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# The Regional Remaking of Trade and Investment Law

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## Abstract

*Regional trade agreements (RTAs) are reshaping the international regime on trade and investments. This is not because they establish new forms of liberalizing or diverting trade and investment. It is rather that narratives are deployed to justify their government. These narratives derive their force from setting out what the vocation of government requires. However, in turn, they inform the remit of the RTA by setting out its mission. In this, they inform its sectors of activity, the types of regulation and rule adopted it, its approach to migration and how it handles distributive conflicts generated by its norms.*

## 1 Introduction

In August 2018, there were 287 regional trade agreements (RTAs) covering most of the world's territory.<sup>1</sup> These agreements rewrite the terms of world trade and investment. They exempt members from the central pillar of the World Trade Organization (WTO) system – the most-favoured-nation principle<sup>2</sup> – and their investment chapters supersede bilateral investment treaties.<sup>3</sup> This legal significance is reflected politically in the contestation surrounding them: be this Brexit, the renegotiation of the North American Free Trade Agreement, the Nigerian refusal to sign up to the African Continental Free Trade Area or the significant street protests against the Pacific Alliance (in Guatemala) or the Asia-Pacific Economic Cooperation (in Manila). Yet all

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<sup>1</sup> 'Welcome to the Regional Trade Agreements Information System (RTA-IS)', World Trade Organization, available at <http://rtais.wto.org/UI/Charts.aspx>.

<sup>2</sup> General Agreement on Tariffs and Trade 1994, 1867 UNTS 187, Art. XXIV(5); General Agreement on Trade in Services 1994, 1869 UNTS 183, Art. V(1).

<sup>3</sup> Over half of regional trade agreements (RTAs) have investment chapters. V. Chorny et al., 'A Survey of Investment Provisions in Regional Trade Agreements', WTO Working Paper ERSD-2016-07 (2016), at 9.

this is something of a puzzle as economists are unsure about the significance of RTAs.<sup>4</sup> With the exception of the European Union (EU) and the North American Free Trade Area, no RTA accounts for more than 25 per cent of its member states' total trade.<sup>5</sup> Many RTAs do not secure free trade, allowing some tariffs and many non-tariff barriers to remain in place.<sup>6</sup> Furthermore, the advantage offered by tariff-free access within the RTA is often minimal, as states have already set zero tariffs for many products in their WTO schedules.<sup>7</sup> This puzzle is all the greater as many RTAs extend beyond trade liberalization to restrict domestic legislative choices in a range of neighbouring policy fields.<sup>8</sup> Weak trade liberalization, even on its own terms, is plainly insufficient to sustain RTAs' authority over such a broad range of activities.

This article argues that, to understand what RTAs do, an alternate account of their authority must be provided. For RTAs will only be able to carry out sustained activities where they have a measure of authority to do so. In this regard, it will be argued that the authority of RTAs is sustained by narratives whose appeal lies in their providing a map for these governments about what government is about in their particular position. In turn, regional markets serve as vehicles for the realization of these narratives. States are more likely to adopt market measures contributing to an institutional narrative, as there is consensus that this is what the RTA is about whereas other measures are less likely to be agreed. This leads to these narratives reshaping the regulatory and institutional architecture of international trade and investment.

These narratives need to be broad enough to sustain a compelling account about government and flexible enough to bring together states with different needs and preferences. This has led to two narratives dominating RTAs. One goes to the public sphere that states should have, their quality of administration, respect for liberal (or other) values and commitment to democracy (the 'civilizational' narrative). The other goes to how governments are to find their way in the global economy – that is to say, how governments are to harness and protect themselves from economic liberalization and global flows of data and, alongside this, how they are to position themselves within the global economy (the 'competitiveness' narrative). These narratives are not mutually exclusive. A RTA can pursue or oscillate between both narratives. However, as each narrative serves to justify action by the RTA, both narratives tend only to be salient in highly institutionalized RTAs such as the EU. This argument is elaborated through the analysis of a dataset of all measures adopted by two of the most active RTAs – the

<sup>4</sup> Esteveadoral, Freund and Ornelas, 'Does Regionalism Affect Trade Liberalization toward Non-Members', 123 *Quarterly Journal of Economics* (2008) 1531; Freund and Ornelas, 'Regional Trade Agreements', 2 *Annual Review of Economics* (2010) 139.

<sup>5</sup> World Trade Organization (WTO), *World Statistical Review 2017* (2017), at 12.

<sup>6</sup> Y. Damuri, 'How Preferential Are Preferential Trade Agreements? Analysis of Product Exclusions in PTAs', CTEI Working Paper 2012–3 (2012), s. 3.2.

<sup>7</sup> Bagwell, Brown and Staiger, 'Is the WTO Passé?', 54 *Journal of Economic Literature* (2016) 1125, at 1136.

<sup>8</sup> About three-fifths, thus, contain provisions on competition, just under a third contain provisions on protection of the environment and just over a fifth contain provisions on e-commerce and labour rights. Acharya, 'Introduction: Regional Trade Agreements, Recent Developments', in R. Acharya (ed.), *Regional Trade Agreements and the Multilateral Trading System* (2016) 1, at 10–11.

Association of Southeast Asian Nations (ASEAN) and the Southern Common Market (Mercosur) – which serve as archetypes for the different narratives, as Mercosur has largely followed the civilizational narrative whilst ASEAN has largely followed the competitiveness narrative. Comparison suggests that civilizational narratives lead to much more confined markets as they engage less with the quality of markets and are therefore indifferent to their conditions. Rules are concentrated in fewer market sectors, focus on access to domestic markets rather than the conditions of competition in these markets and are not too concerned with the protection of investment. Provision is made for the free movement of persons, but little is done to protect the position of these migrants on domestic labour markets. As these narratives seek to constrain administrative power, their rules tend to be binding. Distributive conflicts are addressed through an inter-temporal sleight of hand. They foreground the benefits of market access as immediate, whilst its costs are presented as contingent and future. By contrast, as competitiveness narratives seek to facilitate investment, they cover a wider range of market rules and sectors. They provide for no generalized free movement of persons, but, as foreign labour is seen as central to competitiveness, there is more concern with regulating its place on the labour market. Competitiveness RTAs also see administrative power as central to securing the competitiveness of their markets and the responsiveness of the regime. Thus, it is actively cultivated through soft law, which is also used to mediate distributive conflicts by balancing the demands of RTAs against other normative imperatives.

Of these two types of RTA, competitiveness RTAs are becoming increasingly predominant. Their structuring of trade and investment regimes has generated a number of acute concerns. Politically, such narratives manifest a disinterest in the quality of domestic public spaces, an embrace of the executive and its policy style of managerialism and a too easy acceptance of the opaque resolution of conflicts. They also have a thin vision for international law in which it becomes simply a response to the prospect of investment or de-investment, indifferent to the uncomfortable economic and political geographies associated with this prospect.

## 2 The Authority Deficit of RTAs

The reach of RTAs is a puzzle as their authority suffers from a double whammy. First, parties can opt out of them. They may occur through flat-out secession. More frequently, it is targeted and selective. Parties may not comply with certain obligations<sup>9</sup> or develop alternate regimes that supersede the RTA.<sup>10</sup> They may refuse to finance it or

<sup>9</sup> On the South African Development Community, see T. Hartzenberg and P. Kalenga, 'National Policies and Regional Integration in the South African Development Community', WIDER Working Paper 2015–56 (2015), at 10–12.

<sup>10</sup> For example, service commitments made in the Trans Pacific Partnership by Brunei, Malaysia, Vietnam and Singapore superseded a number of their Association of Southeast Asian Nations (ASEAN) commitments. B. Gootiiz and A. Mattoo, 'Services in the Trans-Pacific Partnership: What Would Be Lost?', World Bank Policy Research Working Paper 7964 (2017), at 10–20.

engage with it so weakly that it atrophies. The possibility of opting out corrodes RTAs' authority as it acts as a threat over the RTA and provides incentives for parties not to engage fully if there is no certainty of mutual commitment. Consequently, there is only a weak link between the degree of institutionalization of a RTA and its effectiveness.<sup>11</sup> Second, RTAs can appear partisan and polarizing as they can be used by government to secure measures that would be politically impossible to realize domestically.<sup>12</sup> These measures are then entrenched by the RTA as reform or repeal will invariably require all states agreeing unanimously to it or by some form of qualified majority. Insofar as this happens, RTAs can appear partisan, polarizing and unresponsive. Third, the threshold to be met for RTAs to have authority is higher than for most states since they must not only provide reasons for obedience but also persuade the actors that matter that these reasons are more compelling than those offered by the legal and regulatory arenas – be these domestic or global, public or private – with which they compete.<sup>13</sup>

The reasons presented could be that the RTA advances welfare, gets its subjects to pursue things that are good and right or generates feelings of inclusion and commitment between its members. Yet it is unlikely that any of these reasons will sustain the RTA's authority. This is because of the emotional complexity and lability of RTAs' human subjects. Psychologists have noted that humans have somatic desires of their own, so their interests do matter. They are also social actors for whom issues of respect, trust and convention weigh heavily; doing the right thing or conforming will also matter. Therefore, there will be times when personal interest matters and other times when ideals or inclusion matter. It is, in part, because humans are emotionally labile. It is difficult to predict when they will act selfishly, idealistically or follow the crowd, and, therefore, it is very hard to calibrate when to appeal to these different elements of human motivation.<sup>14</sup> Without taken-for-granted authority, rules are most likely to be authoritative, therefore, when they incorporate these dimensions to human motivation in a manner that each reinforces the other.<sup>15</sup> RTAs, therefore, must simultaneously provide material, moral and social reasons for their observance. Yet it is very difficult for RTAs to enact norms that do this over a constant period of time. RTAs involve a wider array of interests and beliefs than their individual states, so the space where these reasons might coincide is more limited. They are further limited by their decision-making rules, which require unanimity or supermajorities for the adoption of any measure with the consequence that consensual solutions have to be sought that are likely generic and unpersuasive.<sup>16</sup>

<sup>11</sup> Commitment rather than institutionalization seems more pivotal to an RTA's success. Gray and Slapin, 'How Effective Are Preferential Trade Agreements? Ask the Experts', 7 *Review of International Organization* (2012) 309.

<sup>12</sup> L. Bacchini and J. Urpelainen, *Cutting the Gordian Knot of Economic Reform: When and How International Institutions Help* (2015), ch. 3.

<sup>13</sup> J. Jupille et al., *Institutional Choice and Global Commerce* (2013), at 132–164.

<sup>14</sup> For a summary of the literature, see J. Heath, *Following the Rules: Practical Reasoning and Deontic Constraint* (2011), at 44–63, 278–289.

<sup>15</sup> *Ibid.*, especially ch. 3, conclusion.

<sup>16</sup> M. Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule* (2014), at 11–14.

The central RTA strategy to meet this authority deficit has been the adoption of institutional narratives about what the RTA is about. These narratives are not set out within the legal texts of RTAs but, rather, are accounts about these texts, which set out reasons for them, qualifications, histories, prospectuses and critiques. They are present in the texts of declarations or communiques by the RTA's heads of state; in its actions plans or programmes and in statements by national governments or other important institutions setting out reforms, agendas, interpretations and priorities for the RTA. The power of these narratives derives from their enabling institutional actors who make sense of what they do and their place in the world.<sup>17</sup> They set out the central challenges facing states in the region; the central goods that states should prioritize; the values and beliefs epitomizing the region; the expectations of what administrations can achieve; the commitments owed to each other and, finally, the political friends and enemies in the region. A frame is provided for how that state should govern: the activities to be pursued, the values and beliefs to be articulated; the targets to be aspired to and the commitments to be made. Templates are set out for how states are to combine the pursuit of their societies' material interests and its interests. In short, they reveal what the vocation of government requires from the member states.

In this, they meet two powerful governmental needs.<sup>18</sup> First, they enable the government to fit in by setting out a map for what a government in the region is meant to be doing. Benchmarking and peer review thus have proliferated as policy tools because they meet this drive. Notwithstanding mixed results, they offer up-to-date templates and state of the art for policy-making in different fields.<sup>19</sup> Second, they provide recognition of the government's worth by peers who are meaningful for it. They express an acknowledgement by the neighbourhood that the individual government is not simply a crude vessel of rule but also has a certain organizational capacity, authority and legitimacy. The power of neighbour acknowledgement is considerable as states are particularly prone to influence and emulate their neighbours. A democratic neighbourhood, for example, is one of the most powerful determinants of whether a state will be democratic or not, with a state being more likely to be democratic where the neighbourhood is democratic and autocratic if it is not.<sup>20</sup> Third, they allow governments to give an account of themselves.<sup>21</sup> On the one hand, the narratives supplied

<sup>17</sup> On this, more generally, see famously Cover, 'Foreword – Nomos and Narrative', 97 *Yale Law Journal* (1983) 4.

<sup>18</sup> On the power of the needs to feel at one with the world and for recognition, see J. Kristeva, *This Incredible Need to Believe* (2009), at 7–10.

<sup>19</sup> K. Dominique *et al.* 'International Benchmarking: Politics and Policy', 40 *Science and Public Policy* (2013) 504; Broome and Quirk, 'Governing the World at a Distance: The Practice of Global Benchmarking', 41 *Review of International Studies* (2015) 819.

<sup>20</sup> Brinks and Coppedge, 'Diffusion Is No Illusion: Neighbor Emulation in the Third Wave of Democracy', 39 *Comparative Political Studies* (2006) 463; J. Teorell, *Determinants of Democratization* (2010), at 86–89; von Soest, 'Democracy Prevention: The International Collaboration of Authoritarian Regimes', 54 *European Journal of Political Research* (2015) 623. Houle *et al.* 'Diffusion or Confusion? Clustered Shocks and the Conditional Diffusion of Democracy', 70 *International Organization* (2016) 687.

<sup>21</sup> On how prior experiences, histories, relations and norms shape accounts of ourselves, see J. Butler, *Giving an Account of Oneself* (2005), at 26–40.

by RTAs are received ones. There is a history of the RTA, the region and the state's place in it that precedes the government and that it must accept if it is not to be seen as denying reality. However, the government is free then to narrate this account in its own terms. And, in this way, it can claim authorship over this account of its place in the world. It can weave new dimensions and trajectories into this account, foreground different elements, introduce new lexicons and draw morality tales from this account.

Such narratives are hallmarks of all RTAs with significant powers. Three features of RTAs allow easier recourse to them. First, RTAs have states both as lawmakers – the creators of legal obligation – and law takers – the subjects of legal obligation. Institutional narratives are used to make sense of this relationship between law taking and law-making. They are used to discern the collective intentions of the parties as to the meaning of the provisions at the time of the signing of the treaty: be this in the *travaux préparatoires* or the wider historical background to the treaty.<sup>22</sup> They are also deployed to determine whether there is subsequent agreement between the parties about how the treaty is to be subsequently interpreted.<sup>23</sup>

Second, institutional narratives facilitate agreement over the measures necessary to bring the regional market into being. Typically taking the form of action plans, they narrow the points of disagreement, relate individual measures to one another and the agendas of the organization, rationalize any logrolling between states when concessions on one matter are made in exchange for concessions on other markets and confine RTA action by setting out its limits. Such narratives usually relate to particular sectors or spheres of activity. However, they invariably rely on some authorization to get started, which is typically set in communiqués or declarations from summits.<sup>24</sup> This authorization sets out these action plans against both the wider agendas and history of the RTA, which, in turn, places them within some broader meta-narrative about what the RTA is about.

Third, narratives characterize regional markets as having some predictability and stability by setting them out as following a linear trajectory that will continue indefinitely. This characterization is necessary if operators are to have sufficient trust to

<sup>22</sup> *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, ICJ Reports (1991) 53, para. 48; PCA, *Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976*, Award, 12 March 2004, ICGJ 374 (2004), para. 63; WTO, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Report of the Appellate Body*, 12 September 2005, WT/DS269/AB/R, WT/DS286/AB/R, para. 289.

<sup>23</sup> Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Art. 31(3)(b); WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body*, 7 April 2005, WT/DS285/AB/R, para. 259.

<sup>24</sup> This is formalized in a number of organizations, e.g., Charter of the Association of Southeast Asian Nations (ASEAN Charter) 2007, 2624 UNTS 223, Art. 7; Treaty of European Union (TEU), OJ 2007 C 306/1, Art. 15(1); Treaty of Cotonou 1993, 2373 UNTS 233, Art. 7 (ECOWAS); Treaty on the Eurasian Economic Union 2014, [https://docs.eaeunion.org/docs/en-us/0003610/itia\\_05062014](https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014), Arts 10–12. In others, like the Pacific Alliance or Asia-Pacific Economic Cooperation, the summit has no formal legal basis but considerable agenda-setting power.

transact or invest in that market.<sup>25</sup> Politically, they address the challenge that trade liberalization may be too contentious and provide too thin a vision of human life to secure more wide-ranging change to member state societies.

So what are these narratives? Two of them have dominated significant RTAs: they serve a wider civilizational mission and they secure the competitiveness of member states within the global economy.<sup>26</sup>

### A Civilizational Narrative

The central claim of the civilizational narrative is that RTAs strengthen and develop the public qualities of the region, be this by strengthening and developing public spheres, public institutions, public values, such as human rights, or public identities such as citizenship. Depending upon the RTA, this is done in a variety of ways. First, many RTAs reinforce domestic commitments to national democracy and the observance of human rights by making these a condition of membership.<sup>27</sup> Costs may be imposed on states where democracy is overthrown, or serious violations of civil liberties may take place as a result of expulsion from the RTA.<sup>28</sup> Even where this is not done, the RTA might claim to be a vehicle for disseminating a shared culture of liberal democracy within the region.<sup>29</sup> Second, RTAs help secure or augment the political independence of the member states. They may offer states greater political capacity by combining their resources and voice on the international stage<sup>30</sup> or by setting themselves out as a buffer against prevailing hegemonies or more powerful third states.<sup>31</sup> Third, RTAs

<sup>25</sup> On this literature, see Alexander, 'Market as Narrative and Character', 4 *Journal of Cultural Economy* (2011) 481.

<sup>26</sup> On the reasons why dominant narratives have diffused, see Beckert, 'Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change', 28 *Sociological Theory* (2010) 150, at 157–159; Börzel and van Hüllen, 'Towards a Global Script? Governance Transfer by Regional Organizations', in T. Börzel and V. van Hüllen (eds), *Governance Transfer by Regional Organizations: Patching Together a Global Script* (2015) 3.

<sup>27</sup> Examples include TEU, *supra* note 24, Arts 2, 49; Protocol of Ushuaia on Democratic Commitments in Mercosur 1998, 2177 UNTS 383; Additional Protocol to the Cartagena Agreement 2000, available at [www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/AddProtCartagena.aspx](http://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/AddProtCartagena.aspx) (ANDEAN Community); Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security 2001, available at [www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/ECOWASProtocol.aspx](http://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/ECOWASProtocol.aspx) (ECOWAS); Framework Agreement for the Pacific Alliance 2012, <https://alianzapacifico.net/en/documents-and-studies/>, Art. 2; Consolidated Text of the Treaty of the South African Development Community (SADC) 2015, available at [www.sadc.int/documents-publications/show/4171](http://www.sadc.int/documents-publications/show/4171), Art. 4(c).

<sup>28</sup> Suspension on these grounds is not uncommon. ECOWAS suspended Togo's membership in 2001 and Guinea's, Ivory Coast's and Niger's membership in 2010 for this reason. Mercosur suspended Paraguayan membership in 1996 and 2012 and Venezuelan membership in 2017. The SADC suspended Madagascar in 2009.

<sup>29</sup> E.g., Treaty Instituting the Economic and Monetary Community of Central Africa 1994, available at <https://wits.worldbank.org/GPTAD/PDF/archive/CEMAC.pdf>, preamble, alinea 7; ASEAN Charter, *supra* note 24, Art. 1(7).

<sup>30</sup> Agreement on Andean Sub-Regional Integration 1969, 8 ILM 910 (1969), Arts 50–52;

<sup>31</sup> E.g., Treaty of the Economic Community of West African States 1975, 14 ILM 1200 (1975), preamble, alinea 2, which proclaims 'a determined and concerted policy of self-reliance'.

may create autonomous regional political communities anchored around the idea of individual emancipation. These communities may establish rights justiciable before domestic and regional courts;<sup>32</sup> regional citizenship;<sup>33</sup> regional parliamentary institutions to oversee or participate in regional decision-making;<sup>34</sup> judicial review of errant administrative action;<sup>35</sup> regional mechanisms to police observance of human rights<sup>36</sup> or supranational norms requiring domestic actors to be more sensitive to historically marginalized interests, be these foreign ones or other groups.<sup>37</sup>

## B Competitiveness Narrative

In some instances, where the international political economy is seen as a threat to domestic industries, RTAs have been used to nurture these industries by acting as a form of developmental state.<sup>38</sup> Under this paradigm, administrators set targets for particular industrial sectors in light of the perceived needs of the economy and interact intensely with industry to realize these goals. RTAs contribute to these industrial policies by offering economies of scale and managed competition within the region. The South African Development Community (SADC), thus, initially concerned itself with the augmentation of the skills base, food security, better management of natural resources, development of infrastructure and increased investment in the productive

<sup>32</sup> Case 26/62, *Van Gend en Loos* (EU:C:1963:1); Case E-9/97, *Sveinbjörnsdóttir v. Government of Iceland* [1998] EFTA Ct Rep 95 (EEA); Consultative Opinion 1/07, *Laboratorios Northia*, Opinion of the Permanent Review Tribunal, 3 April 2007 (Mercosur); Statute of the Central American Court of Justice 1992, 1821 UNTS 31191, Art. 22(c); Treaty Establishing the Common Market for Eastern and Southern Africa (ESA Treaty) 1994, 33 ILM 1067 (1994), Art. 30; Protocol A/P.1/7/91 Relating to the Community Court of Justice (Protocol on CCJ) 1993, 2375 UNTS 178 (ECOWAS), Art. 10(d); Protocol Amending the Treaty Creating the Court of Justice of the Cartagena Agreement 1996, available at [https://idatd.cepal.org/Normativas/CAN/Ingles/Treaty\\_Creating\\_the\\_Court\\_of\\_Justice.pdf](https://idatd.cepal.org/Normativas/CAN/Ingles/Treaty_Creating_the_Court_of_Justice.pdf), Arts 25, 33; Agreement Establishing the Caribbean Court of Justice 2001, 2255 UNTS 319, Art. XXIV.

<sup>33</sup> Protocol A/P.35//82 Relating to the Definition of Community Citizen 1982, available at [http://documentation.ecowas.int/download/en/legal\\_documents/protocols/Protocol%20Relating%20to%20the%20Definition%20of%20Community%20Citizen.pdf](http://documentation.ecowas.int/download/en/legal_documents/protocols/Protocol%20Relating%20to%20the%20Definition%20of%20Community%20Citizen.pdf) (ECOWAS); TEU, *supra* note 24, Art. 20; *Estatuto de la Ciudadanía del Mercosur Plan de Acción*, Decision of the Mercosur Common Market Council 64/10, 16 December 2010.

<sup>34</sup> O. Costa *et al.* (eds), *Parliamentary Dimensions of Regionalization and Globalization: The Role of Inter-Parliamentary Institutions* (2013).

<sup>35</sup> Protocol on CCJ, *supra* note 32, Art. 10(c); Statute of the Central American Court of Justice, *supra* note 32, Art. 22(b); ESA Treaty, *supra* note 32, Art. 26; Treaty Establishing the East African Community 1996, 2144 UNTS 255, Art. 30.

<sup>36</sup> E.g., the ASEAN Intergovernmental Commission on Human Rights, <http://aichr.org/>; European Union (EU) Agency for Fundamental Rights, <http://fra.europa.eu/en>; Mercosur Human Rights Public Policy Institute, <http://www.ipdh.mercosur.int>. It is rare for RTA courts to given self-standing jurisdiction over human rights. See, however, Protocol on CCJ, *supra* note 32, Art. 10(d); Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction', 13 *Human Rights Law Review* (2013) 153.

<sup>37</sup> Revised Treaty of Chaguaramas Establishing the Caribbean Community 2001, 2259 UNTS 293, Art. 170(b)(iv).

<sup>38</sup> On this, see A. Kohli, *State-Directed Development: Political Power and Industrialization in the Global Periphery* (2007).



sectors of the economy.<sup>39</sup> In recent times, states have secured their position within the international political economy through another route – that of the competition state. The state seeks competitive advantage for particular industries within the global economy. This involves adaptation to, rather than protection from, international markets as well ‘as a shift in the focal point of party and governmental politics away from the general maximization of welfare within a nation ... to the promotion of enterprise, innovation and profitability’.<sup>40</sup> RTAs help secure the competitive position of domestic industries by exposing them to increased competition, fostering increased productivity, securing larger markets for these industries and giving greater voice for member states in international trade negotiations.<sup>41</sup>

The competition state vision of the international trading system is increasingly one of global value chains. In these value chains, the production of a good combines capital, labour, services and materials from multiple jurisdictions, with finance coming from one, raw materials from another, assembly done in another and the sourcing of parts from others.<sup>42</sup> Article 6 of the revised 2001 Treaty of Chaguaramas, thus sets out the objectives of the Caribbean Community (CARICOM) and includes

- (d) expansion of trade and economic relations with third States;
- (e) enhanced levels of international competitiveness;
- (f) organisation for increased production and productivity;
- (g) the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description.<sup>43</sup>

Within such a worldview, the value of a RTA lies in the complementarities that it can secure. Synergies with neighbouring states provide reasons to invest in that state and carry out other parts of the process in the region.

The civilizational and competitiveness narratives are not mutually exclusive. A RTA can pursue both, and the EU is an example of this scenario. Prior to the mid-1990s, the civilizational narrative was dominant in its legitimation. Central agendas in that period were developing the regulatory capacity and quality of national administrations; being at the vanguard of the fight against gender discrimination; pushing forward ecological and labour protection; a proactive development policy; and promoting constitutional democracy in Central and Eastern Europe.<sup>44</sup> The market underpinning these policies was, by

<sup>39</sup> Declaration and Treaty of the South African Development Community 1993, available at [www.sadc.int/files/8613/5292/8378/Declaration\\_\\_Treaty\\_of\\_SADC.pdf](http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf), 4–8.

<sup>40</sup> Cerny, ‘Paradoxes of the Competition State: The Dynamics of Political Globalization’, 32 *Government and Opposition* (1997) 251, at 260.

<sup>41</sup> On the last, see Mansfield and Reinhardt, ‘Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements’, 57 *International Organization* (2003) 829.

<sup>42</sup> Gereffi, ‘Global Value Chains in a Post Washington Consensus World’, 21 *Review of International Political Economy* (2014) 9.

<sup>43</sup> Treaty Establishing the Caribbean Community 1973, 946 UNTS 17.

<sup>44</sup> For a flavour of these policies see A. Windhoff-Héritier *et al.* *Ringling the Changes in Europe: Regulatory Competition and the Transformation of the State: Britain, France, Germany* (1996); Chalmers, ‘The Self-Constitution of EC Environmental Law’, 5 *Columbia Journal of European Law* (1999) 39; M. Vachudova, *Europe Undivided: Democracy, Leverage, and Integration after Communism* (2005).

contrast, relatively confined, focused on promoting market access within the EU in those sectors dominated by export industries and managing competition from non-EU competitors in key sectors such as textiles, automobiles, steel and agriculture.<sup>45</sup> A central reason was that capital movements were not fully liberalized until 1990. This liberalization led to a competitiveness narrative increasingly taking hold. Alongside combatting market externalities, the EU increasingly saw regulation as being about securing competitive advantage for its industries in international markets. EU involvement expanded to cover anything that could remotely affect this competitiveness: welfare, fiscal and employment policies, education and social inclusion, the operation of labour markets and immigration. The style of EU policy-making changes with national governments was foregrounded increasingly at the expense of supranational institutions and soft laws, which were adaptive to the changes in the investment climate and replaced binding laws.<sup>46</sup>

The example of the EU indicates, however, that it will be relatively rare for both narratives to take hold. Each narrative provides reasons for, and, indeed, relies upon, institutional action by the RTA. A RTA characterized by both narratives, therefore, will be one that is likely both to be engaged with a wide range of sectors and to govern these intensively. Such RTAs ask a lot of their member states. They require them to transfer considerable rule-making authority to the RTA whilst exacting significant responsibilities from them to meet the demands of these demands. If the EU and European Economic Area are examples of such narratives, it is more common for the authority of a RTA to be sustained by a dominant narrative – civilizational or competitiveness – with reference to occasional elements of the other.

### 3 The Institution of Regional Markets: Mercosur and ASEAN

#### *A Mercosur and ASEAN as Archetypes of the Different Regional Narratives*

To assess the types of market created by these narratives, we coded all measures adopted by ASEAN and Mercosur up until 29 May 2017.<sup>47</sup> ASEAN and Mercosur

<sup>45</sup> On these narrow confines of the EU's single market programme, see Fligstein and Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union', 102 *American Journal of Sociology* (1996) 1.

<sup>46</sup> A whole of school of thought has been given to marking these changes, C. Bickerton, D. Hodson and U. Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (2015).

<sup>47</sup> We coded 1,101 ASEAN measures and 2,261 Mercosur ones. Some measures were placed in two categories. This led to their having a stronger weight, but we preferred this to arbitrary dichotomies where measures were doing two or more things. There were also not sufficient double weighted measures to have strong distortive effects. We found 1,141 measures adopted by ASEAN, but we did not code 40 as these were duplicated by other measures. Finally, we coded 0.6 per cent of ASEAN measures and 2.3 per cent of Mercosur measures as 'External Relations'. These typically involved agreements with third states or technical assistance. We have not included these in [Figure 1](#). The tables of data can be obtained from Damian Chalmers, [damian.chalmers@nus.edu.sg](mailto:damian.chalmers@nus.edu.sg).

were chosen because they are close to ideal types for the narratives outlined above. ASEAN looks to secure the competitiveness of its member states, whereas Mercosur attempts to establish a civilized trading space. Whilst other RTAs may have elements of both narratives, these two RTAs come closest to representing one narrative or the other. They also involve states that are not members of the Organisation for Economic Co-operation and Development (OECD) and are arguably therefore more typical of most RTAs than the EU or the North American Free Trade Area. They are both well established and have each adopted a significant number of measures. Finally, they share institutional similarities. Their central measures, in each case, are determined by an axis of national economics and foreign ministries.

The ASEAN Summit, comprising the heads of state, is the supreme policy-making body.<sup>48</sup> Its work is prepared by the ASEAN Coordinating Council, which comprises member state foreign ministers.<sup>49</sup> The decisions of the Summit are implemented by the ASEAN Community Councils.<sup>50</sup> Within the context of the ASEAN Economic Community, this is the ASEAN Economic Community Council.<sup>51</sup> As with the Mercosur Common Market Group, the ASEAN Economic Community Council has considerable autonomy. This is reflected in the '-X' formula, which allows this Council to prescribe that only some member states go forward with a particular measure where there is consensus to do so.<sup>52</sup> As with Mercosur, decisions are taken by consensus.<sup>53</sup>

In Mercosur, the Common Market Council, comprising the heads of state,<sup>54</sup> formulates, through adopting decisions,<sup>55</sup> the policies that are necessary to build the common market.<sup>56</sup> Its work is prepared by national foreign ministries.<sup>57</sup> The Common Market Group, comprising of four members and four alternates from each member state, including representatives from the national foreign ministry, the economics ministry and the central bank,<sup>58</sup> adopts measures in the form of resolutions to implement these policies.<sup>59</sup> In practice, the mandates set out by the Common Market Council are quite loose. Finally, the Mercosur Trade Commission, comprising four representatives from each member state,<sup>60</sup> adopts binding directives in the field of the customs union, invariably on the common external tariff.<sup>61</sup> Decision-making for all institutions is by consensus.<sup>62</sup>

<sup>48</sup> ASEAN Charter, *supra* note 24, Art. 7(2)(a).

<sup>49</sup> *Ibid.*, Art. 8(2)(a).

<sup>50</sup> *Ibid.*, Art. 9(4)(a).

<sup>51</sup> *Ibid.*, Art. 9(1).

<sup>52</sup> *Ibid.*, Art. 21(2).

<sup>53</sup> *Ibid.*, Art. 20(1).

<sup>54</sup> Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR (Protocol of Ouro Preto) 1994, 34 ILM 1244 (1994), Art. 6.

<sup>55</sup> *Ibid.*, Art. 9.

<sup>56</sup> *Ibid.*, Art. 8(II).

<sup>57</sup> *Ibid.*, Art. 7.

<sup>58</sup> *Ibid.*, Art. 11.

<sup>59</sup> *Ibid.*, Arts 14(III), 15.

<sup>60</sup> *Ibid.*, Art. 17.

<sup>61</sup> *Ibid.*, Art. 20.

<sup>62</sup> *Ibid.*, Art. 37.

ASEAN was established in 1967 as a ‘security community’.<sup>63</sup> Its central focus in its first 25 years was preventing political conflict between its member states and securing them political space from outside interference.<sup>64</sup> Significant moves to economic integration only occurred in the early 1990s with the establishment of the ASEAN Free Trade Area (AFTA).<sup>65</sup> The AFTA, however, was a highly hesitant free trade area. It initially committed only to reduce tariffs on intra-ASEAN trade to 0–5 per cent on non-sensitive goods over a 15-year period and allowed for national safeguard measures to still be introduced.<sup>66</sup> Economic integration picked up during the 1990s following changes in a number of governments.<sup>67</sup> It accelerated in the early 2000s as ASEAN governments responded to increased Japanese investment in the region and Chinese accession to the WTO. In 2003, it committed to establishing a single market and production base by 2020 (the Bali Concord), which was followed a year later by a detailed action plan targeting trade liberalization in 11 sectors (the Vientiane Action Plan).<sup>68</sup> This process was taken further forward by the adoption of the ASEAN Charter in 2008, which set out explicit decision-making procedures for ASEAN for the first time,<sup>69</sup> and by the Cebu Summit in 2007, which set out a blueprint for establishing an ASEAN Economic Community by the end of 2015.<sup>70</sup> This Economic Community is to comprise:

a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital.<sup>71</sup>

<sup>63</sup> ASEAN was established by the 1967 Bangkok Declaration between Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei, Cambodia, Laos, Myanmar and Vietnam have since acceded to the organization.

<sup>64</sup> The classic account is A. Acharya, *Constructing a Security Community in South East Asia: ASEAN and the Problem of Regional Order* (2014).

<sup>65</sup> A limited preferential agreement lowering tariffs to 10 per cent on 71 items was signed in 1977. Agreement on ASEAN Preferential Trading Arrangements, available at [www.nas.gov.sg/archivesonline/data/pdfdoc/662-1977-12-23.pdf](http://www.nas.gov.sg/archivesonline/data/pdfdoc/662-1977-12-23.pdf).

<sup>66</sup> Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area 1992, available at [www.asean.org/storage/images/2012/Economic/AFTA/Common\\_Effective\\_Preferential\\_Tariff\\_Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%20Scheme%20for%20the%20ASEAN%20Free%20Trade%20Area.pdf](http://www.asean.org/storage/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff_Agreement%20on%20the%20Common%20Effective%20Preferential%20Tariff%20Scheme%20for%20the%20ASEAN%20Free%20Trade%20Area.pdf), Arts 4, 6 respectively. On this agreement, see Bowles and Maclean, ‘Understanding Trade Bloc Formation: The Case of the ASEAN Free Trade Area’, 3 *Review of International Political Economy* (1996) 319.

<sup>67</sup> Stubbs, ‘Signing on to Liberalization: AFTA and the Politics of Regional Economic Cooperation’, 13 *Pacific Review* (2000) 297.

<sup>68</sup> On this, see Aggarwal and Chow, ‘The Perils of Consensus: How ASEAN’s Metaregime Undermines Economic and Environmental Cooperation’, 17 *Review of International Political Economy* (2010) 262. Bali Concord 2003, available at [www.mfa.gov.th/asean/contents/files/other-20130527-164513-046340.pdf](http://www.mfa.gov.th/asean/contents/files/other-20130527-164513-046340.pdf); Vientiane Action Programme 2004, available at [www.asean.org/uploads/archive/VAP-10th%20ASEAN%20Summit.pdf](http://www.asean.org/uploads/archive/VAP-10th%20ASEAN%20Summit.pdf).

<sup>69</sup> For detailed analysis, see W. Woon, *The ASEAN Charter: A Commentary* (2015); ASEAN Charter, *supra* note 24.

<sup>70</sup> ‘13th ASEAN Summit Press Statement: Blueprint for the ASEAN Economic Community’, 20 November 2007, available at [www.mfa.gov.sg/content/mfa/overseasmission/manila/press\\_statements\\_speeches/press\\_releases/2007/200711/PRESS\\_200711\\_10.html](http://www.mfa.gov.sg/content/mfa/overseasmission/manila/press_statements_speeches/press_releases/2007/200711/PRESS_200711_10.html).

<sup>71</sup> ASEAN Charter, *supra* note 24, Art. 1(5).

Efforts in the free movement of goods have focused on 12 priority sectors.<sup>72</sup> The ASEAN Trade in Goods Agreement still allows safeguard measures<sup>73</sup> and has done little to remove technical barriers to trade,<sup>74</sup> albeit over 90 per cent of tariffs on intra-ASEAN trade have been removed.<sup>75</sup> The liberalization of services follows a positive list approach in which states set out schedules of services to be liberalized.<sup>76</sup> Nine rounds of negotiations have led to the liberalization of a wide array of sectors, albeit the depth of liberalization is uncertain.<sup>77</sup>

By contrast, ASEAN has agreed to the significant protection of foreign direct investment between states.<sup>78</sup> There is provision for fair and equitable treatment of ASEAN investors, protection against indirect expropriation<sup>79</sup> and investor–state dispute settlement procedures.<sup>80</sup> This forms part of a view in which synergies between ASEAN states provide reasons to invest in each state and to establish value chains in the region.<sup>81</sup> The *ASEAN Economic Community Blueprint 2025* argues that ‘a highly integrated and cohesive economy’ enhances participation in these chains as it allows ‘better realization of economies of scale, collective efficiencies, and the organic formation of regional innovation chains’ as well as establishing value chains within the region whose leverage will allow ASEAN industries a better chance of ‘leading at the global level’.<sup>82</sup> Finally, ASEAN efforts to establish a wider political community are half-hearted. There is provision for an ASEAN Socio-Cultural Community and an ASEAN Intergovernmental Commission on Human Rights, but neither has much substance.<sup>83</sup> There is no provision for regional

<sup>72</sup> ASEAN Secretariat, *ASEAN Economic Community Blueprint 2015* (2008) paras 35–37. These sectors are electronics, e-ASEAN, health care, logistics, wood-based products, automobiles, rubber-based products, textiles and apparels, agro-based products, fisheries, air travel and tourism.

<sup>73</sup> ASEAN Trade in Goods Agreement 2009, available at [http://fta.miti.gov.my/miti-fta/resources/2\\_ASEAN\\_Trade\\_in\\_Goods\\_Agreement\\_.pdf](http://fta.miti.gov.my/miti-fta/resources/2_ASEAN_Trade_in_Goods_Agreement_.pdf), Art. 86.

<sup>74</sup> There is a duty to review non-tariff measures and a schedule for eliminating identified measures. *Ibid.*, Art. 42. However, this is restricted by member states being free to retain non-discriminatory measures that pursue a range of public interests. *Ibid.*, Art. 8.

<sup>75</sup> ASEAN Secretariat, *A Blueprint for Growth: ASEAN Economic Community 2015: Progress and Key Achievements* (2015), para. 2.3.

<sup>76</sup> ASEAN Free Trade Agreement in Services 1995, available at <https://cil.nus.edu.sg/wp-content/uploads/2017/07/1995-ASEAN-Framework-Agreement-on-Services.pdf>, Art. IV.

<sup>77</sup> ASEAN Secretariat, *ASEAN Services Integration Report: A Joint Report by the ASEAN Secretariat and World Bank* (2015), paras 85–101; Yean, ‘The AEC and Domestic Challenges in Malaysia: Examining the Liberalization of Services in AFAS’, 32 *Journal of Southeast Asian Economies* (2015) 202.

<sup>78</sup> Cho and Kurtz, ‘Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime’, 66 *American Journal of Comparative Law* (2018) 233.

<sup>79</sup> ASEAN Comprehensive Investment Agreement 2012, available at [https://asean.org/?static\\_post=asean-comprehensive-investment-agreement](https://asean.org/?static_post=asean-comprehensive-investment-agreement), Arts 11, 14. See J. Chaisse and S. Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalization of Laws and Policy on Foreign Investment* (2016), at 115–131, 161–180.

<sup>80</sup> *Ibid.*, Arts 28–41.

<sup>81</sup> Ismail *et al.* ‘The Effect of ASEAN Economic Integration on Foreign Direct Investment’, 24 *Journal of Economic Integration* (2009) 385.

<sup>82</sup> ASEAN Secretariat, *ASEAN Economic Community Blueprint 2025* (2015), paras 22, 23.

<sup>83</sup> On the limits of the latter, see Davies, ‘States of Compliance? Global Human Rights Treaties and ASEAN Member States’, 13 *Journal of Human Rights* (2014) 414; Asplund, ‘ASEAN Intergovernmental Commission on Human Rights: Civil Society Organizations’ Limited Influence on ASEAN’, 7 *Journal of Asian Public Policy* (2014) 191.

courts, assemblies or regional citizenship. There is very little formal possibility for private participation in decision-making, and, to date, ASEAN instruments have not been invoked in domestic courts.<sup>84</sup>

Mercosur's origins lie in the democratization of South America in the 1980s. Participation in regionalization was seen as protecting domestic commitments to democracy. The democratic mandate also gave presidents in both Argentina and Brazil greater leeway to negotiate Mercosur, and a link between (soft) economic and political liberalization was established.<sup>85</sup> A series of Argentinian Brazilian bilateral programmes culminated in the Treaty of Asuncion in 1990, which committed the four Mercosur states to a common market.<sup>86</sup> This treaty provided for only weak institutional structures. Stronger institutionalization was provided subsequently by the Protocol of Ouro Preto<sup>87</sup> and a series of instruments granting greater powers to particular Mercosur institutions.<sup>88</sup>

The ambitions for the Mercosur common market are considerable. There is provision for free movement for all factors of production; a common external tariff and trade policy; the coordination of, *inter alia*, industrial, fiscal, transport and agriculture policies; and the harmonization of legislation.<sup>89</sup> As we shall see, these ambitions have not been fully realized.<sup>90</sup> Resort is also had to procedures outside the formal institutional processes in sensitive sectors.<sup>91</sup> Mercosur, however, is reticent about the freedom of investment. Two protocols on investor protection did not enter into force, and

<sup>84</sup> An ASEAN Business Advisory Council was established in 2003 to provide private sector feedback. Its members, however, are appointed by national governments. There is acknowledgement that there should be wider business participation. ASEAN Secretariat, *AEC 2025, Consolidated Strategic Action Plan* (2016), paras 130–131.

<sup>85</sup> G. Gardini, *The Origins of Mercosur: Democracy and Regionalization in South America: Democratization and Regionalism in South America* (2010), at 105–128, 149–174.

<sup>86</sup> *Ibid.* Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asuncion) 1991, 2140 UNTS 319, Art. 1. Venezuela has since acceded but is currently suspended. A treaty of accession was also signed with Bolivia in 2015.

<sup>87</sup> Protocol of Ouro Preto, *supra* note 54.

<sup>88</sup> Olivos Protocol for the Settlement of Disputes in Mercosur 2002, 2251 UNTS 243; Regulation on the Protocol of Olivos for the Settlement of Disputes within Mercosur (Regulation on Protocol of Olivos), Council of the Common Market (CCM) Decision 37/03, 15 December 2003; Protocol on the Establishment of the Mercosur Parliament 2005, 2444 UNTS 172; Political Agreement for a More Democratic Mercosur Parliament 2009, available at [www.parlamentomercosur.org/innovaportal/file/4594/1/acuerdo-politico.pdf](http://www.parlamentomercosur.org/innovaportal/file/4594/1/acuerdo-politico.pdf). On this, see de Klor, 'The Legal-Institutional Structure of MERCOSUR', in M. Franca Filho *et al* (eds), *The Law of Mercosur* (2010) 29.

<sup>89</sup> Treaty of Asuncion, *supra* note 86, Art. 1.

<sup>90</sup> In 2012, three former Uruguayan presidents declared it a failure. 'Three Former Presidents Admit Mercosur Has Failed and Has Uruguay "Trapped"', *MercoPress* (26 December 2018), available at <http://en.mercopress.com/2012/05/25/three-former-presidents-admit-mercosur-has-failed-and-has-uruguay-trapped>. This is also the view of the *Economist*. 'Mercosur's Missed Boat', *Economist* (12 May 2016). On the dynamics, see Campos, 'From Success to Failure: Under What Conditions Did Mercosur Integrate?', 31 *Journal of Economic Integration* (2016) 855.

<sup>91</sup> Malamud, 'Presidential Diplomacy and the Institutional Underpinnings of Mercosur: An Empirical Examination', 40 *Latin American Research Review* (2005) 138, at 142–153.

the most recent one has significant exclusions. There is no right to fair and equitable treatment, no protection against indirect expropriation and no possibility for investors to take the host state to arbitration.<sup>92</sup> By contrast, Mercosur has taken the ideas of regional political community forward.<sup>93</sup> States can be suspended for failing to meet democratic standards.<sup>94</sup> There are commitments to human rights,<sup>95</sup> a social dimension to regional integration,<sup>96</sup> Mercosur citizenship<sup>97</sup> and a Mercosur Parliament, which has provision for direct elections.<sup>98</sup> In addition, there is a preliminary reference procedure that allows courts of last instance to refer questions of Mercosur law to the Mercosur Permanent Review Tribunal.<sup>99</sup> Mercosur law also takes precedence over national law.<sup>100</sup>

## **B Gauging the Ends and Means of ASEAN and Mercosur Market Integration**

ASEAN and Mercosur, similar to all RTAs, do not provide complete economic liberalization but, rather, a form of liberalization that is selective in a number of ways. It is selective in the sectors targeted. Some may be subject to extensive liberalization and others to none. It can be selective in the level of institutional intensity exercised by the RTA. This varying intensity may be reflected in the use of binding measures or not, the detail or exigency of the requirements and how compliance is policed. Finally, it may be selective in whether to liberalize transactions, competition, cooperation or investment. RTAs, for example, may choose to provide only the freedom to transact but provide traders with access to the markets of the region. Alternately, they may want to cooperate by establishing regional industrial policies or do something to regulate the conditions of competition by using common rules on competition, labour or environmental law.

Identifying how different narratives shape the extent and form of market integration in ASEAN and Mercosur involves a comparison of this selective liberalization. To enable comparison, we found Neil Fligstein's schema of market rules particularly helpful and

<sup>92</sup> Protocol on Cooperation and Facilitation of Intra Mercosur Investments 2017, available at <https://investmentpolicyhub.unctad.org/IIA/treaty/3772>. See F. Aznar and Moraes, 'The MERCOSUR Protocol on Investment Cooperation and Facilitation: regionalizing an innovative approach to investment agreements', *EJIL: Talk!* (12 September 2017).

<sup>93</sup> Arcarazo, 'Toward a South American Citizenship? The Development of a New Post-National Form of Membership in the Region', 68 *Journal of International Affairs* (2015) 213; M. Giupponi, *Rethinking Free Trade, Economic Integration and Human Rights in the Americas* (2017), at 324–392.

<sup>94</sup> Protocol of Ushuaia on Democratic Commitment in Mercosur 1998, 2177 UNTS 373, Art. 5.

<sup>95</sup> Protocol of Asuncion on Commitment to Promotion and Protection of Human Rights in Mercosur 2005, CCM Decision 17/05 (2005).

<sup>96</sup> Charter of Buenos Aires on Social Commitment 2000, available at <https://www.state.gov/p/wha/rls/70982.htm>.

<sup>97</sup> Action Plan for Statute on Citizenship, CCM Decision 64/10, 16 December 2010.

<sup>98</sup> Protocol on the Establishment of the Mercosur Parliament 2005, *supra* note 88, Arts 2–6.

<sup>99</sup> Regulation on Protocol of Olivos, *supra* note 88, Art. 2.

<sup>100</sup> Opinion of the Permanent Review Tribunal, *Laboratorios Northia* (Consultative Opinion 1/07), 3 April 2007.

have adapted it.<sup>101</sup> It categorizes market rules according to what market activities they enable – competition and cooperation; transacting or the distribution of wealth – and this allows easier identification of the type of market that is being created. We identify five forms of market rule. Governance structures condition the competition and cooperation on a market. They include agencies regulating the conditions under which providers can operate in certain markets (for example, competition, audiovisual, energy or financial services regulators) as well as rules that directly and significantly affect conditions of competition or cooperation (for example, environmental, financial, professional, labour and competition laws). We broke these rules down further to reflect differing levels of institutional intensity. The most intense are regional requirements for national governance structures to be adapted or harmonized (‘convergence’). There are then administrative processes set up parallel to domestic governance structures. These do not supplant or constrain domestic processes but may be significant insofar as they have autonomous agenda-setting power (‘admin’). There are then cooperative processes, such as networks, in which domestic administrations come together to resolve particular problems. These are arguably less demanding but still impose duties of mutual justification (‘cooperation’). There are then two types of measures that cut across this scale of intensity. In some instances, where there is little difference between the host state’s law and the other state’s law, the constraint imposed by mutual recognition may be marginal. In other instances, where the divergence is significant and many actors are exercising their rights under mutual recognition, the constraints can be considerable (‘MRA’). Finally, there were measures going to investment either generically or in particular sectors (‘investment’). The demands made of states here were very heterogeneous. In some instances, they were aimed at gentle regional capacity building, whilst, in others, they were significant, such as requiring the abolition of restrictions on investment in a particular sector.

Rules of exchange go to what may be transacted. They include not only contract laws but also laws on the specifications of products and services that may be sold (for example, consumer protection laws). Technical regulations prescribe the quality, presentation or composition of a good or service (‘rules of exchange’). These are constraining as they affect all goods and services across the domestic market. Tariffs count as a rule of exchange as parties cannot transact across borders without paying this tax (‘tariff’). They are frontier measures, however, and regional rules on these are often less constraining than those on technical regulations. Customs cooperation ensures that the administrative arrangements for the free movement of goods work well. Such arrangements provide the administrative machinery for transnational transactions to take place and, therefore, were also categorized as rules of exchange. Property rights concern who secures the profits from any market operation. They comprise, therefore, laws on intellectual property as well as laws setting out the terms of beneficial ownership within companies.

<sup>101</sup> N. Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty First Century Capitalist Societies* (2001), at 32–35.



Fligstein's schema was initially devised for domestic markets, which already had a physical infrastructure in place. This is not always the case with regional markets, particularly outside the OECD context. We have added a fourth category, therefore: infrastructure. This involves physical projects in fields such as transport, energy or communication that allow a market to be established. These do not prescribe a particular type of market but provide the conditions for the other market institutions to operate. Finally, the free movement of persons raises particular sensitivities, which warrant its being treated separately. These sensitivities include states being more sensitive about labour markets than other markets, with particular concerns about the effects of migration on employment and wage levels; migration also raises both civil liberties and citizenship issues in terms of the dignity accorded to migration and the migrants' integration into the host state and, finally, the free movement of persons recomposes the society of the host state in the sense that it changes its population in a way that is not true for the free movement of goods, services or investment.

## 4 The Institutional Features of Regional Markets

### *A The Central Rules for Civilizational RTAs Will Be Rules of Exchange: Competitiveness RTAs Will Focus on All Types of Market Rule*

The civilizational narrative pushes for a narrowly confined market as it acts weakly on market structures. Improving public life in the region does not require common rules on the conditions of competition. Instead, such a narrative is concerned with the bare minimum for a market – that is, the possibility for transactions to take place across the region. A good or service from one member state has to be able to be sold in other member states. The concern is with the openness of domestic markets rather than a single market operating under common rules. This focus on market openness is reinforced by a further trope of the civilizational narrative – namely, that open societies rely upon open markets.<sup>102</sup> Regional trade norms reinforce democracy by undermining domestic hegemonies,<sup>103</sup> preventing impoverishing policies,<sup>104</sup> securing advantages for powerful elites who are necessary to consolidate democracy<sup>105</sup> and protecting individual (economic) liberties.<sup>106</sup>

The central rules of civilizational RTAs, therefore, are rules of exchange as these are the norms that secure market openness. These rules secure access to local markets

<sup>102</sup> On the literature, see Manger and Pickup, 'The Coevolution of Trade Agreement Networks and Democracy', 60 *Journal of Conflict Resolution* (2016) 164.

<sup>103</sup> Vega-Cánovas, 'NAFTA and the EU: Towards Convergence' and Albuquerque, 'Mercosur: Democratic Stability and Economic Integration in South America', both in J. Anderson (ed.), *Regional Integration and Democracy: Expanding on the European Experience* (1999) 225 and 272 respectively.

<sup>104</sup> J. Williamson, 'Democracy and the "Washington Consensus"', 21 *World Development* (1993) 1329.

<sup>105</sup> J. Pevehouse, *Democracy from Above: Regional Organizations and Democratization* (2005), at 15–45.

<sup>106</sup> E.-U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods* (2017), at 337–358.

by setting out what may be transacted across the region. This can be seen in the breakdown of Mercosur's market rules set out in [Figure 1](#).<sup>107</sup> Technical regulations accounted for 39.8 per cent of all measures. In addition, a further 28.8 per cent of Mercosur measures were concerned with tariffs. And 3.2 per cent of all measures went to securing the customs infrastructure for trade by setting up procedures of customs classification. Combined, therefore, 71.8 per cent of all measures were concerned with market access.

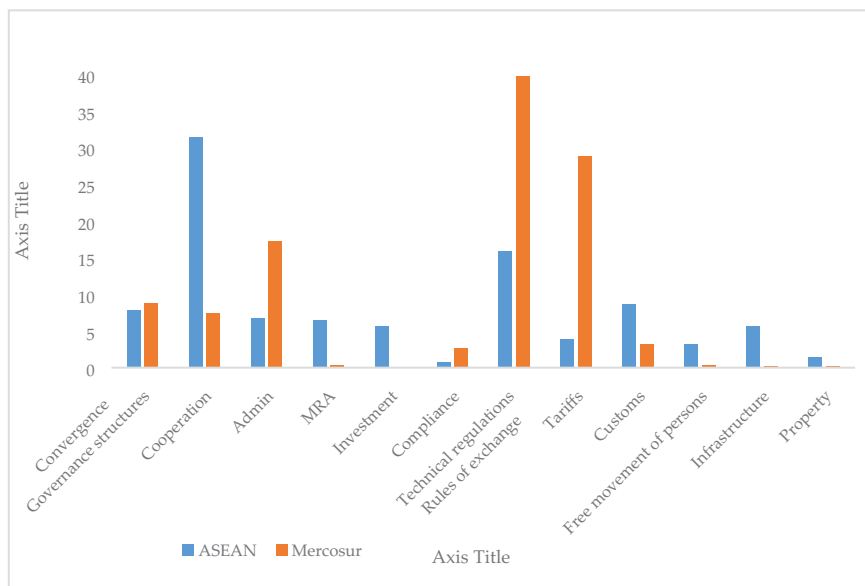
There can be circumstances where rules of exchange alone do not secure market access because prevailing conditions of competition make entry to the market impractical. Governance structures need to be aligned in such circumstances to make competition possible. Since states are concerned with this alignment, which is necessary to secure market access rather than a generally level playing field, one would expect more emphasis on hard guarantees and the policing of these guarantees. Mercosur practice reflects this; 8.8 per cent of measures were given over to the harmonization of governance structures ('convergence'), whilst only 7.4 per cent went to policy cooperation, notwithstanding that the latter offers more freedom to national administrations and more room for local sensitivities. Alongside this, 2.6 per cent of measures went to questions of compliance and inspection, whilst, by contrast, there was very little mutual recognition of standards or processes, with these comprising only 0.3 per cent of all Mercosur measures.<sup>108</sup>

The final feature was the amount of administrative churn. 17.2 per cent of measures – just over one-sixth – were administrative measures. Very few went to establishing new Mercosur structures, be it agencies or committees, which would govern the Mercosur market in new ways. The overwhelming majority went to the financing and continually reordering of Mercosur's supranational machinery, be it digital signatures by administrators, the types of form to be used, the rules of procedure of the different Mercosur institutions or negotiating guidelines for the different working groups. Like the EU, it is an organization that spends a lot of time absorbed in its own decision-making. The shape of the ASEAN market is different. A variety of factors are central to attracting foreign direct investment. These include the quality of regulatory and legal institutions, the strength and size of the local market, the proximity to neighbouring markets, the quality of the financial sector, the levels of labour market protection, the access to natural resources, the openness to the global market and tax regimes.<sup>109</sup>

<sup>107</sup> The evidence on the types of rule adopted by Mercosur replicates that on the establishment of the single European market. Fligstein and Mara-Drita, 'How to Make a Market: Reflections on the Attempt to Create a Single Market in the European Union', 102 *American Journal of Sociology* (1996) 1.

<sup>108</sup> Mutual recognition has worked poorly in competition policy where it was tried. Prado and Bertrand, 'Regulatory Cooperation in Latin America: The Case of Mercosur', 78 *Law and Contemporary Problems* (2005) 205, at 214–218.

<sup>109</sup> Bevan and Estrin, 'The Determinants of Foreign Direct Investment into European Transition Economies', 32 *Journal of Comparative Economics* (2004) 775; Bénassy-Quéré *et al.* 'Institutional Determinants of Foreign Direct Investment', 30 *World Economy* (2007) 764; Jayanwu and Yameogo, 'What Drives Foreign Direct Investments into West Africa? An Empirical Investigation', 27 *Africa Development Review* (2015) 199; Moosa, 'Theories of Foreign Direct Investment: Diversity and Implications for Empirical Testing', 7 *Transnational Corporations Review* (2015) 297.



**Figure 1:** *Types of Market Rule Adopted by ASEAN and Mercosur*

Consequently, one finds ASEAN rules more widely dispersed across the different types of market rule. The highest proportion of measures – 51.5 per cent – are governance structures; 31.5 per cent of all measures focus on policy cooperation between member states; 7.9 per cent are on the convergence of governance structures and 6.5 per cent are on mutual recognition. The central concern of these measures is to secure a level of competitive performance so that regulatory conditions across the region are conducive to investment. In addition, 5.6 per cent of all ASEAN measures, therefore, go explicitly to facilitating investment, be this through requiring states to open up certain sectors or by providing more generally for the liberalization of investment. Since there is concern with the general level of overall performance, individual acts of non-observance of ASEAN norms are seen as being less problematic. A higher proportion of measures involve either policy cooperation or mutual recognition, with states correspondingly granted greater leeway and accorded more trust in realizing ASEAN objectives. By contrast, there is less focus on market access between member states. In total, 19.5 per cent of measures are rules of exchange, 15.6 per cent go to technical regulations and 3.9 per cent go to tariffs. A further 8.7 per cent go to establishing customs classifications and procedures for cooperation that will enable the free trade area to operate. If these measures are combined, over a quarter of measures – 28.2 per cent – are about market access. Albeit significant, this is much lower than Mercosur.

### ***B Competitiveness RTAs Secure Market Integration in a Wider Number of Sectors Than Civilizational RTAs***

As observed above, the liberalizing qualities of civilizational narratives are diffuse. They provide no strong reason why a particular market sector should be liberalized

ahead of any other. They rely, therefore, on supporting forces to secure liberalization. Fligstein has observed that liberalization is likely to be the focus in sectors where there are established patterns of regional trade as there may well be an export-oriented industrial lobby pushing for liberalization.<sup>110</sup> Yet relatively few firms export. A well-known study found that, in 2000, only 4 per cent of US firms exported and that the top 10 per cent of these firms accounted for 96 per cent of all US exports.<sup>111</sup> One would expect even fewer firm strategies to be centred on exporting to the regional market. Civilizational RTAs, according to this thesis, would be characterized by markets where rules are densely concentrated around a limited number of sectors.

Mercosur follows this pattern.<sup>112</sup> Figure 2 sets out the measures that have liberalized trade between states in goods or service sectors. For Mercosur, seven sectors – agriculture, cosmetics, culture, food and beverage, phytosanitary, pharmaceuticals and public health – accounted for 782 out of 1,122 measures, which is 69.7 per cent of the total. This concentration is even more notable when account is taken of the linkage between three of these sectors (agriculture, food and beverages and public health). There are only another five sectors – automobiles, cleaning products, environment, telecommunications and transport – where 30 or more measures (less than a measure a year) have been adopted. In many ways, Mercosur has struggled to advance beyond a regional trade arrangement dedicated to agricultural products. There is limited integration in service markets (culture, transport and telecommunications) and not much integration either in industrial sectors, including cosmetics, automobiles and pharmaceuticals.

On its face, one might imagine ASEAN norms to be even more confined. The regulation of trade between ASEAN states appears to be focused around allowing production networks to operate in an unimpeded way, so that inputs from one state can be freely imported into another state to form part of the industrial process in the latter. However, ASEAN rules and norms cover a much wider array of sectors than Mercosur. We identified 950 ASEAN measures that address a particular sector. There were 14 sectors in which 30 or more measures were adopted.<sup>113</sup> There is also greater heterogeneity between these sectors. ASEAN has a substantial number of norms in sectors involving primary materials, such as wood, rubber or minerals. However, it has many more norms on the services sector, financial services and information technology as well as on complex manufactured goods, such as automobiles or electronics.

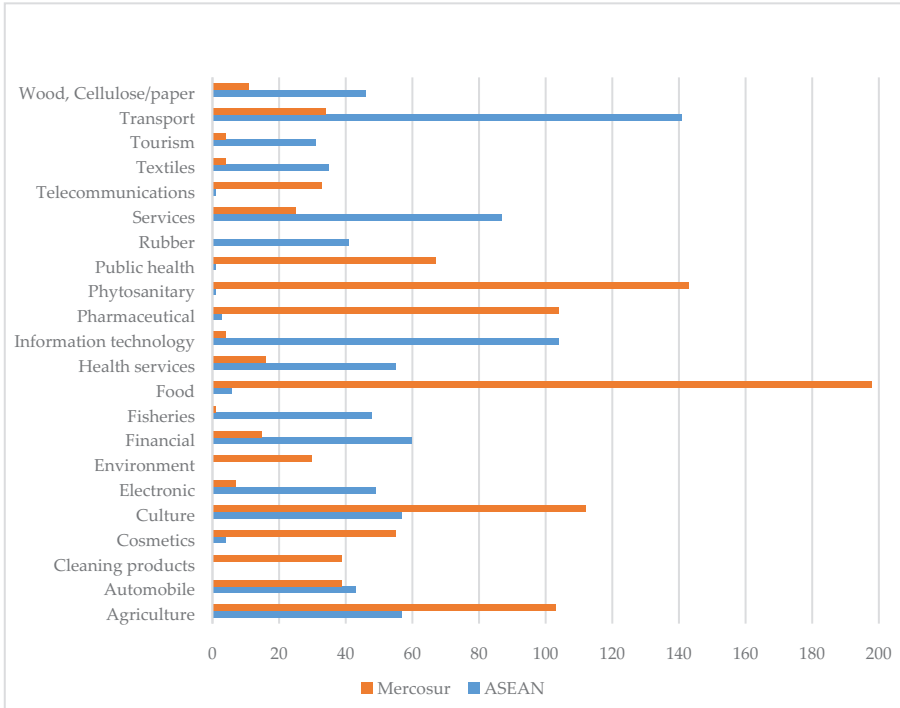
This diversity might be because ASEAN has to appeal to the different investment possibilities of its various states, and this, paradoxically, might impose considerable demands. Put bluntly, the Singaporean sectors that are attractive for investors are different from the Cambodian ones, and, insofar as investors will require protection in

<sup>110</sup> Fligstein, 'The Political and Economic Sociology of International Economic Arrangements', in N. Swelser and R. Swedberg (eds), *The Handbook of Economic Sociology* (2005) 183, at 192–194.

<sup>111</sup> A. Bernard *et al.*, 'Firms in International Trade', 21 *Journal of Economic Perspectives* (2017) 105.

<sup>112</sup> As did the EU's single market of the 1990s. Fligstein and Mara-Drita, *supra* note 107.

<sup>113</sup> These are culture, rubber, tourism, fisheries, electronics, services, financial services, paper and wood, health services, agriculture, information technology, transport, textiles and automobiles.



**Figure 2:** Measures Adopted in Each Sector

each sector, ASEAN will be required to regulate a wider variety of sectors. It might also be because the production of a regional investment hub requires a more general investment climate to be created. There is also a sense that competitiveness RTAs require the liberalization of a wider number of complimentary markets, such as financial services, transport or services, which an investor will wish to access if she wishes to make a regional investment.

### ***C Civilizational RTAs Provide for General Free Movement of Persons Whereas Competitiveness RTAs Only Secure Visits for Narrow Categories of Economic Actors Who Boost the Competitiveness of the Host State***

Within civilizational narratives, the free movement of persons contributes to civilizing the region. It stands for the opening up and diversification of domestic societies and for the provision of opportunities to the citizens of the region. It is thus characterized as something emancipatory that can generate new forms of citizenship<sup>114</sup> or create a 'denationalised and open world predicated on the primacy of the person over territorially defined narratives'.<sup>115</sup> Civilizational narratives are uncomfortable with free

<sup>114</sup> Y. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994), ch. 8.

<sup>115</sup> E. Recchi, *Mobile Europe: The Theory and Practice of Free Movement in the EU* (2015), at 13.

movement only being available to some of the region's citizens. This is seen either as selective or only granting an instrumental value to the citizen. They can only move insofar as they provide some wider benefit to the host society. This discomfort leads to a shift in onus where restrictions on free movement, as opposed to free movement itself, need to be justified.

Mercosur, therefore, provides for a right of migration, which is strikingly unencumbered. Mercosur citizens may acquire residence for two years in another state<sup>116</sup> merely by demonstrating proof of nationality and an absence of criminal convictions in the previous five years.<sup>117</sup> Host states may also require, if there is a domestic legislative basis, a medical certificate attesting to good physical health.<sup>118</sup> Permanent residence may be sought 90 days before the end of this two-year period. For permanent residence, proof of constant residence as well as an absence of criminal convictions in the host state must be demonstrated. The migrant also has to show that they have the lawful means for them and their family to subsist within the host state.<sup>119</sup>

There are a number of remarkable features about this right of residence. There is no initial requirement that the migrant be economically active or even self-sufficient. The period required for acquiring permanent residence is very short. The right of residence has been extended not just to the citizens of Mercosur states but also to citizens of states with whom Mercosur has an association agreement: Bolivia, Chile, Colombia, Ecuador and Peru.<sup>120</sup> The narrative, thus, is one of a generalized South American citizenship. This was taken forward in 2013 in the Buenos Declaration of the South American Conference on Migration, which includes all South American states other than French Guyana. This declaration states that 'the right to human migration and the recognition of migrants as subjects of law must be at the centre of immigration policies,'<sup>121</sup> and it identifies this as one of the principles that is a feature of South American identity.<sup>122</sup>

Such a narrative might elevate discourse, but it does not escape the politics of migration. Diego Acosta Arcarazo and Leiza Brumat have observed, therefore, that it was a concern not only with regional identity but also with regularizing irregular migration that led to the adoption of the 2002 Residence Accord for Nationals of Mercosur States.<sup>123</sup> There have also been issues with compliance. Venezuela has not implemented the accord, as required. More recently, Argentina has taken a minimalist interpretation

<sup>116</sup> Residence Accord for Nationals of Mercosur States (Residence Accord) 2002, Art. 4(1). <https://www.mercosur.int/ciudadanos/residir/>

<sup>117</sup> *Ibid.*, Art. 4(1)(a), (c) respectively.

<sup>118</sup> *Ibid.*, Art. 4(1)(f).

<sup>119</sup> *Ibid.*, Art. 5.

<sup>120</sup> On this, see D. Arcarazo, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (2019), at 181–196.

<sup>121</sup> Buenos Aires Declaration of the South American Conference on Migration 2013, available at [http://csm-osumi.org/sites/default/files/documentos%20csm/declaracion\\_de\\_buenos\\_aires\\_28agostofinal\\_1.pdf](http://csm-osumi.org/sites/default/files/documentos%20csm/declaracion_de_buenos_aires_28agostofinal_1.pdf), Principle 2.

<sup>122</sup> *Ibid.*, Principle 1.

<sup>123</sup> Residence Accord, *supra* note 116.

of its obligations, taking a view that any criminal offence, as well as irregular migration, will justify deportation.<sup>124</sup> The competitiveness narrative starts from there being no presumption of free movement of persons. The only ASEAN document liberalizing migration – the 2012 ASEAN Agreement on Movement of Natural Persons – states that labour markets and immigration are a matter for national law.<sup>125</sup> A justification, therefore, has to be provided for migration, and it has to be couched in national terms – namely, that it facilitates investment or the competitiveness of the host state.<sup>126</sup> The agreement provides for a limited number of categories that might provide this justification: business visitors, intra-corporate transferees, contractual service suppliers and an ‘other’ category of persons.<sup>127</sup> There is only a commitment to grant these individuals temporary residence in the host state, and even this is conditional on the migrant meeting any other immigration checks that the state might require.<sup>128</sup>

There is no collective ASEAN commitment to liberalize movement for these persons. Instead, each state sets out national schedules of commitments, which specify the length of stay that will be offered and the categories to be liberalized.<sup>129</sup> States are committed to liberalization, furthermore, in those activities most closely connected to foreign direct investment. All states are committed to liberalization for intra-corporate transferees (managers and specialists connected with such investments), and all, except Brunei, Myanmar and Singapore, are committed to liberalization for business visitors, reflecting the fact that these states were possibly more interested in potential investors from further afield, whilst other states were looking for ASEAN investors. By contrast, only Cambodia, the Philippines and Vietnam are committed to any liberalization of contractual services suppliers, and no state is committed to any liberalization in the ‘other’ category.<sup>130</sup> Even with regard to these visitors, there was no instance of full liberalization, with a large number of business sectors closed off from any commitments.<sup>131</sup>

## D Migration Is Likely to Be More Subject to Diverse Regulatory Strategies in Competitiveness RTAs

The above information might suggest that there are more restrictive migration policies in ASEAN than in Mercosur. This would reaffirm the thesis that states with more

<sup>124</sup> D. Arcarazo and L. Brumat, ‘Argentina’s Restrictive Turn on Migration: Trump’s First Imitator in the Americas’, *Prospects for International Migration Governance Blog*, 13 February 2017, available at [www.migrationpolicycentre.eu/migprosp/2017/02/13/argentinas-restrictive-turn-on-migration-trumps-first-imitator-in-the-americas/](http://www.migrationpolicycentre.eu/migprosp/2017/02/13/argentinas-restrictive-turn-on-migration-trumps-first-imitator-in-the-americas/).

<sup>125</sup> ASEAN Agreement on Movement of Natural Persons (Agreement on Movement) 2012, available at <https://cil.nus.edu.sg/wp-content/uploads/2017/08/2012-ASEAN-Agreement-on-the-Movement-of-Natural-Persons.pdf>, Arts 2(2), (3).

<sup>126</sup> S. Lavanex and F. Jurje, ‘The Migration–Trade Nexus: Migration Provisions in Trade Agreements’, in L. Talani and S. McMahon (eds), *Handbook of the International Political Economy of Migration* (2015) 259, at 259–265.

<sup>127</sup> Agreement on Movement, *supra* note 125, Art. 2(1).

<sup>128</sup> *Ibid.*, Art. 4.

<sup>129</sup> *Ibid.*, Art. 6(1).

<sup>130</sup> *Ibid.*, Annex 1.

<sup>131</sup> On this, see Y. Fukunaga and H. Ishido, ‘Values and Limitations of the ASEAN Agreement on the Movement of Natural Persons’, ERIA Discussion Paper 2015–20 (2015), at 6–8.

open trade policies will have more restrictive migration policies since domestic industries that would otherwise push for cheaper foreign labour no longer do so as they can source this labour by investing abroad.<sup>132</sup> Insofar as competitiveness RTAs open up the region to the global economy, they are likely to reinforce the nationalization of employment and labour law, whereas civilizational RTAs are less likely to do this. However, a number of ASEAN states (Brunei, Malaysia, Singapore and Thailand) have much higher levels of migration, proportionately, than any Mercosur state. ASEAN treats migration policies as a form of domestic regulatory policy. Within such a panorama, the possibility for regulatory flexibility becomes paramount with individual states having the freedom to adjust labour market conditions for migrants and migration flows according to labour market needs, albeit often at significant human cost.<sup>133</sup> Collective commitments both constrain this freedom and, indeed, run counter to the competitiveness narrative by limiting state's autonomy to adopt migration and labour market policies perceived as pursuing that narrative.

Regional involvement takes three forms within such a narrative. First, the region, as a whole, becomes responsible for managing the labour pool available to receiving states. These states commit to some respect to the human rights of the migrants,<sup>134</sup> but, in return, migration is regionally ordered according to the needs of the receiving state. Sending states, thus, have responsibilities for pre-departure programmes for the migrant, ensuring she meets the health requirements of the host and for her return,<sup>135</sup> whilst there are duties to channel migration through systems of registered recruitment agencies.<sup>136</sup> There is no equivalent for this in Mercosur.

Second, as the categories of persons protected by the ASEAN Agreement on the Movement of Natural Persons are seen as being linked to securing foreign direct investment, guarantees are offered that are analogous to those provided more generally for investor protection. ASEAN offers (limited) governance guarantees, therefore, to these migrants, which are not offered by Mercosur to migrants. States commit to publish all laws affecting these categories of migrants as well as all explanatory material on the immigration formalities that must be followed. In addition, contact points must be made available for migrant enquiries.<sup>137</sup>

Third, a market for professional expertise is created. ASEAN has shown itself to be much more willing to provide mutual recognition of professional qualifications than Mercosur. Thus, it has established eight agreements on the mutual recognition of professional qualifications, whilst Mercosur has concluded none.<sup>138</sup> Furthermore, whilst

<sup>132</sup> M. Peters, *Trading Barriers: Immigration and the Remaking of Globalization* (2017), at 1–68, and 222–242.

<sup>133</sup> On how Malaysia has done this, see E. Devadason and W.-M. Chan, 'Policies and Laws Regulating Migrant Workers in Malaysia: A Critical Appraisal', 44 *Journal of Contemporary Asia* (2014) 19.

<sup>134</sup> ASEAN Consensus on the Protection and Promotion of Rights of Migrant Workers 2017, available at <https://cil.nus.edu.sg/wp-content/uploads/formidable/14/2017-ASEAN-Consensus-on-the-Protection-and-Promotion-of-the-Rights-of-Migrant-Workers-2.pdf>, ch. 6, para. 30, in particular.

<sup>135</sup> *Ibid.*, paras 21, 25, 28.

<sup>136</sup> *Ibid.*, para. 51.

<sup>137</sup> Agreement on Movement, *supra* note 125, Art. 9.

<sup>138</sup> These cover accountants, architects, dentists, doctors, engineers, nurses, surveyors and tourism professionals.



there have been operational difficulties in some ASEAN states, this mutual recognition has worked to a reasonable extent.<sup>139</sup> However, none of these agreements secures the professional access to another state's territory. This is still contingent on national immigration requirements, which can be used to manage the number of professionals that enter the host state's market.

### ***E Civilizational RTAs Are Likely to Rely on Binding Rules with Distributive Conflicts Resolved through Discounting: Competitiveness RTAs Rely on Soft Law and the Mediation of Distributive Conflicts***

Mercosur has relied exclusively on binding rules to secure its markets. This study identified 1,684 resolutions and 19 agreements. All of these are legally binding.<sup>140</sup> No reasons are provided for such strong reliance on hard law. However, the centring of its market around rules of exchange provides a greater need for binding instruments. These rules are about securing market access, and the market becomes identified with that quality. Market access, however, has an all or nothing quality. A good or service can either be sold on another market or it cannot. Soft law provides weak guarantees here as it allows for the possibility that states may not follow its norms, and market access may only be contingently available. The civilizational narrative is also about disciplining the state. Such a narrative seeks for institutions to be accountable and act transparently.<sup>141</sup> In this regard, binding rules hold government institutions to account both internationally and domestically in a way that is not possible with soft law.

The challenge with binding rules is their inflexibility, particularly with regard to distributive conflicts that may arise as a result of their application, be it between industrial actors, economic actors and non-economic actors or public and private actors. Some RTAs mitigate these conflicts by containing safeguard clauses that allow states not to apply RTA norms in cases of particular difficulty or by making provision for states or sectors with particular vulnerabilities. However, studies have found that these are only prevalent in those RTAs whose activities go beyond market access,<sup>142</sup> and they are not available to Mercosur states. Mercosur has addressed these conflicts by giving parties limited time to exercise buyer's regret. Binding measures may not enter into force until incorporated into the national law of all member states.<sup>143</sup> Domestic actors not involved in the negotiation of the instrument, therefore, have an opportunity to get it vetoed by their national parliament. This strategy does not address issues that may arise after incorporation. It is, thus, hostage to unanticipated events.

<sup>139</sup> On the operation of these agreements, see Y. Fukunaga, 'Assessing the Progress of ASEAN MRAs on Professional Services', ERIA Discussion Paper 2015–21 (2015).

<sup>140</sup> In Mercosur law, resolutions are binding instruments. Protocol of Ouro Preto, *supra* note 54, Arts 15.

<sup>141</sup> Schneider, 'The Political Economy of Regional Integration', 20 *Annual Review of Political Science* (2017) 229, at 240.

<sup>142</sup> Johns, 'Depth versus Rigidity in the Design of International Trade Agreements', 26 *Journal of Theoretical Politics* (2014) 468; L. Baccini *et al.*, 'The Politics of Trade Agreement Design: Revisiting the Depth–Flexibility Nexus', 59 *International Studies Quarterly* (2015) 765.

<sup>143</sup> Measures enter into force 30 days after the final state has notified implementation to the Mercosur Secretariat. Protocol of Ouro Preto, *supra* note 54, Art. 40(III).

A more pervasive strategy has been discounting. Mercosur adopts measures whose immediate value is highlighted but whose distributive effects are masked. Most typically, this is done by rules of exchange. These direct attention to the removal of barriers on commercial freedom but are silent on the consequences of the actor's activities after her entry to the market.<sup>144</sup> This opaqueness about the distributive consequences of trade allows them to be characterized as risks whose presence, incidence and extent is contingent. This results in the costs of these consequences being discounted.<sup>145</sup> A lower weight is attached to them than to the gains of market access, which are anticipated to come earlier in time and be more certain. These consequences emerge, however, in due course, typically at moments of implementation. Significant issues have arisen with compliance in Mercosur consequently.<sup>146</sup>

ASEAN, by contrast, has relied heavily on soft law. Of the 1,102 measures, 139 were binding instruments – 12.6 per cent – which is a significant number for an organization that does not commit itself to adopting formal legal instruments, and suggests that, even for these organizations, a considerable level of formal commitment is sought. However, for all of this, soft law remains the dominant instrument. There are a number of reasons why soft law would be desirable for competitiveness RTAs. These RTAs cover a wide range of market rules, and binding rules would impose far-reaching constraints on national autonomy. There is also a premium on regulatory responsiveness in adapting to changes in investment patterns and seeking to maintain competitive advantage *vis-à-vis* other parts of the world. Binding rules stymie this responsiveness insofar as they are difficult to change. Finally, in these RTAs, whilst member states are seeking synergies with other member states, they are also competing against each other, be it for investment or in goods and services markets. Soft law gives each member state the possibility for regulatory and fiscal competition.

These RTAs cover a wide array of sectors and types of market rule. Correspondingly, they bring into conflict a greater diversity of interests. The central distributive strategy of ASEAN, therefore, is mediation. This involves balancing ASEAN commitments against their distributive consequences. The deployment of soft law is one way in which mediation takes place. It sets out a suggestion rather than an expectation of the measures to be taken, with states granted leeway to depart from this direction. However, it is a highly unstructured form of mediation. States must provide no reasons for departing from soft law, and their motivations may be good or bad. ASEAN has resorted, therefore, to increasingly shrill assertions about the high levels of domestic

<sup>144</sup> An example is Mercosur Resolution 12/06, 22 June 2006. Vegetables meeting the Resolution's criteria can be traded across Mercosur. It requires international standards be used for classification, sets its own norms for packaging and presentation and references other Mercosur law on additives, contaminants and weight. All of these criteria can have distributive consequences, as does liberalization of this trade across the region. The resolution is silent on all this.

<sup>145</sup> On this, see Green and Myerson, 'A Discounting Framework for Choice with Delayed and Probabilistic Rewards', 130 *Psychological Bulletin* (2004) 769.

<sup>146</sup> For a detailed study, see Arnold, 'Empty Promises and Non-incorporation in Mercosur', 43 *International Interactions* (2017) 643.

compliance with its norms, even though these assertions are belied by its not providing evidence to support these assertions.<sup>147</sup>

In 2017, ASEAN moved to a more structured, multilateral system of mediation. A monitoring and evaluation mechanism was established, which will carry out two forms of monitoring: compliance monitoring and outcomes monitoring.<sup>148</sup> Compliance monitoring will regularly look at the levels of formal compliance with ASEAN norms and action plans. This will, however, be done within the context of outcomes monitoring, which will be done less frequently. On the one hand, outcome monitoring looks at the trade and investment benefits as a result of ASEAN membership and, on the other, at impact evaluation, ASEAN's effect on the socio-economic environment in that state and its domestic distributive effects.<sup>149</sup> It is too early to assess how the procedure will work. It might do no more than restate the distributive tensions resulting from ASEAN commitments rather than mediate them. However, at the very least, it expresses an ethos centred on balancing in which market commitments are accorded some value but do not trump other values, which can be asserted against these commitments if either the benefits or costs between states or within states are too asymmetric.

## 5 Conclusion

Civilizational RTAs may be atrophying. The turn to nationalism is accompanied by an aversion to post-national community. Alongside this, regimes built on regional rules of exchange are vulnerable to competition from international standards. One would expect industries expanding their export markets to pursue these standards rather than regional rules as the former allow industries both to set the rules and to sell their wares both regionally and further afield. The latter thus have proliferated in recent years.<sup>150</sup> By contrast, competitiveness narratives continue to develop. They are dominant narratives in emergent RTAs like the Pacific Alliance<sup>151</sup> or the Comprehensive and Progressive Agreement for Trans Pacific Partnership.<sup>152</sup> Equally, existing RTAs

<sup>147</sup> In October 2015, ASEAN states were deemed to have successfully implemented 92.7 per cent of the measures necessary for the ASEAN Economic Community. The measures are not identified, nor is there any indication of what successful implementation entails. ASEAN Secretariat, *A Blueprint for Growth ASEAN Economic Community 2015: Progress and Key Achievements* (2015), at 8.

<sup>148</sup> ASEAN Secretariat, *Towards ASEAN Economic Community 2025: Monitoring Economic Integration* (2017), at 9–13.

<sup>149</sup> The benefits accruing to each state will be examined every two to three years, and an impact evaluation will be done periodically. *Ibid.*, at 10, 12.

<sup>150</sup> In 2016, the total number of International Organisation for Standardisation (ISO) and International Electrotechnical Commission (IEC) standards stood at 27,804, almost five times the number of the early 1980s. ISO, 'ISO in Figures for 2017', available at [www.iso.org/iso-in-figures.html](http://www.iso.org/iso-in-figures.html); IEC, 'Facts and Figures', [www.iec.ch/about/activities/facts.htm](http://www.iec.ch/about/activities/facts.htm)

<sup>151</sup> Both narratives are mentioned in the Framework Agreement of the Pacific Alliance, *supra* note 27, Art. 3. However, there is little doubt from the text that the dominant narrative is competitiveness.

<sup>152</sup> Central refrains are strengthening the competitiveness of businesses and economies in global markets, developing and strengthening regional supply chains and enhancing possibilities for small businesses. Trans-Pacific Partnership Agreement, 26 November 2016, preamble, alinea 4–7; Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018, art. 1(1).

are either increasingly dominated by the discourse of competitiveness (for example, the EU<sup>153</sup> and the SADC<sup>154</sup>) or aligning their laws in issues more directly related to investment and competitiveness than to trade (for example, closer economic relations between Australia and New Zealand).<sup>155</sup>

This poses a number of challenges. Competitiveness RTAs can be both extensive and intrusive. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, for example, has a chapter on ‘Regulatory Coherence’, which covers all significant fields of regulatory activity.<sup>156</sup> To all intents and purposes, this chapter has a general scope, setting up oversight procedures and disciplines for how member states are to regulate.<sup>157</sup> Their norms frequently have ‘now you see me now you don’t’ qualities. Many appear to be non-binding or to have few costs attached to non-compliance, which, however, does not mean that these measures do not govern citizens as they often provide both a source for administrative action and a norm guiding it. In such circumstances, it is unclear whether the locus of power is with the RTA or with individual national administrations, with a corresponding lack of accountability.

These RTAs also manifest a lack of concern about the quality of politics within the region.<sup>158</sup> There can be concerns about who takes the decisions. Administrative actors invariably dominate RTAs. Soft law provides justifications for these to take action supplanting domestic legislative processes.<sup>159</sup> These can be concerns about lines of accountability. Transnational networks establish mutual reinforcing relationships between civil servants and regulators in different member states, thereby displacing

<sup>153</sup> The European Commission has recently described the purpose of the single market as being to ‘facilitate the integration of our companies in European and global value chains and act as an essential driver of industrial competitiveness. European Commission, *Investing in a Smart, Innovative and Sustainable Industry: A Renewed EU Industrial Policy Strategy*, Doc. COM (2017) 479, at 6.

<sup>154</sup> SADC Agreement amending Annex I of the Protocol on Finance and Investment 2017, available at [www.sadc.int/files/9114/9500/6488/Agreement\\_Amending\\_Annex\\_1\\_-\\_Cooperation\\_on\\_investment\\_-\\_on\\_the\\_Protocol\\_on\\_Finance\\_Investment\\_-\\_French\\_-\\_2016.pdf](http://www.sadc.int/files/9114/9500/6488/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance_Investment_-_French_-_2016.pdf). Art. 16 talks of the link between trade and investment, whereas Art. 17 calls for the harmonization of laws to establish a common investment zone.

<sup>155</sup> E.g., Memorandum of Understanding between the Government of New Zealand and the Government of Australia on the Coordination of Business Law 2010, available at <https://dfat.gov.au/trade/agreements/in-force/anzcerta/Pages/memorandum-of-understanding-between-the-government-of-new-zealand-and-the-government-of-australia-on-the-coordination-of-bu.aspx>; Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement 2013, available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/22307/A-22307-08000002803d08f2.pdf>.

<sup>156</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership 2018, available at <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng>, Art. 25.3.

<sup>157</sup> *Ibid.*, Art. 25.4.

<sup>158</sup> In like vein, E. Benvenisti, ‘Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law’, 23 *Constellations* (2016) 58.

<sup>159</sup> For an example of this with regard to ASEAN norms and the energy sector in Indonesia, see Loo, ‘ASEAN and Janus-faced Constitutionalism: The Indonesian Case’, 17 *International Journal of Constitutional Law* (2019) 177.

relations between them and local constituents and parliaments.<sup>160</sup> There can also be concerns about the language of political debate. The thin discourse of problem solving replaces the more emancipatory language of political contestation and ideological cleavage.

However, the biggest concern is that the central reason for these settlements is that they encourage investment. This power of investment becomes something, therefore, which precedes and structures the legal system. Consequently, it is not fully subject to the rule of law but, rather, establishes a system of rule that sets out the conditions for laws to be enacted. To be sure, host states may place legal restrictions on which investments take place within their territory, and investments will be subject to their laws. However, this is only a partial legal response to this power of investment. Therefore, it does not address the decisions of the investor not to invest in the host state or to disinvest, notwithstanding that the consequences of these may be as significant as those of the decision to invest. To challenge this right would seem to challenge capitalism itself as this goes to the possibility to seek a return from capital. Yet the appeal (to some) of the threat by President Donald Trump to impose punitive tariffs or use the tax system, in other ways, to punish companies investing outside the USA lies in its challenge to the rights not to invest in the USA or disinvest from it. The threat's perniciousness lies in its beggar-thy-neighbour qualities and crude nationalism – a perniciousness that can be countered by an internationalization or possibly a regionalization of this question.

<sup>160</sup> For a convincing account of the extent of administrator power, see T. Johnson, *Organizational Progeny: Why Governments Are Losing Control over the Proliferating Structures of Global Governance* (2014), at 51–71. On this, within the context of negotiations on the Transatlantic Trade and Investment Partnership and US–EU relations, see Wiener and Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory', 78 *Law and Contemporary Problems* (2015) 103; Farrell and Newman, 'The New Politics of Interdependence Cross-National Layering in Trans-Atlantic Regulatory Disputes', 48 *Comparative Political Studies* (2015) 497.