinds of other actors in order to encourage the integration of all sections of society, including the private sector and civil society organisations, into the mainstream of political, economic, and social life.⁷²

Analysing the EPAs through discourse theory provides an opportunity to reflect upon how interregional relationships affect our understanding of modern global society. Moving away from state-centric analyses of rational action, wherein regions are conceived of as functional cooperative frameworks motivated by predominantly materialist interests, this book understands interregional spaces as historically situated and inter-subjective transnational societies that are created not only to promote economic liberalisation but with a view to creating a transnational social

⁶⁹ Article 2 of the ‘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’ or ‘CPA’.

⁷⁰ Recital in the Preamble to the Cotonou Partnership Agreement 2014.

⁷¹ *Ibid.*

⁷² Article 2 Cotonou Partnership Agreement 2014.

order. Bringing together social orders through the medium of law creates a space that *should* be constituted through the discursive and performative argumentation of all free and equal legal persons within that space.

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.'⁷³

Habermas asserts that the codification of rights serve as an example of the moral principles in which the law is grounded. This is particularly evident in the EPAs which are framed around the promotion and protection of human rights within the interregional space. So important is human rights protection that the Cotonou Agreement provides for suspension of concessions under Article 96 where a party to the Agreement fails to comply with the standards of human rights, democracy and good governance underpinning the trade and development framework. To date, this power has been exercised once by the EU against Burundi. As such, the catalogue of rights outlined in the EPAs provide an expression of the justification of the legality of these trade agreements and represent the embodiment of consciousness in these interregional spaces.

Discourse theory requires that the law's normativity derives from the democratic deliberation among free and equal legal individuals. Implicit to this theory are the principles of equality and fairness. At an inter-regional level, the failure to enable intersubjective deliberation and the substantive inequality between the regional partners exacerbates the deliberative potential of society and weakens the legitimacy of the EPA framework. That the EU is on equal footing with the ACP sub-regions, or any individual state within those regions, is a gross misrepresentation of social reality, leading some to argue that the new trade regime has an 'imperial flavour'.

Analysing the EPAs as a partnership of *unequals* requires an analysis of power in the construction of interregional spaces. This book adopts the Gramscian concept of hegemony which entails the advancement of the interests of the dominant class but through a medium of language that appeals to the interests of individual actors in the general population.

⁷³ Article 8(4) and (6) Cotonou Partnership Agreement 2014.

Through this smokescreen, the dominant interest is universalised and accepted by society as a ‘taken-for granted truth’, enabling the hegemonic ideology to be maximised:

A taken-for granted truth is one that people assume to be so without questioning its empirical or normative validity. A legitimate truth is one that people consciously regard as ‘right’ in a given context.⁷⁴

Hegemonic ideas are cultivated not only by the international financial institutions, which champion the (post-)Washington Consensus, but also through the various relations between the state and its citizens through social, cultural, educative and informational sites. The role of legal practitioners, who become experts of technical knowledge through the everyday practice of law, is to be responsible for the reproduction of hegemonic argumentation, or doctrine.⁷⁵ Buckel and Lescano define *doctrine* as ‘the substantive reference framework of various norms and decisions that fixes in time solutions once found and thus makes them reproducible, establishes legal figures, enables systemisation and differentiation, and stores manifold model solutions and bygone conflicts’.⁷⁶ Bureaucratic legal institutions, from courts to formal legal education in universities, create an ever-increasing rational-legal order and internal logic. It is the special effect of doctrine, combining both technical procedure and formal reasoning, that not only seals off the legal system from the lifeworld but enables hegemonic discourse to be produced and reproduced in an invisible form:

Hegemony accordingly becomes significant precisely at the weakest point of the legal system, the fragile claim to legitimacy of its legal entities. Here is the point at which the legal intellectuals have to manage to develop a hegemonic argumentation – that is, one that formulates a ‘politico-ethical’,

⁷⁴ T. Hopf, ‘Common-Sense Constructivism and Hegemony in World Politics’ (2013) 67 *International Organisation* 321.

⁷⁵ From a legal perspective, doctrine serves an important purpose in sustaining and reproducing the internal logic of the legal system. Doctrine is an important infrastructure in the institution of the law, providing cohesion, predictability, and articulate principles that can guide future conduct. In one respect, doctrine can serve as points of analogous reference where similar facts arise in future cases. For example, in the common law tradition of the United Kingdom and the United States of America, scholars have argued that the doctrine of *precedent* and *stare decisis* serve the institutional adjudicative function of analogical reasoning.

⁷⁶ Buckel and Fischer-Lescano (n. 49), 446.

albeit symmetrical consensus, a complex 'collective will' on the basis of the current relations of force.⁷⁷

Hegemony is, therefore, not just about coercion because it refers to the 'subscription to a shared and legitimised ideology'⁷⁸ found in civil society. In Habermasian terms, the shift toward strategic and normative rationality, expressed through the dominant perspective, leads to a 'colonisation' of the forum in which deliberation should take place:

The consequence is that relations which should be based on personal commitment, common understanding and involvement, are instead regulated on an impersonal basis, with alienation, disintegration of social responsibility and a decline of legitimacy as results.⁷⁹

Obedience to the hegemonic order derives from an ideological proof of power's necessity or rationality in society. Gramsci posits that for the hegemon to maintain its power it must possess a *philosophy* of its own precipitating at a 'molecular' level all collective expressions of life, including the law.⁸⁰ His notion of *common sense* is 'not reducible to popular beliefs' but rather, is illuminated through the everyday lived experiences of individuals which offer a shared, or common, perspective. It follows that any attempt to revolutionise the global order cannot take place in opposition to the common sense of the population.⁸¹ Ideological struggle represents a site of contestation between maintaining the *status quo* of the uncritical philosophy and the search for a transformative discourse that emancipates society from the yokes of hegemony. However, a successful counter-hegemonic discourse requires conditions for responsiveness.

It is herein asserted that hegemonic legal structures articulate a *common sense*, or non-critical philosophy, which is conceived by society as a taken-for granted truth. In doing so, hegemonic law regulates social relations; both the subjectivities of action and the intersubjective relations between actors. If we accept this account of the common-sense articulated through hegemonic legal regimes to be a taken-for granted truth, then legitimate truth will only emerge from a struggle for emancipation from the hegemonic regime.

⁷⁷ *Ibid.*

⁷⁸ Hopf (n. 74), 320.

⁷⁹ Eriksen and Weigård (n. 51), 6.

⁸⁰ Buckel and Fischer-Lescano (n. 49), 442.

⁸¹ Hopf (n. 74), 329.

Analysis of the EU-ACP negotiations and the interim and final texts of the EPAs illuminates the politico-ethical framework which renders the production of the hegemonic neoliberal capitalist discourse almost invisible. By shrouding the trade and development agreements in predominantly developmental terms, that is, with an emphasis on the concept of sustainability, the EPAs attempt to mask or conceal the neoliberal spirit in which the trade framework is couched. Rather than bringing together regional spaces through a process embedded in justice and fairness, this book argues that the EPAs represent hegemonic legal regimes oriented by the strategic action of the more powerful member: the European Union. Orienting its social action through its external trade competence, the EU has colonised the areas which should have been open to deliberation.

Deliberative democracy embraces the notion of an inclusive right to participate for all participants in the public sphere. In a contemporary society, and certainly within an interregional space, it is unlikely that all people affected will participate in a process of deliberation. For this reason alone, the limitations of deliberative models that might transcend territorial boundaries must be recognised. Seyla Benhabib overcomes this critical impasse in her assertion that there exists a 'plurality of modes of association' through which each individual person affected by a particular issue can engage in argumentation.⁸² Modes of association may include social movements, local organisations, voluntary groups, political parties and trade unions, but this list is by no means exhaustive. Central to Benhabib's conception of deliberation is the notion that these modes of association are interlocking through which an 'anonymous public conversation' can take place.⁸³ From this perspective, and in keeping with the Habermasian ideal of popular sovereignty, grass roots organisations may play an important role in presenting the consensus achieved through a deliberative conversation in different social spheres. The mass media also assumes a pivotal role in ensuring information is disseminated so that deliberative processes can take place in civil society.

Forms of resistance and revolution are likely to arise in the general population where a discursive fit is not present, as evidenced through the 'Stop the EPAs' campaign. However, political elites may share the common sense non-critical philosophy of the general population and seek to reject the structural imposition of norms that they perceive to be incompatible with their strategic and ethical goals. Resistance from

⁸² S. Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996), 73–4.

⁸³ *Ibid.*

political elites, those who negotiate the agreements on behalf of their country, may manifest in a variety of forms from delaying the negotiating process to failure to implement or ratify the agreement. An interesting approach adopted by the ACP countries has been a form of rhetorical action known as ‘mimetic challenge’.⁸⁴ Through normative argumentation, the ACP countries have harnessed the EU’s rhetoric of the EPAs as ‘drivers of development’ to strategically direct the negotiations toward development objectives. Resistance of this nature has been present in almost every EPA grouping, albeit perhaps of most significance in the CARIFORUM and SADC regions. While the CARIFORUM EPA was the first agreement to be concluded and, indeed, remains the only comprehensive EPA in place, the Five Year Review shows that implementation and ratification has been poor. This, it will be argued, signals a lack of discursive fit between the ideational forces of the EU vis-à-vis the Caribbean states. For SADC, the negotiation process has been drawn-out for over 10 years with a full agreement only concluded in June 2016. It is for this reason that the EU-SADC EPA is used as a case study for this book: this EPA represents one of the most contentious groupings, with the protracted negotiations marking a site of ideological struggle.

CONCLUSION

This chapter has proposed that the law serves an integrative function in institutionalising politics and economics in a social space. It is a fundamental claim of this book that regions are regimes constituted through law. Drawing insights from the rationalist theoretical perspectives, this chapter has shown that regionalism has emerged, in part at least, as a response to the problems facing the multilateral trading system. As regionalism proliferates at an unprecedented rate it is more important now than ever before to critically reflect on the ideational forces that are shaping the new global order. Conceiving of law as a medium of social integration, this chapter has emphasised the importance of discursive spaces through which deliberative and participative processes can take place in order that the law can make a claim to normative validity. With a focus on the various actors involved in the EPA negotiation process, the remaining chapters of this book will demonstrate how these hegemonic legal regimes have presented a discursive space for the ACP countries to challenge the dominant rationality of the EU.

⁸⁴ S. Hurt, D. Lee and U. Lorenz-Carl, ‘The Argumentative Dimension to the EU-Africa EPAs’ (2013) 18 *International Negotiation* 67–87.

In the following chapter, the legally institutionalised forms of regionalism under Article XXIV and the Enabling Clause will be examined with reference to the relevant WTO jurisprudence. It will be argued that the dominant members of the WTO have interpreted the ambiguous language of Article XXIV in a legally formalistic way which has enabled them to pursue their trade interests, sometimes aggressively, in RTAs with developing countries. As a result, North-South RTAs as *hegemonic* legal regimes are an increasingly common phenomenon of the global economy. Integrating developing countries into the global economy is a fundamental goal of the WTO but given the depth and breadth of liberalisation pursued by developed countries in North-South RTAs, it is not clear whether these arrangements are an appropriate vehicle to achieve this goal.