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# Regional Organizations and the Reintegrating of International Law

Damian Chalmers\*

Regional organizations range from geographically dispersed, weakly institutionalized organizations to organizations like the European Union (EU). This diversity is a reflection of their ubiquity. As of 1 May 2018, the World Trade Organization (WTO) acknowledged that there were 287 regional trading arrangements in force.<sup>1</sup> This idea has been picked up for some time in political science. At least since the pioneering work of Peter Katzenstein, the (international) region has been seen as generating a research agenda of its own.<sup>2</sup> In parallel fashion, a significant literature has emerged on comparative regional integration.<sup>3</sup> With a few notable exceptions, however, there has been little legal literature that has been comparative,<sup>4</sup> and the legal academy has focused on the EU at the possible expense of other regional organizations.<sup>5</sup>

In fact, regional organizations increasingly pose a number of interesting and significant legal challenges. This brief introduction will allude to just four. First, the scale and sweep of regional organizations have made them crucibles for ascertaining the possibilities and limits of international law. In terms of their scale, all WTO members are

\* Faculty of Law, National University of Singapore, Singapore. Email: [damian.chalmers@nus.edu.sg](mailto:damian.chalmers@nus.edu.sg).

<sup>1</sup> 'Regional Trade Agreements', World Trade Organization, available at [www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm)

<sup>2</sup> Katzenstein, 'A World of Regions: America, Europe and East Asia', 1 *Indiana Journal of Global Legal Studies* (1993) 65; Katzenstein, 'Regionalism in Comparative Perspective', 31 *Cooperation and Conflict* (1996) 123; P. Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (2005).

<sup>3</sup> W. Mattli, *The Logic of Regional Integration* (1999); L. Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (2000); F. Duina, *The Social Construction of Free Trade: The European Union, NAFTA and Mercosur* (2006); Y. Haftel, *Regional Economic Institutions and Conflict Mitigation* (2014); M. Egan, *Single Markets: Economic Integration in Europe and the United States* (2015); L. Brennan and P. Murray, *Drivers of Integration and Regionalism in Europe and Asia: Comparative Perspectives* (2015); S. Saurugger and F. Terpan (eds), *Crisis and Institutional Change in Regional Integration* (2016); T. Börzel and T. Risse (eds), *The Oxford Handbook of Comparative Regionalism* (2016); T. Börzel and V. van Hüllen (eds), *Governance Transfer by Regional Organizations: Patching Together a Global Script* (2015).

<sup>4</sup> J. Weiler (ed.), *The EU, NAFTA and the WTO: Toward a Common Law of International Trade* (2000); C. Closa and L. Casini, *Comparative Regional Integration: Governance and Legal Models* (2016); L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006);

<sup>5</sup> Notable exceptions include M. Franco Filho, L. Lixinski and M. Giupponi, *The Law of Mercosur* (2010); R. Oppong, *Legal Aspects of Economic Integration in Africa* (2011); J. Gathi, *African Regional Trade Agreements as Legal Regimes* (2011); D. Berry, *Caribbean Integration Law* (2014); *Integration though Law* series on the Association on Southeast Asian Nations, edited by J. Weiler and H.-L. Tan.

party to at least one regional trading arrangement.<sup>6</sup> As for their sweep, a high proportion of these arrangements have chapters on e-commerce, competition, environment, labour and regulatory convergence.<sup>7</sup> Migration, human rights and security provisions are also not uncommon. Sense has to be made of this range of activities. And this has significant consequences for the law. On the one hand, it creates a demand for laws. Decision-making has to be coordinated, policies made intelligible and non-contradictory and a level of predictability secured so that subjects have an idea of what is expected. Historically, law has been central to realizing all of these goals. It puts in place processes that coordinate, principles that justify individual policies and render the system coherent and norms of behaviour settling expectations about what the organization requires. This leads, on the other hand, to regional organizations often being the sites where tensions about the place of international law are often at their most acute since they involve law imposing significant and contested demands on its subjects and expose law to exacting expectations about what it must realize.

Second, regional organizations often expose international law to intense political contestation. Administrations drive them forward. Questions about governance, the displacement of parliaments and civil society and the quality of public debate, thus, bedevil them. This also makes them vulnerable when administrations change. Therefore, in recent years, many have been beset by elite level breakdowns (for example, the renegotiation of the North American Free Trade Agreement, Brexit or Venezuela's suspension from Mercosur).<sup>8</sup> This contestation also derives from regional organizations being activity-driven enterprises oriented towards realizing public goods through programmes of activities. Insofar as these programmes sideline other activities, destabilize relations or impose burdens, the organization can be seen as ideological or as pushing forward ends-driven rationalities at the expense of other values. If regional organizations have proliferated in recent times, so have the popular protests accompanying them, be this the Stop Fast Track Alliance against the Trans-Pacific Partnership in the USA, the huge protests in Germany against the Transatlantic Trade and Investment Partnership or the violent protests surrounding the summits of the Association of Southeast Asian Nations (ASEAN) and the South African Development Community in 2017.<sup>9</sup>

Third, regional organizations lay bare the tensions surrounding the protection of the individual in international law. There is, to be sure, a long tradition of regional human rights protection. In addition to the Economic Community of West African States (ECOWAS), the EU and the Southern Common Market (Mercosur) have all

<sup>6</sup> 'Participation in Regional Trade Agreements', World Trade Organization, available at [www.wto.org/english/tratop\\_e/region\\_e/rta\\_participation\\_map\\_e.htm](http://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm).

<sup>7</sup> Acharya, 'Introduction: Regional Trade Agreements, Recent Developments', in R. Acharya (ed.), *Regional Trade Agreements and the Multilateral Trading System* (2016) 1.

<sup>8</sup> North American Free Trade Agreement 1992, 32 ILM 289, 605 (1993).

<sup>9</sup> Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam (TPP) 2016, [2006] ATNIF 2; Transatlantic Trade and Investment Partnership (TTIP) (draft dated 12 November 2015).

established notions of regional citizenship. Most famously, the EU granted the individual an autonomous presence in international law over 50 years ago by providing for individual rights established by EU law to be invoked in national courts.<sup>10</sup> If this allows international law to enfranchise those marginalized by domestic laws, and to curb both administrative abuse within the domestic settlement and the exploitation of asymmetries of power within the international system, the subsequent regional narratives have generated ambivalence. The vision of the human condition in the law is often a thin and partial one, with little detail on human dignity, individual freedom or solidarity. In corollary fashion, the identities of many of those asserting individual entitlements have a highly selective feel: intellectual property right holders in the Andean Community, transnational investors before investor state dispute settlement arbitration panels or, in the EU, large transnational enterprises policing EU rules through litigation before its Court of Justice.

Fourth, regional organizations problematize the geographies of international law. They throw into question its generality and the value of that generality. The ubiquity of regional trade arrangements suggests, for example, that they are not exceptions to the world trading system, to be shoehorned into the criteria set out in Article XXIV of the General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services.<sup>11</sup> These arrangements are its centrepiece, with the perceived universal most-favoured-nation principle there largely to deal with the perennial regional outsiders and to provide a backstop in case of a breakdown of negotiations.

Since their content, missions and remit vary significantly, regional organizations raise questions about the extent of a hegemonic international law. They suggest that international law is better seen as comprising a number of legal orders loosely coordinated and identified by a limited number of legal norms. To be sure, the emancipatory potential of this multiplicity should not be overstated. Regional organizations more often than not perpetuate injustices of class, race, religion and gender endemic to the state system. However, the regional view provides stronger illustrations of the global South's contribution to international law; since many regional organizations comprise only member states from the global South, they express more clearly the practices and legal trajectories developed by these states. The early years of the Andean pact, the Caribbean Community and the East African Economic Community, for example, reveal an international economic law geared to pan regional industrial policies in selective industries and engaged state intervention in these industries.<sup>12</sup> This is an international economic law far removed from the one of transparent competition and structured safeguards promoted by the GATT. Equally, one finds that emancipatory

<sup>10</sup> Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration* (EU:C:1963:1).

<sup>11</sup> General Agreement on Tariffs and Trade 1994, 55 UNTS 194; General Agreement on Trade in Services 1994, 1869 UNTS 183.

<sup>12</sup> J. Ter Wengel, *Allocation of Industry in the Andean Common Market* (1980); A. Payne, *The Political History of CARICOM* (2014); R. Mshomba, *Economic Integration in Africa: The East African Community in Comparative Perspective* (2017), at 49–56.

narratives are not a tale of Western transplants but, rather, that their provenance is more globally dispersed. Regional citizenship in ECOWAS, thus, preceded that in the EU.

This symposium does not claim that all of these themes are exclusive to regional organizations. Questions about the place of international law in the international system, its public qualities, the establishment of individual subjects in international law and the asymmetries of power within it permeate international law more generally. This symposium does claim, however, that they arise in intense ways in regional organizations and their regional contexts and that these can provide distinctive and significant insights. To this end, the articles have focused on significant regional trading arrangements. It was felt that the array of activities and the levels of institutional interaction would generate particularly interesting insights. No attention is paid to mega-regional arrangements as none are in force yet. Equally, no time is spent on regional human rights courts, notwithstanding their significance, in part because we wished to move the regional narrative away from a court-centred one.<sup>13</sup> The symposium also tried to avoid a Euro-centric focus. Two articles are exclusively about regional organizations from the global South. The other two include the EU, but they compare it with two other regional organizations.

The article by Chalmers and Slupska addresses the quality of legal authority enjoyed by regional organizations and how this, in turn, informs their legal activity. They argue that regional organizations garner their authority from providing narratives about what states in the region are about. The dominant narratives are a civilizational narrative, which sets out what a state has to do to have a decent public sphere and quality of governance, and a competitiveness narrative, which sets out what it has to do to create a strong economy in the global market place. Through an analysis of the practice of two organizations, ASEAN and Mercosur, this article argues that these narratives structure in very different ways the nature of the markets created. They shape in different ways the material remit of market integration, its regulatory reach, the prescriptiveness of its norms, its approach to migration and how it manages distributive conflicts. The authors argue that since competitiveness narratives have become more predominant recently, it has led to regional organizations having a more pervasive reach, on the one hand, and granting central executives more power, on the other, in an environment where there are weak checks and balances and opaque handling of distributive conflicts. It is not surprising that this has prompted domestic pushback.

The second article by Davor Jancic looks at the question of the public sphere. He does this in the African regional context. No regional organization (and, thus, no regional parliament) has legislative powers, and the continent has a fragile tradition of parliamentary democracy. He nevertheless notes that these regional parliaments have been able to create significant roles for themselves, albeit roles that are not traditionally associated with parliaments. One role is capacity building, which helps parliaments

<sup>13</sup> See, in particular, K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014).

secure domestic democracies by being the central institutions that oversee the fairness of national elections and provide infrastructure, notably training, for national parliaments. The other is securing regional peace and security. These parliaments are central in fact-finding and goodwill missions as well as in mediation between conflicting parties. These roles reconfigure traditional assumptions about the relationship between regional and national democracy and assumptions about the roles identified with parliaments.

The article by Päivi Johanna Neuvonen considers the place of the individual within regional organizations through the prism of belonging. She argues that regional organizations have two strategies for generating attachment: setting out shared conceptions of what their peoples are and the distribution (in some cases) of socio-political and economic rights. These are influenced, however, by different visions of belonging. In ASEAN, the notion of belonging is based around an idea of pre-existing shared cultural heritage and a commitment to social development. Individuals are to be inculcated in this vision rather than the political community being something in which they actively participate. ECOWAS, by contrast, generates a notion of belonging based around the freedom of migration, with the exercise of this freedom establishing belonging. It is a civil identity, however, as there is no entitlement to socio-economic benefits. Mercosur's vision is also based on the idea of participation, but its vision is a more socio-economic one based on equal participation in other state's welfare systems and labour markets. The author argues that, independently of their qualities, none of these visions have established strong senses of attachment because of the manner in which they have been generated. They have been instigated as strategic reactions by governing elites to external pressures, and this is too thin a basis for community building. She also problematizes the very idea of community building deployed by regional organizations, arguing that it is too undifferentiated, thereby obscuring the different vulnerabilities, interests and identities of citizens.

The fourth and final article by Floris De Witte goes to the geographies of power institutionalized by regional organizations. He argues that the regional vision of the subject emerges out of an interplay of three phenomena: the broader history informing the integration process, the objectives of that process and the organization's laws themselves. These visions always portray the subject in the context of her relationship with the state. Out of this, a vision of emancipation emerges based on an idea of what the state is about and what it can offer the subject. De Witte argues that the EU narrative is one of scepticism about state power and how it may restrict or oppress the individual. Thus, it has adopted a conception of emancipation as freedom from the state. By contrast, the narrative of the African Union is one of emancipation from colonialism. Emancipation is secured by the African Union establishing strong states, with their increased capacity and independence seen as liberating the subject. The most complex narrative is that of Mercosur. Strong nationalist and pan-regionalist legacies have created a dual narrative of emancipation. Economically, the state is seen as being responsible for emancipating the subject. However, with regard to political and civil rights, a regionalist narrative emerges in which emancipation is delivered through a strong regional identity.