Review Essay - *The Uneasy Fit Between Legal Traditions and the Political Economy of Regional Trade. Reflections on:* Francesco Duina, **The Social Construction of Free Trade (2006)**

By Mark Piel[*]

[Francesco Duina, *The Social Construction of Free Trade: The European Union, NAFTA, and Mercosur*, Princeton University Press: Princeton (2006), ISBN: 978-0-691-12353-0, pp. 249, $35.00]

A. Introduction

In his recent book *The Social Construction of Free Trade*[1], sociologist Francesco Duina engages in thoughtful comparative assessment of three regional trading blocs and associated agreements—the EU, NAFTA, and Mercosur—in an effort to refute the notion that regional trading blocs express a consistent economic logic and can therefore be analyzed as a homogenous class of organizational realities. Contrary to much of the literature published during the upswing in regional and bilateral trade in the 1980s and 1990s which focused on either the facilitative (*i.e.*, trade creation) or inhibitive (*i.e.*, trade diversion) implications of regional trade agreements for an multilateral trade regime governed by the General Agreement on Tariffs and Trade and the World Trade Organization[2], Duina's project is concerned

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[1] (2006).

[2] For a relatively positive assessments of regional trade regimes and the benefits of protectionist policies with respect to trade in the United States, see ROBERT Z. LAWRENCE AND ROBERT E. LITAN, SAVING FREE TRADE: A PRAGMATIC APPROACH (1986); For the complimentary association between regional trade agreements and multilateral trade regimes see Roberto Echandi, *Regional Trade Integration in the 1990s: Reflections of Some Trends and Their Implication for the Multilateral Trade System*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 367 (2001); For a stinging critique of regional trade agreements and their incompatibilities with the multilateral trade regime, see JAGDISH NATWARLAL BHAGWATI, THE WORLD TRADING SYSTEM AT RISK (1991), *Regionalism versus Multilateralism*, 15 THE WORLD ECONOMY 535 (1992) as

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less with assessing the stated or implicit objectives of regional trade agreements and more with the historically informed contexts and in which those agreements are forged. Duina focuses on the impact of legal traditions of the members states on the development of regional trade law as well as the extent to which political actors within regions contribute to organizational adaptations in response to legal change as well as how such actors steer the formation of regional law. In doing so, Duina reflects on the nature of globalization, the "varieties of capitalism"[3] in a post neo-liberal market reform world, and the phenomena of regional law in the law-nation-state matrix that characterizes the Westphalian international community.

B. The Basis of Markets

Duina ably demonstrates that "market building" is a process of social construction that is particular to the places in which markets are formed and is fundamentally a social, rather than an economic, activity. The author emphasizes the social embeddedness of markets, both regional and national. This situatedness of institutions and political actors contributes to the formation of differing and complex organizational structures despite the presence of a pervasively uniform market ideology which pushes policy makers towards the reordering of regulatory regimes so as to facilitate the free movement of goods, services, capital and labor. Market differentiation is therefore the product of particular political economies of nations which attempt trade integration on a regional scale and not primarily in response to a perceived failure of market reform efforts. Duina contends the evidence demonstrates that abstract ideological positions such as neoliberal market reforms are often tempered by the practical world of policy development and implementation.[4] He singles out three regulatory fields that each regional trade bloc has re-regulated in order to facilitate the regional integration of trade: labor, dairy products, and women's rights. After presenting a wealth of empirical data and canvassing the particular histories of each region, highlighting the relationship between legal innovation and organizational change, Duina's conclusions strike the

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well as Arvind Panagariya & T. N. Srinivasan, *The New Regionalism: A Benign or Malign Growth?*, *in* THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL 221 (Jagdish Natwarlal Bhagwati et al. eds., 1998); For the challenges associated with multilateralism more generally see Americo Beviglia Zampetti, *A Rough Map of Challenges to the Mulitlateral Trading System at the Millennium*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 34 (Roger B. Porter, ed., 2001); For the classic economic treatment of the subject see JOSEPH VINER, THE CUSTOMS UNION ISSUE (1950).

[3] For a background, compare VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice, eds. 2001).

[4] *Supra* note 1, at 11.

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reader as still raising as many questions as he set out to answer when asking them: the author rejects the thesis of global convergence of economic and legal systems; identifies changes to the integrity of the nation-state as it relates to economic, legal, and organizational capacities; suggests regional trade agreements are producing distinctive regional markets comprised of several nation-states which draw on their shared legal histories to produce stability as well as regional legal innovation; and frames the study of globalization as a matter of understanding the relationships between regional, national, and global forces.[5]

Central to Duina's analysis is the role of existing legal traditions of the member nation states of the EU, NAFTA, and Mercosur and how these legal traditions contribute to either "minimalist" or "interventionist" approaches to the regional integration of trade. Not surprisingly, the author maintains that the civil law tradition of the member states of the EU contributes to an "interventionist" approach to integration, emphasizing the "harmonization of reality" in the EU and Mercosur, and the universal application of regulatory principles as is evidenced by lengthy sections in founding documents dealing with the creation of common definitional attributes of goods as well as normative standards as they relate to labor rights, the environment, *etc*.[6] Conversely, the common law tradition of the member states of the NAFTA has contributed to a "minimalist" approach to integration, which emphasizes the particular over the general as well as pragmatic and reactive rule making in an effort to avoid lengthy codification and associated regulation, all of which is evidenced by scant attention to definitional and normative standards in trade agreements.[7] The theory is each legal tradition contributes to the particular choices of policy makers, and those choices in turn are structured by the influence of important political and economic actors in a given region who desire legal regimes that either resemble traditional regulatory approaches so as not to require significant changes in established economic and production practices or to harmonize sophisticated national regulatory regimes in order to facilitate regional trade.

Duina's larger theoretical position is sound and his empirical research is thorough. The trick however is arranging the pieces of the story such that the analysis is convincing. In this latter respect, the author falters, primarily due to a lack of nuance necessary to avoid reducing the role of law in the process of social change to that of caricature. The dichotomy between the civil and common law is a nice story, and is no doubt attractive to scholars outside the field of law in order to make

[5] *Id*. at 197.

[6] *Id*. at 74-88.

[7] *Id*. 67-74.

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sense of a discipline that is labyrinth in character even to those who devote their energies full time to its study. "Legal determinants" of economic policy have been attempted elsewhere, notably among scholars employing a law and economics approach to the study of capital markets and their respective regulatory regimes.[8] But such an approach takes a legal tradition as a "given" and overlooks the indeterminacy and fluidity of all legal regimes (common, civil, or otherwise) especially under the circumstances of advanced global capitalism.[9] Whether legal traditions, as opposed to economic systems, are converging is not a matter Duina explicitly addresses in his book despite reaching an anti-convergence conclusion. However, the reader will be forgiven if she gets the feeling that Duina seems rather comfortable with the notion that the civil and common law systems are so distinct so as to be incommensurable.

C. The Trickyness of Comparisons

Perhaps the picture would have been more nuanced had the author given still more room to the scholarly works he cites to advance his position. Case in point being Duina's reliance on the work of notable comparative law, private international law, and trade law scholar Patrick Glenn of McGill University in Canada. Contrary to Duina's portrayal of civil and common law traditions as creating polar opposite regulatory cultures, Glenn maintains "[d]ifferences between the civil and common laws are thus today not found in basic, foundational concepts or institutional structures. They are microdifferences, those found in the content of specific rules, the application of each of which in a given case is always arguable."[10] There is no comparative discussion of these "microdifferences" in Duina's book. While the author did not set about to write a monograph on private as opposed to public international law, the situatedness of trade law in the network of civil and common legal traditions would certainly have deserved still to be explored in greater depth. One of the consequences is that he fails to scrutinize how, despite his intentions, terms such as "minimalist" and "interventionist" to describe approaches to regional integration are shot through with ideological meaning. The picture here could have been clearer, if Duina had included at least some comparative discussion (or even mention) of civil law and common law conflict of laws rules respecting the

[8] Rafael La Porta, Florencio Lopez-de-Silane, Andrei Shleifer & Robert W. Vishny , *Legal Determinants of External Finance*, 52 JOURNAL OF FINANCE 1131 (1997).

[9] See, in that respect, the constructive contributions by Katharina Pistor, Daniel Berkowitz & Jean-François Richard, *The Transplant Effect*, 51 AMERICAN JOURNAL OF COMPARATIVE LAW 163 (2003).

[10] *Conflicting Law in a Common Market? The NAFTA Experiment*, 76 CHICAGO-KENT LAW REVIEW 1789 (2001).

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enforcement of judgments or the recognition of jurisdiction, and how notions of sovereignty and presumptions of conflict between legal rules in Europe may in fact be the product of scale and scope of the EU enterprise itself. Instead, the reader is left with the impression that the tendency of the EU to codify laws in an effort to achieve harmonization is simply the product of a fixed legal tradition, rather than being illuminated as to the specific legal rules of a particular tradition and how they contribute to particular regulatory outcomes in a larger legal architecture.[11]

By beginning with the premise that a legal tradition structures methods of legal norm articulation, Duina's analysis of "standardizing reality" (Chapter 3)—the development of "cognitive guidebooks" which constitute the social reality of trade regimes—is unsatisfactory. The author does not explore how the fundamentally different objectives of the regional trade agreements in question may contribute to different regulatory approaches, both in substance and form. The treaties leading up to the EU (the Treaty of the European Economic Community (1957), the Maastricht Treaty (1992) and the Treaty of the European Union (1993)) have created a common market, complete the removal of border restrictions on the movement of goods, services, capital and labour between member states, harmonization of external trade policies with non-member countries, *i.e.*, the establishment of a common export tariff for all non-member states, as well as common monetary, security, and foreign policies, as well as judicial system. Efforts have of course stopped short of the ratification of a constitution for the EU, but the mere fact such considerations are on the table in the EU hints at the whole to which trade policy is merely a single element. Neither the NAFTA or Mercosur are agreements which attempt integration on this scale, as they are not agreements which establish a common market, but are more modest agreements which remove tariffs and other non-tariff barriers such as quotas or subsidy programs between member states. To conclude that the civil law tradition of codification is what contributes to the massive legislative undertaking in the EU fails to capture the complexity and multipolar and multilevel nature of European lawmaking; Duina draws a straight line from codification to supranational forms of governance. Rather, the continuously contested scale of the EU project perhaps warrants what the author refers to as "interventionist" approaches, which require substantive codification of both the essential characteristics of the objects of trade and the desireability of certain practices, procedures and behaviors associated with trade.

The situation of Mercosur member states suggests the residue of colonial experience, namely the sharing of civil law traditions with European nations,

[11] See, for example, Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline* (EUI Working Paper LAW No. 12, 2004) available at http://www.iue.it/PUB/law04-12.pdf.

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would produce similar approaches to regulatory regimes. However, the author's analysis is confusing and contradictory. With respect to all three regulatory fields of study in *The Social Construction of Free Trade*—women in the workplace, labor rights, and dairy products—it is only in the latter policy field that there has seen significant codification efforts at the regional level on the part of Mercosur officials. Nonetheless, Duina maintains Mercosur officials were confronted with "rich national legal systems" which "presented serious barriers to trade."[12] As to why robust codified regional law did not develop with respect to labor rights and women's rights, Duina cites the comparative paucity of national law from which Mercosur officials could draw as well as the relatively undeveloped organizational capacities of interest groups at the national level which could in turn push for legal robustness at the regional level. Absent, from the analysis are connections between the pressures directed towards developing regions by international organizations such as the International Monetary Fund and World Bank to comply with "good governance" norms, and how financial aid is often conditional on such compliance. Exploring how the codification of regional law may be the result of international and national pressures independent of legal traditions is not examined.

Similarly, the role that the common law plays in a "minimalist" approach in the NAFTA might oversimplify the surrounding political and historical context of the agreement itself. Combinations of American exceptionalism as well as Canadian economic nationalism produced a volatile political situation for trade negotiators in the late 1980s and early 1990s, such that any agreement, which may have resembled an "interventionist" approach—which in Duina's estimation is synonymous with a civil law tradition—would have ensured failure. The comparatively modest scale and scope of the agreement suggests the parties were less aware of legal traditions than they were with the cessation of sovereignty, particularly when one party to the agreement—the United States—was a global economic and political hegemon. "Harmonization" in the North American experience suggests something quite different than the European or South American one, and the resulting "minimalism" may have less to do with legal traditions than overt political considerations.[13] A possible rejoinder to the notion that power asymmetries rather than legal traditions may play a larger role in the development of regulatory minimalism would be the case of Germany in the EU; how does one explain the "interventionism" of the EU when the conditions of asymmetry were present in the early days of the European Community as well? The answer lies in the long view of European

[12] *Supra* note 1, at 100.

[13] See for example, the work by Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 167 (George A. Bermann et al., eds., 2000).

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history. The particular type of legalization of integration in Europe is borne out of the necessity of avoiding the types of conflicts that plagued the continent in the early 20th century and the incorporation of Germany within that integrated institutional structure was a necessary component of peace as well as a signal to the continent and beyond that Germany was a good citizen of the international community.

There is also the troublesome fact that NAFTA signatories can hardly be referred to as common law jurisdictions. Mexico is a civil law jurisdiction, while Quebec and Louisiana share civil law traditions as well. Acknowledgements of these latter facts can be found in a brief footnote where the author states he is interested in the "predominant" system in each country.[14] In the case of Mexico the author relies more on the federal structure of the country and the associated degree of legislative independence as the primary reason for its acquiescence to the common law "minimalism" of NAFTA.[15] The irony will no doubt not be lost on those aware of the fact that the United Kingdom, the "home" of the common law, is a unitary state, while Germany, a founding member of the European Communities and civil law jurisdiction, is a federal state. The suggestion that detailed codification is a foreign practice in the U.S. is likewise suspect. Considering the role of legal traditions is a lynch pin of the author's argument, these broad generalizations cannot work in favor of the book's argument.

Duina fares better in his discussion of societal organizations' adaptation to legal change as a result of regional integration of trade policies (Chapter Five) as well as thinking through the merits and demerits associated with supranational institutions on the one hand—the EU and Mercosur—and looser intergovernmental structures on the other—NAFTA (Chapter Six). He correctly draws on established legislative histories of various states to make the case that regional law does at times reflect national legislative regimes (the case of regulating the workplace in order to achieve equity between the sexes in the EU)[16], and at other times regional law is innovative in advancing specific interests looking to capitalize on the creation of common markets (the case of dairy producers in Mercosur).[17] But given Duina's earlier discussion of legal traditions reflected in the particular legislative strategies of the EU, NAFTA and Mercosur, his contention that the *Social Construction of Free Trade* should not be read as portraying a "static picture" of the

[14] *Supra* note 1, at 91.

[15] *Id*. at 91-92.

[16] *Id*. at 110-113.

[17] *Id*. at 129.

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respective free trade agreements, but rather "a story of dynamism and novelty"[18], rings hollow. Certainly, the experiences of societal organizations, be they business, state, or social justice groups differ from region to region and react to and stimulate legal change in differing ways. However, the utility of comparing regimes according to a theory of "legal traditions" embodied in the texts of trade agreements creates an uncomfortable feeling throughout an otherwise well structured, and well written book.

[18] *Id*. at 194-195.

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