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## ADB Working Paper Series on Regional Economic Integration



### Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?

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Erik Voeten

No. 65 | November 2010

Asian Development Bank





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## **Abstract**

Why is Asia lagging behind other regions in creating regional judicial institutions? What lessons from the operation of such institutions elsewhere could be valuable to Asian regional economic integration? I show that Asian states are not unusually averse to refer inter-state disputes over trade, investment, and territory to global judicial institutions. Moreover, Asian states are not unique in their reluctance to resolve regional inter-state disputes through judicial means: Regional judicial institutions elsewhere have also rarely been used to resolve inter-state disputes. The most valuable lesson for Asia from experiences elsewhere is the role that regional courts can play in resolving disputes between administrative agencies and private parties about the implementation of international law. While Asia lacks an extensive set of regional laws and regulations that create rights and obligations for private parties, there is a broad body of international law that already applies in many Asian countries. National administrative agencies or courts may not always be well-equipped to interpret this law. I suggest the creation of a regional judicial institution that contributes to the uniform application of this law and that may help signal the commitment of states to their international obligations. The proposed institution provides incentives for harmonization without creating new obligations, thus recognizing the diversity among Asian states.

*Keywords:* regional judicial institutions, regional economic integration, Asia

*JEL Classification:* F50, F51, F53, F55





## 1. Introduction

The absence of regional judicial institutions in Asia is one of the most striking differences between its regional economic integration projects and those elsewhere. While Asia has no active standing regional court, Europe, Latin America, and Africa each have at least four active regional courts that have issued thousands of legally binding judgments.<sup>1</sup> About 90% of these judgments have come since 1990 (Alter 2009). This increased usage stems not just from Europe but also from the Americas and even Africa. These trends are backed by an emerging consensus on the centrality of legal institutions for economic development (e.g. Dixit 2009).

Why is Asia lagging behind other regions in this regard? And, what is Asian regional economic integration and cooperation missing by not partaking in this trend? This paper first discusses the theoretical reasons why regional judicial institutions could enhance economic integration and cooperation. It then turns to the question why Asian regional cooperation projects have decided (until now) to forego these theoretical advantages. A prevalent hypothesis among scholars and policymakers is that Asia has opted for a model of cooperation without legalization because Asian states are inherently averse to legalized dispute resolution for cultural or institutional reasons. So far, however, this proposition has not been systematically tested. Using data and models from studies published in top peer-reviewed journals, I find no evidence that Asian states are less likely than other states to refer trade, investment, or territorial disputes to global judicial institutions. This also holds for inter-Asian disputes.

A slightly different argument is that Asian regional cooperation projects have a distinct social logic that prescribe consensual as opposed to legalized forms of dispute resolution between states. This is, however, mostly based on a misconception about the nature of regional integration elsewhere. While regional inter-state dispute resolution mechanisms are ubiquitous, they are rarely used by states involved in a regional integration project. Resolving inter-state disputes is not and has not been the main contribution of regional judicial institutions.

Instead, the lessons from regional courts elsewhere suggest that they become active engines of integration if two conditions are present.<sup>2</sup> First, and most important, there must be legally binding regional rules that create rights and obligations for private parties. This allows private parties to sue and be sued on the basis of international law. Second, there must be an institutional configuration that allows private parties access to a regional court. This can be direct (such as in the case of the European Court of Human Rights) or indirect through references by national courts. National courts could decide to resolve disputes over the implementation of regional rules without reference to a regional court. Yet, there are instances where they are obliged to do so or when it is in their interest to do so. In such cases, regional courts can contribute to the harmonization of laws, rules, and practices, which in turn may stimulate transnational economic activity.

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<sup>1</sup> Alter (2009) finds evidence of almost 30,000 rulings issued by standing international courts until 2007. About 90% of these rulings come from regional courts. This number does not include rulings by arbitration panels or non-permanent courts.

<sup>2</sup> For a similar argument, see Alter (2009).

While Asia has few regional treaties that create legal obligations and rights for private parties, there is a broad body of international trade and commercial law that is already relevant. I suggest that a judicial institution could be created that can, at the request of national courts or administrative agencies, offer advisory opinions on the interpretation of international rules, laws, and standards that are already applicable. The underlying assumption is that governments want to see those obligations implemented but that national administrative agencies or courts may not always be well-equipped to do so. The new institution would allow Asian states to send a signal that they are committed to take their legal obligations seriously. Moreover, it would contribute to the uniform application (and thus harmonization) of commercial law while allowing each state to make new obligations at their own pace. The concluding sections offer some thoughts on political feasibility, issues of institutional design, and expected effects.

## **2. How Could Regional Judicial Institutions Promote Economic Integration?**

In what way could regional judicial institutions contribute to economic integration and cooperation? Regional economic cooperation refers to cooperative policies such as sharing technology, reducing trade barriers, and otherwise facilitating market access for regional parties. Regional economic integration also implies harmonization or standardization of laws and regulations across countries. Cooperation and integration are ultimately aimed at increasing economic transactions. Judicial institutions address two immediate problems that arise in any such project: dispute resolution and rule interpretation. These activities may have broader effects by improving compliance with, commitment to, and implementation of regional agreements. This section briefly discusses each in turn.

### **2.1 Dispute Resolution**

An increase in economic transactions also increases the probability that disputes arise between governments and/or private parties across borders. The expectation that such disputes are resolved in an impartial and efficient way by third parties both increases the likelihood that contracts are entered into and the likelihood that transactions continue in the aftermath of disputes. The ability to adjudicate disputes is central to courts around the world. The minimal institutional design requirements for effective dispute resolution are limited. The ideal-typical model requires primarily that the third actor who resolves a dispute is impartial and that there are few impediments to utilizing the dispute resolution mechanism (Shapiro 1981).

These requirements do not necessarily imply a standing court but could be achieved with arbitration. In its most basic version, two parties both agree to submit a dispute to a third party and make some promise to accept the third party's ruling. In most cases, however, states agree *ex ante* (through a treaty) that certain actors (other states, foreign investors) have a right to sue them in a particular forum. This is a delegation of authority with sovereignty costs attached to it. The motivation for states to do so is that by granting the right to be sued they expect increased trade and/or investment in the same way that the

right to be sued is essential for business to enter into contracts. In most arbitral models, each party appoints one panelist. These two panelists appoint the third one with mutual consent. This model is especially prevalent in the resolution of investment disputes, often done under the auspices of a standard set of procedures, such as those stipulated by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). It is also used in some regional trade disputes, such as NAFTA's binational review panels. Other treaties create permanent dispute settlement bodies, meaning that states have less control over panel composition.

There is some controversy over whether creating dispute settlement bodies actually increases trade (see Rose 2004, Tomz et al 2007) or investment (see Bütte and Milner 2009), although all of this evidence is from bilateral treaty membership or GATT/WTO rather than for regional agreements. There is strong evidence that domestic courts that resolve simple economic disputes in an efficient manner stimulate economic activity (e.g. Djankov et al 2003). It is unclear, however, to what extent international dispute resolution mechanisms fit this paradigm. Indeed, much of the criticism targeted at the WTO dispute resolution mechanism argues that developing countries lack the legal capacity to pursue cases effectively and that this deters them from initiating disputes (e.g. Busch et al 2009, Davis and Bermeo 2009).

## 2.2 Interpretation

Attempts to standardize rules, regulations, and laws across countries can only contribute to increased economic activity if the agreements that establish such standardization are similarly translated into national laws, rules, and practices. Regional courts can play an important role in ensuring a uniform interpretation of regional agreements across member states. All courts engage in interpretational activities of some sort. At a minimum, courts must make a judgment on how a particular case fits the law. Yet, treaties are always incomplete or imprecise. Consequently, courts frequently make determinations about precisely how a treaty should be interpreted. These determinations do not necessarily match the desires of the states that created the treaty. Such interpretations can have broad impact, especially if other courts or panels rely on them.

This latter point is worth elaborating on. There is no formal principle of *stare decisis* in international law. Most international tribunals are asked to limit their focus to the dispute at hand. For example, article 59 of the ICJ's Statute proclaims that "The decision of the Court has no binding force except between the parties and in respect of that particular case" (ICJ Statute, Article 59). Yet, the ICJ motivates its resolution of disputes with extensive references to its past opinions and considers these as precedent (Shahabuddeen 2007). *De facto* norms of *stare decisis* are operative at the WTO (e.g. Busch 2007). Similarly, the ECJ and the ECtHR rely heavily on their past decisions, have no trepidations in referring to these decisions as "precedent" (e.g. Wildhaber 2000) and have developed elaborate systems to keep track of their case-law.<sup>3</sup>

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<sup>3</sup> For example, the ECtHR's case law on-line system Hudoc documents the "Strasbourg law" each decision relies on. Similarly, EUR-Lex documents the case-law for the ECJ.

That norms resembling *stare decisis* have developed on international courts should not be surprising and partially follows from their dispute settlement roles. Courts need to tell the losing parties why they lost. In all modern societies, judges tell the loser: "You did not lose because we the judges chose that you should lose. You lost because the law required that you should lose" (Shapiro 1994). Such justification is essential to establish the perception that a tribunal is impartial. Demonstrating the consistency of a decision with past decisions may alleviate the losing party's potential to claim that a decision was whimsical or motivated by non-legal considerations (e.g. Shapiro 1981, Stone Sweet 2002). Concerns about justification are perhaps even stronger on international courts, which generally operate in a more uncertain compliance environment than domestic courts.<sup>4</sup>

Although all international judicial institutions engage in treaty interpretation of some sort, there is large variation in how far-reaching their authority is in this regard. Some arbitral decisions are not public and thus cannot contribute to uniform interpretation. Other regional courts are merely allowed to give non-binding advisory opinions to states and at the request of states. Such opinions could have a broad effect only if they are accepted by states. Yet other institutions have constitutional review authority; including the ability to nullify domestic laws that are in violation of a regional agreement.<sup>5</sup> Some courts also have administrative review roles, evaluating complaints by private actors that government agencies have failed to properly implement a regional treaty.<sup>6</sup> For such courts to function properly, they must have compulsory jurisdiction and allow private access, either through a system of preliminary references by national courts or directly.

The key quality that a court should have to exercise its interpretive function is expertise. Indeed, there is some evidence that administrative agencies and national courts refer decisions to regional courts because the national courts lack expertise in a certain area, such as intellectual property rights law (Helfer and Alter 2009). In addition judges should have incentives to issue rulings according to their expertise as opposed to concerns about the future of their careers or the desires of the governments who may have appointed them (Voeten 2008, 2009). This requires some independence on the part of judges, at least to the degree that judges should believe that states will not interfere in a particular case or will punish them for interpreting a treaty in a manner that is inconsistent with the wishes of a government.

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<sup>4</sup> At least in comparison to domestic courts in developed democracies. There are, of course, numerous domestic courts who operate in a weaker compliance environment than, say, the ECJ. There may also be reasons that norms to adhere to past precedent are not quite as strong in international courts. For example, the ECtHR has developed a "margin of appreciation" doctrine, which posits that countries should have some leeway in how they implement their Convention obligations into their specific domestic contexts (e.g. Yourow 1996). This leaves judges some room to motivate deviations from case-law with reference to specific national circumstances.

<sup>5</sup> Nullification is not always a direct consequence of a regional court's actions. For example, the ECtHR can find that a domestic law is in violation of the ECHR but this does not automatically imply that the domestic law is nullified. It does, however, imply that future litigants can expect the same outcome of challenges to the domestic law, giving governments incentives to change the law.

<sup>6</sup> See Alter 2009 on the distinction between constitutional and administrative review roles.

### 2.3 Compliance

Theories of international cooperation stipulate that fear of non-compliance is one of the main issues that stifles potentially beneficial cooperation between states. This is especially so in Prisoner-dilemma type situations, where governments do not engage in mutually beneficial cooperation because they fear that they will be the ones to take costly measures to implement regional agreements, leaving others to benefit. The presence of a regional judicial institution could help in this regard even at the negotiation stage. If states expect enforcement, they may be more careful to construct regional agreements that they expect to comply with (e.g. Fearon 1998). This may not necessarily increase the volume of regional agreements but should increase their quality.

All courts aim to increase compliance to some degree, hoping that the shadow of binding judicial enforcement makes it more likely that states comply with agreed upon rules. Yet, the prospect of a costly law suit by another state may not be sufficient incentive for compliance. Legalized dispute resolution between states is an indirect way to resolve trade disputes. The parties that directly benefit from or are hurt by unfair trade practices are generally firms. Firms lobby their governments in order to convince them that it is also in their interest to incur the economic and political cost of launching a dispute against another government. These political costs may be especially high in the context of a regional integration project. It may not seem credible that a global institution such as the WTO has a bias for or against (for example) Malaysia or Indonesia. Yet, such charges are more likely in a context where there are few actors with well-understood histories and cleavages. Regional institutions generally serve other purposes than resolving disputes. Potential charges of bias in the resolution of contentious disputes may have negative spillover effects to the workings of these institutions. Indeed, the data will show that regional courts embedded in larger integration projects are rarely used to resolve inter-state disputes.

Some regional agreements address compliance more directly, by creating a treaty body that monitors compliance by member states and can file infringement or non-compliance cases with a regional court. Examples are the European commission, but also the Andean Community and other regional organizations have such treaty bodies (see Alter 2009, Ch. 2 for an overview). Others allow private actors direct access, either directly (the European Court of Human Rights) or indirectly by allowing national courts to refer cases to a regional court. Such arrangements substantially reduce the cost of litigation in comparison to pure inter-state disputes and thus should increase the expectation that a regional agreement will be enforced. Yet, there are also larger sovereignty costs to such institutional arrangements.

### 2.4 Implementation and Administrative Authority

Non-compliance is not necessarily the result of willful acts by governments to act in ways that are inconsistent with treaty commitments. Many issues of non-compliance arise due to the complexity of implementing agreements (see Chayes and Chayes 1993, Raustiala and Slaughter 2002). Implementing regional agreements generally requires delegating tasks to a bureaucracy or even an independent regulatory agency. Bureaucracies vary in their technical capacities to implement regional regulation. Moreover, agencies generally

have some discretion and could potentially abuse this to implement their own policy preferences or extract rents.

Allowing private parties to challenge administrative decisions in front of impartial tribunals could limit such practices and strengthen the capacity of administrative agencies to correctly implement regional rules. Such fire alarm control could be exercised by domestic administrative tribunals. Regional tribunals have the added benefit of contributing to coordination of interpretation. This is important as common regulation only has the desired effect if it is interpreted in a common way. Moreover, regional courts may have better expertise to interpret international law. In several regional agreements, most notably the EU, OHADA, and the Andean Community, national courts then have the right or obligation to refer disputes over regional law to a regional court. As the empirical part of this paper will demonstrate, many of these disputes are between private parties and regulatory agencies over the proper application of regional law in the denial of permits, trademarks, and so on. These regional courts often issue advisory rulings only about the interpretation of regional law in a case, leaving the actual resolution of a dispute to the national court. This limits their interference with domestic sovereignty.

There are two other ways in which regional courts contribute to checking administrative authority. First, some regional integration projects, most notably the EU, create new supranational bureaucracies with the authority to implement, interpret, and even issue legally binding rules and rulings. The ECJ often reviews disputes between the Commission and states or private parties about the proper exercise of that authority. Second, the ECtHR has determined on various occasions that existing procedures for administrative review in countries such as the Netherlands and Sweden were not truly independent, for example because the review determinations were also done by administrators rather than judges. Such rulings have led to important institutional reforms.

There is a large literature in economics that illustrates the positive economic effects of a proper system of checks and balances to the exercise of administrative authority (e.g. Persson and Tabellini 2003). Recent research in economic history suggests that the need to check administrative power was the key to the development of the rule of law in modern Europe (González de Lara et al, 2008, Greif 2008). Such checking of administrative authority aids in the harmonization of law across countries, prevents abuses of authority, and helps make administrative decisions more predictable for businesses. All of these activities theoretically stimulate economic activity. Moreover, they interfere less directly with sovereignty than the remedies targeted at willful non-compliance by states.

## **2.5 Credibility of Commitments**

Regional cooperation may be stifled by uncertainties about the degree to which actors are committed to the project. Regional agreements suffer from a time inconsistency problem: even if it is in the interest of a government to comply with an agreement, the incentives for that government may change or the government may lose power. Since regional cooperation and especially integration often require costly ex ante investments

with promises of long-term benefits, uncertainty about the commitment of actors could stifle a cooperation project.

Delegating authority to an independent court increases the credibility of these commitments. For example, new democracies may want to signal that they are committed to upholding human rights by signing a human rights treaty. They could increase the credibility of that commitment by also delegating authority to interpret a treaty to a regional court and allowing citizens to directly file suit with that court (Moravcsik 2000). This may increase the perception of other actors that these governments are committed to a regional integration effort and perhaps make actors more likely to make long-term investments (Farber 2002). Governments also frequently use judgments by international courts to explain to their domestic publics why they have to maintain an unpopular (protectionist) policy (Reinhardt 2002), thus potentially alleviating fears that cooperation will stop due to domestic opposition. Moreover, delegation to regional courts may alleviate concerns among smaller states that they will be subjected to power-based inequalities in the implementation of regional agreements. Such assurances could be central to deepen cooperation among states.

The credibility of a commitment to regional integration is only increased if the delegation to the regional court is meaningful in the sense that court is independent, has compulsory jurisdiction, is easily accessible for potential disputants, imposes meaningful penalties on non-compliance, and is costly to withdraw from. Indeed, the very logic of this argument stipulates that there are benefits to incurring sovereignty costs.

### **3. Are Asian States Less Likely To Resolve Disputes Through Legal Means?**

Why have Asian countries, in contrast to governments elsewhere, seemingly rejected the potential benefits of regional courts discussed in the previous section? The answer to this question is important for understanding the lessons that can plausibly be learned from experience elsewhere. Many accounts of why Asian countries prefer cooperation without legalization are based on the notion that Asian states share a strong preference for non-binding commitments and non-legalistic methods of dispute resolution. This is generally considered a central feature of the "ASEAN way" as well as the "Asia-Pacific way" of cooperation (e.g. Acharya 1997). To some scholars this stems from a distinct legal culture that is less adversarial and litigious than Western legal culture (e.g. Green 1994). Instead, Asian approaches to dispute resolution stress consensus and informality. Scholars have identified such differences in legal culture as one of the main challenges for Asian states to participate in global legal regimes, such as the WTO (Peng 2000). Some claim that the rise of Asian economies will significantly challenge the emerging global legal culture based on US legal practices and replace it with a culture based on informal dispute resolution (Appelbaum 1997). Others argue that Asian countries differ not so much because they lack an adversarial legal culture but because of their domestic political institutions and the sensitive nature of diplomatic relations between



Asian states.<sup>7</sup> Again others maintain that Asian governments' unusually strong concerns about sovereignty costs lie at the root of their unwillingness to use legalized forms of dispute settlement (Poon 2001).

There is considerable criticism of the notion that there are cultural or institutional reasons that underpin the cooperation without legalization route that Asian regionalism has taken. For example, scholars have pointed to the diversity in Asia's domestic political and legal institutions (Kahler 2000, Pryles 2006). Yet, as far as I am aware, there are no systematic tests in the literature of the proposition that Asian states are less likely than others to resolve their disputes through legal means. Such a test is important for the purposes of this paper. If Asian countries have unusually strong predispositions against using legal means to resolve disputes, then the lessons from other regions may not be applicable to the Asian context.

My empirical strategy for evaluating this question is to replicate recently published analyses of legalized dispute resolutions in three critical areas: trade, investment, and territory. I then add an indicator variable for whether a country is Asian, as defined by the ADB.<sup>8</sup>

### 3.1 Trade Disputes

If Asian countries are averse to legalized dispute settlement, they may be less likely to initiate trade disputes at the GATT/WTO than are other countries. In a study published in the *Journal of Politics*, Davis and Bermeo (2009) analyze why some developing countries are more likely than others to initiate disputes at the GATT/WTO. They argue that there are large start-up costs for using the dispute settlement process. Therefore, they hypothesize that past experience as a complainant or defendant makes states more likely to initiate disputes in the future.

I replicated their analysis (without problems) and added an indicator variable for whether a country is Asian. The sample includes 75 developing countries that were WTO members by 2003 (the end of the data), including 14 Asian countries. The analysis excludes 31 least developed countries who are beneficiaries to preferential market access and have less need to invoke WTO rights. Davis and Bermeo argue that the correlates that determine dispute initiation among developed countries are different and estimate a separate model for this group. The dependent variable is the number of cases a country initiated in a given year. The model is estimated using a negative binomial regression, with robust standard errors clustered on countries.

Table 1 offers the results of the simplest specifications estimated by Davis and Bermeo. The indicator for Asia does not have an effect on either developing or developed country dispute initiation. This result also holds in the more extensive models with additional control variables and a model where the dependent variable is converted to a binary

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<sup>7</sup> For example, Davis and Shirato (2007) use such an account to explain Japan's restraint in initiating WTO trade disputes. This also fits with the large literature that sees democracy as the key to explaining trends in legalization (add citations).

<sup>8</sup> <http://www.adb.org/Countries/> (accessed 30 June 2009). Japan is also included.

indicator, allowing for the use of a logit estimation. Finally, the result holds for developing countries if the democracy variable is omitted from the regression model, indicating that it is not the scarcity of democracies in Asia that drives this result.

In all, there is no evidence that Asian countries are more averse to seeking legalized resolutions of their trade disputes. Of the 352 disputes initiated between the start of the WTO process in 1995 and October 2006, there have been nine within-Asia disputes between Singapore and Malaysia, Republic of Korea (Korea) and Japan (2), Japan and Indonesia (2), Korea and the Philippines, Bangladesh and India, Indonesia and Korea, and Taipei, China and India.<sup>9</sup> This is more than the number of disputes filed among Latin American, European, African, or Central American states. There are obviously different base-line probabilities for the filing of such within region disputes, yet it is hard to maintain based on these data that Asian states have a deep cultural aversion against legalized resolutions of their trade disputes.

### 3.2 Investment Disputes

The regulation of foreign investment has long been a potent source for disputes, especially when foreign property is expropriated by host governments of foreign investments. In recent years, the regulation of foreign investment has increasingly taken the form of Bilateral Investment Treaties (BITs), which may or may not delegate authority to an international authority to resolve disputes between foreign firms and governments (e.g. Franck 2007). The most prominent international body that resolves the vast majority of investment disputes is the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). ICSID rulings are public, are closely watched by investors, and are consequential for future FDI streams (Allee and Peinhardt 2009b). Governments have much less control over ICSID dispute resolution mechanisms than if they delegated dispute resolution to ad hoc arbitral tribunals or domestic courts (e.g. Franck 2007).

If Asian countries indeed prefer cooperation without legalized dispute settlement, we would expect these countries to be less willing to delegate authority to ICSID when they agree on cooperation by signing a BIT. Allee and Peinhardt (2009a) coded all publicly archived BITs for their level of delegation to ICSID. They create an ordinal variable, coded 0 in the absence of any delegation, 1 if ICSID is one of the options for dispute resolutions and 2 if ICSID is the only venue for international arbitration. They argue that this variable reflects the degree of delegation in an ordinal way because governments usually have some control over the venue of arbitration if ICSID is only one of more options. The negotiation of BITs tends to be asymmetric in that there is usually one 'home' country (from which most of the investment originates) and a 'host' country (towards which the investment is directed). Home countries typically (although not always) tend to prefer ICSID delegation but the preferences of host countries vary.

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<sup>9</sup> Based on the World Bank's WTO data: <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20804376~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html> (accessed 13 July 2009).

Allee and Peinhardt identify a range of characteristics of host countries and home countries as well as of the relationship between them that would make it more or less likely that a BIT includes an ICSID provision. I refer the interested reader to their article for more details on the theoretical motivation for including these variables. The appendix lists the variables and precise data sources. I replicated their original results (without problems) and added to their model indicator variables for whether there is an Asian home or host country and an additional indicator variable for whether both countries are Asian.

Table 2 has the results from an ordinal probit model. Quite strikingly, an Asian home country makes it significantly more likely that a BIT delegates authority to ICSID. The same is true for an Asian host country, although this effect is only significant at the 10% level in a two-tailed test. There is no additional effect of both countries being Asian. It is clear that Asian countries are not more likely to cooperate without legalized dispute resolution. If anything, the result seems to go the other way.

It is perhaps plausible that this reflects the specific Asian countries who sign BITs or that Asian countries are less likely to sign BITs because they expect that a legalized commitment will be involved. There is, as far as I can tell, no evidence in the BIT literature of such a proposition. Moreover, coverage is broad. The data includes BITs with 16 different Asian home governments and 29 different Asian host governments. 112 (11%) of the BITs have home countries that are Asian and 251 (25%) have host countries that are Asian. This includes 65 BITs involving People's Republic of China, which only include exclusive ICSID clauses in 9% of its BITs and had no ICSID option in 59% of its treaties. In all, though, exclusive delegation to ICSID exists in 45% of BITs with an Asian home country, 36% of BITs with an Asian host country, 42% of BITs between two Asian states but only 29% of the total population of BITs. Moreover, countries that are threatening to leave the ICSID system appear to be from Latin America, not Asia (Franck 2009, p. 436-7). These data simply do not support a conclusion that Asian countries that have signed BITs are particularly averse to legalized dispute settlement (i.e. they do not prefer cooperation without legalization).<sup>10</sup>

### 3.3 Territorial Disputes

Territory is another commodity over which states frequently bargain and even fight. Yet, territorial disputes can also be settled through legal dispute resolution, for example through the International Court of Justice (ICJ) the Permanent Court of Arbitration (PCA). A characteristic of such legal solutions is that both countries need to agree to it. If Asian countries are averse to legalized solutions, then territorial disputes involving Asian countries should be less likely to be resolved by legal means than are other disputes.

In a study published in the *American Political Science Review*, Allee and Huth (2006) investigate what makes states more and less likely to choose legal dispute resolution over bilateral negotiations as a means for settling territorial disputes. They identify 1490 bilateral rounds of negotiations in 348 disputes over territory. They then code whether

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<sup>10</sup> Note that since companies rather than states tend to file ICSID suits, it is more useful to analyze the initial decision to allow this to take place rather than the actual usage of ICSID.

the negotiation round ended in a stalemate, compromise (bilateral concessions) or a legalized form of dispute resolution. Their core theoretical contribution is the argument that international legal rulings at least in some significant part provide political cover for leaders in need of making concessions.

I refer the interested reader to the Allee and Huth article for more detail on model specification. The appendix provides more detail on measurement. I successfully replicated their analyses (Table 2 in the article) and added two indicator variables: one for whether the dispute involved an Asian country (true for 350 (23%) of rounds of negotiations in the data) and one for whether both parties in the dispute were Asian (true for 199 (13%) of cases). The second variable is included to assess whether there is an additional effect if both parties are Asian and thus, presumably, unlikely to resort to legal solutions for their territorial disputes.

Table 3 shows that there is no significant effect of Asian involvement on the likelihood that a dispute has a legal resolution. Thus, the involvement of Asian countries makes it neither more or less likely that a dispute is resolved through legal means. Creating exclusive category where one indicator variable measures whether only one Asian state is involved does not materially affect the result nor does dropping the indicator for whether the conflict involves two Asian states.

The Allee and Huth data only runs until 1995. Since then, there have been at least two other Asian territorial disputes that were submitted to the ICJ: the dispute over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge between Malaysia and Singapore and the dispute over Pulau Ligitan and Pulau Sipadan between Indonesia and Malaysia. In all, there is no evidence that Asian countries are more reluctant than others to seek legalized dispute settlement for their territorial conflicts.

#### 4. Regional Resolution of Inter-State Disputes

The preceding section demonstrates that Asian states are not less likely to resolve inter-state disputes through legal means in *global* institutions. Another plausible story is that Asian *regional* integration projects have a distinct social logic that warrants cooperation without legalization and that explicitly rejects European-style institutionalization. This is especially reflected in the "ASEAN way" of regional cooperation. As Acharya (1997, p.329) puts it:

[..] the "ASEAN way" is not so much about the substance or structure of multilateral interactions, but a claim about the process through which such interactions are carried out. This approach involves a high degree of discreetness, informality, pragmatism, expediency, consensus-building, and non-confrontational bargaining styles which are often contrasted with the adversarial posturing and legalistic decision-making procedures in Western multilateral negotiations.

The "ASEAN way" influenced Asia-Pacific regional cooperation and has also been termed the "Asian way" of regional cooperation (Acharya 1997). Indeed, there is no documented use of legalized regional mechanisms to settle disputes between states in

Asia. This section evaluates whether this aversion to the use of regional legalized resolution of inter-state disputes is unusual. Inter-state disputes are those where one state files dispute against each other and each state gets to present its case before a tribunal. As the summary below will show, while virtually all regional judicial institutions allow for such inter-state disputes (as does the ASEAN dispute settlement mechanism), these provisions are rarely used.

#### 4.1 Inter-State Disputes in Regional Tribunals

There are four standing international courts<sup>11</sup> in Europe. The best known ones are the highest courts of the European Union: the European Court of Justice (ECJ) and the Court of First Instance (CFI). Under Article 227, EU member states could directly bring complaints to the ECJ against other member states. The article has been used only a handful of times and was described as “a virtual dead letter” in a recent overview of ECJ activity (Brunell et al 2008). The Court of Justice of the European Free Trade Agreement (EFTA) resolves disputes involving countries that are not part of the EU but that are part of the European Free Trade Area.<sup>12</sup> The agreement that establishes the EFTA Court grants the Court jurisdiction to settle disputes between two or more member states.<sup>13</sup> Yet, none of its 102 pending or decided cases are inter-state disputes.<sup>14</sup> The BENELUX Court of Justice interprets rules of law common to Belgium, the Netherlands, and Luxemburg. The BENELUX treaty established a College of Arbitrators to settle disputes between states but it has not appointed new arbitrators since the first nomination in 1962 and has never been used.<sup>15</sup> Finally, the Council of Europe’s European Court of Human Rights (ECtHR) has issued over 10,000 judgments on individual complaints but only 3 inter-state cases.<sup>16</sup> As of 2009, these courts have together allowed inter-state cases for 172 years. Yet, it is difficult to find even 10 examples of such cases. In short, European states have not settled their inter-state disputes by suing each other in regional courts.

In addition, the Economic Court of the Commonwealth of Independent States (ECCIS) was created in 1991 to resolve trade disputes among the countries belonging to the Commonwealth of Independent States (CIS) (Danilenko 1999).<sup>17</sup> Unlike the other European courts, the legal status of ECCIS decisions is in dispute and the court has

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<sup>11</sup> Information comes from the Project on International Courts and Tribunals: <http://www.pict-pcti.org> (accessed 7 July 2009).

<sup>12</sup> Currently, these countries are Iceland, Liechtenstein, Norway, and Switzerland.

<sup>13</sup> Article 32, see [http://www.eftacourt.int/index.php/court/mission/esa\\_court\\_agreement/](http://www.eftacourt.int/index.php/court/mission/esa_court_agreement/) (accessed 6 July 2009).

<sup>14</sup> <http://www.eftacourt.int/index.php/cases> (accessed 6 July 2009).

<sup>15</sup> <http://www.pict-pcti.org/courts/beneluxCJ.html> (accessed 7 July 2009).

<sup>16</sup> There were 17 inter-state complaints that were dealt with by the European Commission on Human Rights. Georgia has recently brought another inter-state complaint (against Russia): “Inter-State Application Brought by Georgi Against the Russian Federation.” Press release by the Registrar of the European Court of Human Rights, 27 March 2007. <http://wcd.coe.int/ViewDoc.jsp?id=1111315&Site=COE> (accessed 9 July 2009).

<sup>17</sup> It only became a formal judicial organ of CIS in 1993 (Danilenko 1999).

weak enforcement capabilities, thus allowing losing states to ignore its rulings (Danilenko 1999, Dragneva and De Kort 2007). During its first decade, the court issued 65 decisions, 54 of which were advisory opinions and only 9 were disputes about non-performance of economic obligations (Dragneva and De Kort 2007, p. 260). While little information is available about these 9 cases, the perception is that they have been resolved through negotiation (Dragneva and De Kort 2007, fn. 112).

The evidence from Latin America is similar. The Court of Justice of the Andean Community (ATJ) is the third most active international court with 1492 rulings (Helfer and Alter 2009, Helfer et al 2009). About 90% of these cases came from preliminary references by national courts. Almost all of the other cases were initiated by a treaty organ (the Secretary-General). I have been able to find only three pure inter-state cases.<sup>18</sup> Mercosur has had a formal arbitration system in place since 1991, which only allowed access to state parties. As of 2005, arbitration panels had issued only nine awards (Vervaele 2005). Institutional reforms to create more advanced forms of dispute resolution are under way.

The Central American Court of Justice (CACJ) was originally established in 1907 to maintain peace and resolve disagreements between Central American States. It was dissolved in 1918. Three of the court's ten decisions were inter-state cases.<sup>19</sup> Since its restart in 1990, the court has issued an additional 78 rulings (Alter 2009) but it is unclear how many are inter-state disputes. The Caribbean Court of Justice (CCJ) was established in 2001<sup>20</sup> by the members of the Caribbean Community (CARICOM) to replace the Judicial Committee of the Privy Council and to interpret the Treaty Establishing the Caribbean Community. The court has issued 34 judgments, none of which were inter-state disputes.<sup>21</sup>

NAFTA does not have a standing court but does allow for ad hoc binational review panels, most notable those under chapter 19. This has led to concerns about strategic forum shopping with the WTO (Busch 2007) and to critiques that the NAFTA panels supersede conventional judicial review.<sup>22</sup> The chapter 19 procedure allows private parties to sue administrative agencies for their decisions on antidumping or countervailing duties. On at least 23 cases, government lawyers argued on behalf of these private parties, creating a perception of putting two state actors into conflict with

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<sup>18</sup> Article 24 of the Treaty Creating the Court of Justice of the Cartagena Agreement ([http://www.comunidadandina.org/ingles/normativa/ande\\_trie2.htm](http://www.comunidadandina.org/ingles/normativa/ande_trie2.htm)) allows states to file non-compliance claims with the secretary-general. The ATJ web-site suggests that it has happened on only three occasions that a state was the originator of a non-compliance complaint (<http://idatd.eclac.cl/controversias/can.htm?perform=estadisticas&numero=5>). Yet, when reading cases it becomes clear that several of the cases brought by the secretary-general originated with state complaints (private communication with Karen Alter and Larry Helfer, 7 July 2009).

<sup>19</sup> <http://www.worldcourts.com/cacj/eng/decisions.htm> (accessed 10 July 2009).

<sup>20</sup> The court was inaugurated in 2005.

<sup>21</sup> <http://www.caribbeancourtjustice.org/judgments.html> (accessed 10 July 2009).

<sup>22</sup> Adam Liptak "Nafta Tribunals Stir U.S. Worries" *The New York Times* Sunday 18 April 2004.

each other.<sup>23</sup> NAFTA does not have a treaty organ in charge of enforcement nor is it part of a deeper regional integration project.

Africa has four active international courts: Common Court Of Justice And Arbitration Of The Organization For The Harmonization Of Corporate Law In Africa (OHADA, or OHBLA), the Court Of Justice Of The Common Market For Eastern And Southern Africa (COMESA), Court of Justice of the East African Community (EACJ), and the Court of Justice of the Economic Community of West African States (ECOWAS). OHADA aims to harmonize corporate law in 16 mostly francophone African states. Its Common Court of Justice and Arbitration had issued 274 judgments by 2007 (Alter 2009), none were inter-state cases.<sup>24</sup> COMESA established a common market between 19 states in Eastern and Southern Africa. Its court was established in 1994 and its first judges were appointed by 1998.<sup>25</sup> The Court had heard seven cases by 2007 (Alter 2009), none of which appear to be inter-state cases.<sup>26</sup> The EACJ and its predecessor have issued eight rulings, none of which appear to have been inter-state cases.<sup>27</sup> The ECOWAS court has received 33 cases, none inter-state disputes.<sup>28</sup>

There are also a number of courts that have been in existence for some time but that have never or rarely been used (Alter 2009). These include the Organization of Arab Petroleum Exporting Countries Tribunal (OAPEC) (1978), The West African Economic and Monetary Union Court (WAEMU) (1995), the Community of Central Africa Court of Justice (CEMAC) (2000), and the Tribunal of the Southern African Development Community (SADC) (2007).<sup>29</sup> Thus, the ASEAN dispute resolution mechanisms is not the only existing DSM that has not been used.

## 4.2 Why So Little Use of Regional Mechanisms for Inter-State Disputes?

In all, the number of standing regional courts is about equal to the total number of direct inter-state disputes that they have resolved. Why are there so few inter-state disputes submitted to regional courts? Part of the answer is that some regional agreements have treaty bodies, such as the European Commission, that can file infringement suits against

<sup>23</sup> Based on a reading of disputes at: <http://www.sice.oas.org/DISPUTE/naftdispe.asp> (accessed 7 July 2009). In addition there were 25 disputes filed by private business where I did not find evidence of government involvement on both sides. Chapter 11 also gives private actors standing to sue governments for damages, a procedure that has been widely used. There has also been one inter-state dispute under Chapter 20.

<sup>24</sup> <http://www.ohada.com/jurisprudence.php> (accessed 13 July 2009).

<sup>25</sup> <http://about.comesa.int/lang-en/institutions/court-of-justice> (accessed 13 July 2009).

<sup>26</sup> I was able to find evidence of only five cases: [http://www.aictctia.org/courts\\_subreg/comesa/comesa\\_cases.html](http://www.aictctia.org/courts_subreg/comesa/comesa_cases.html) (accessed 13 July 2009).

<sup>27</sup> Alter 2009 and [http://www.aict-ctia.org/courts\\_subreg/eac/eac\\_home.html](http://www.aict-ctia.org/courts_subreg/eac/eac_home.html) (accessed 13 July 2009).

<sup>28</sup> [http://www.aict-ctia.org/courts\\_subreg/ecowas/ecowas\\_home.html](http://www.aict-ctia.org/courts_subreg/ecowas/ecowas_home.html) (accessed 13 July 2009).

<sup>29</sup> Moreover, there are a number of courts that are not yet operational, including the Court of Justice for the Arab Magreb Union (AMU), the Court of Justice of the Economic Community of Central African States (ECCAS), and the African Court of Justice (ACJ).

states and that can, to some extent, serve as substitutes for inter-state disputes. It is likely that some complaints about foreign practices originate with other governments, although there is no hard evidence that documents this. Politically, there is a difference between cases between a commission and a government and cases where two states involved in a broader regional integration project directly challenge each other in court. Among others, it would force the court to choose sides between two member states, which could cause some fallout for a regional integration project. Moreover, especially the literature on the EU shows that the Commission often takes its own initiatives and is quite far from a simple tool that (powerful) member states can use to go after each other (e.g. Pollack 1997). Finally, DSMs in regions that lack a supranational body are also not frequently used, suggesting that there is something else going on than a simple substitute story.

The theory section already highlighted that economic disputes between states are usually proxy disputes. Businesses are harmed or benefit from unfair trade practices. States are only hurt indirectly. There are many hurdles that may prevent states from filing suits against each other. Businesses must lobby governments to file suits on their behalves and pay the cost for this. This generally only works if they come from a particularly influential or economically important sector. In such cases, it may be more useful to file at a global institution, such as the WTO, where the precedent will be broader. There are many other ways to resolve disputes between states and many issues that could be linked together in omnibus compromises. The patterns in the data also suggest that there are additional political cost to be paid from using regional institutions for inter-state disputes. For example, the only regional tribunal that is used somewhat frequently to resolve (proxy) inter-state disputes are the NAFTA binational review panels, which exist in the absence of a broader political regional integration project. At times, the existence of a regional inter-state DSM may be a useful option, if only as a potential outcome that all want to avoid. But there is little reason to believe that resolving inter-state disputes has been a major contribution of regional judicial institutions or that it will be in the Asian context.

## **5. What Can Be Learned from the Activity of Regional Judicial Institutions?**

The widespread perception that Asian states are unusual in their reluctance to resolve their disputes through legal means is at least partially based on misconceptions about the behavior of Asian states and about the logic of regional integration elsewhere. Asian states are not generally less likely than are other states to resolve their disputes through legal means. Moreover, regional integration in other parts of the world has not been driven by legal institutions that resolve inter-state disputes. Indeed, European, Latin American, and African states also do not sue each other in regional courts and prefer to resolve their differences through other means.

These findings are important because they establish that there is some potential for learning from the experience of regional judicial institutions elsewhere. But what are these potential lessons that could be valuable for Asian regional cooperation projects? I



review the evidence by answering the questions suggested in the theory section. What disputes do they resolve? What is their interpretive authority? How does the exercise of their dispute resolution and interpretive activities influence compliance, commitment, and checks and balances? I then apply these lessons to the design of a potential new Asian judicial institution.

## **5.1 The Activities of Courts: Dispute Resolution and Interpretation**

Most disputes in front of regional judicial institutions are of two kinds. First, there are disputes between a treaty body, such as the European Commission, and a government, for example about whether a government has correctly implemented a treaty provision. Such cases constitute about one-fourth of the ECJ's caseload and less than 10% of the ATJ caseload (Alter 2009). Second, and much more commonly, regional judicial institutions review disputes between private actors and a government or a government agency. These may be cases where a private party charges that a government has incorrectly implemented regional law. More commonly, these are cases where the relevant law for a dispute over an administrative decision is regional rather than national law.

The activity of courts is not a simple function of formal institutional design. Allowing private actors access does not by itself ensure that a court becomes active (see also Alter 2006) nor does granting a treaty body the authority to file infringement suits against governments mean that they will actually do so (see Helfer and Alter 2009 for the Andean Community). For private access to matter, two criteria need to be satisfied. First and most obvious, there must be legally binding regional rules that create rights and obligations for private parties. This allows private parties to sue and be sued on the basis of regional law. A second condition is that if private access is indirect, as it is for virtually all cases other than the European Court of Human Rights, there must be national institutions that perceive to have an interest in referring cases to the regional court. Some regional agreements require national courts to refer cases to a regional court if the issue concerns regional law but, as the examples below will illustrate, this does not mean that this actually happens. In the case of the ECJ, it was crucially important that national courts started to see the ECJ as an ally that could help them advance their interests as opposed to an institution that encroached on their terrain (see Alter 1998, Weiler 1994). This is not (yet) the case for national courts in most OHADA member states (Dickerson 2005). In the case of the ATJ, the key national actors were national administrative agencies charged with protecting intellectual property rights (IP) that were the engines behind increased references to the regional court (Helfer and Alter 2009).

The ATJ illustrates these points well. Until recent research by Larry Helfer, Karen Alter and Florencia Guerzovich, little was known about the world's third most active international court (Helfer et al. 2009, Helfer and Alter 2009). The ATJ had only a minimal caseload in the 1980s and early 1990s. Yet, references to the court started to increase in 1995 due to two factors. First, the Andean Community adopted IP rules that were broadly consistent with the TRIPS rules under WTO. These rules gave private actors rights and obligations under Andean law. At the same time, domestic administrative IP agencies were transformed or created. These agencies were in charge of reviewing trademark and patent registrations. Since the relevant IP law was regional law, they

applied this law in those decisions. Consequentially, when dissatisfied businesses challenged these administrative decisions in courts, Andean law had to be interpreted by national courts. Initially most national courts were hesitant to refer such cases to the ATJ. Yet, through various forms of pressure by IP agencies, businesses, and lawyers, courts in three countries (Columbia, Ecuador, and Peru) started to refer IP cases to the ATJ.<sup>30</sup> Such cases make up about 90% of the nearly 1500 judgments the ATJ has issued.

Another interesting example of a regional regime that delegated authority in a limited issue area to a regional court is OHADA. OHADA (Organization for Harmonization in Africa of Business Laws) is a system of business laws and implementing institutions adopted by sixteen mostly francophone West and Central African nations.<sup>31</sup> These countries adopted this regime in 1993 in order to stimulate (foreign) investments and promote growth (Mancuso 2006). The organization's Council of Ministers has the authority to adopt uniform acts that need not be implemented by national legislatures. Many of the acts are based on draft conventions and model laws created by other organizations, such as UNIDROIT, but they are adjusted to reflect Western Africa's realities. The Cour Commune de Justice et d'Arbitrage (CCJA) is an international court that ensures that OHADA laws are interpreted uniformly across the membership and to increase the credibility of the regional regime. Formally, the CCJA provides a forum for interstate arbitration as well as a court of last resort for disputes under OHADA law that were initiated within member states. Predictably, the first function remains undeveloped (Dickinson 2005). The second function has led to at least 274 judgments, most coming from Côte d'Ivoire (the seat of the court), indicating that in reality national courts do not always refer OHADA cases to the CCJA.<sup>32</sup> Nevertheless, the regime is broadly perceived to be a remarkable success (Mancuso 2006).

## 5.2 Broader Effects of Regional Judicial Institutions

The theory section stipulated that by exercising their immediate functions of dispute resolution and treaty interpretation, regional judicial institutions could also have broader effects on regional cooperation. Most notably, they can help improve compliance with regional agreements, increase the commitment that states have to regional integration, and provide checks and balances to new international authority.

There is regrettably little evidence that regional judicial institutions have or have not had such broad effects. While there is considerable evidence that national courts have mostly been willing to accept ECJ rulings in individual cases (e.g. Weiler 1994), it is unclear what broader effect the court has had on compliance in the EU. It is clear that compliance in the EU is far from perfect. For example, Mastenbroek (2003)

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<sup>30</sup> See Helfer and Alter 2009 for the more precise story on the mechanisms in each country and also for a preliminary account of why the same trend has not happened in Bolivia and Venezuela.

<sup>31</sup> The Western African members are: Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo. The Central African members are Central African Republic, Chad, Cameroon, Comores, Congo, Equatorial Guinea, and Gabon.

<sup>32</sup> Alter 2009. Private parties may also not always insist on this, given the expense of proceedings in a another country (Dickerson 2005). There are hundreds more rulings on OHADA law that are decided in national courts.

demonstrates that even in the Netherlands, a country widely praised for its compliance with international law, only 40 percent of EU directives are implemented on time. More generally, research about compliance with EU law and the ECJ's role in this is fraught with data and methodological differences (e.g. Börzel 2001, Tallberg 2002). To make matters worse, Carrubba et al. (2008) find evidence that the ECJ may take anticipated compliance into account in its decision making process. To my knowledge, there are no systematic studies of compliance with the ECtHR or other regional courts.

The effect on commitment can only be gleaned anecdotally. While there are many examples of failed regional integration projects (see Mattli 1999), I am not aware of a regional integration scheme that collapsed after it has had an active regional court. The possible exception is the Central American Court of Justice, which issued ten decisions between 1908 and 1916. Cases of countries withdrawing from the jurisdiction of an active regional court are also few and far between. The withdrawal of Trinidad and Tobago from the jurisdiction of the Inter-American Court of Human Rights over the issue of the death penalty is the most prominent example that comes to mind (Helfer 2002). Yet, it is impossible to assert what the causal role of regional courts is in keeping a regional integration project going.

There is anecdotal evidence that regional courts have had commitment benefits, in unanticipated ways that may be attractive for Asian states. For example, Helfer et al. 2009 document how the distinct Andean interpretation of IP law, which had been influenced by national IP agencies, strengthened the Peruvian negotiation position in bilateral bargaining with the United States as it allowed the Peruvian delegation to credibly claim that they could not make certain concessions given that those would be in violation of Andean law. Given that Andean law cannot be changed by Peru unilaterally, this commitment device may work rather well. In this sense, then, opting for a regional legal regime may be a way of implementing legal obligations in a manner that stays closer to home than it would be in the absence of such a regime.

The effect on checks and balances is clearer, albeit almost entirely build on qualitative evidence (e.g. Weiler 1994, Mattli and Slaughter 1998). A recent interesting exercise in checks and balances came in the ECJ's recent *Kadi* decision<sup>33</sup>, which invalidated the EU's implementation of a Security Council resolution that requires the financial measures against persons linked to a terrorist organization, as determined by a UN Sanctions Committee. The *Kadi* decision essentially argues that persons had no effective legal remedy to challenge their placement on the list and thus the freezing of their bank accounts. This is a remarkable example in checking the exercise of international authority over individuals.

More generally, it has proven difficult to examine empirically to what extent regional judicial institutions have indeed increased transnational economic activity. Kono (2008) finds that the presence of inter-state DSMs appears to stimulate regional trade but that there is no evidence that enhancing the legalistic features of this process have had any effect. Stone Sweet and Brunell (1998) find evidence that ECJ activity is both driven by

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<sup>33</sup> Joined Cases C-402/05 P and C-415/05 P.

and drives transnational economic activity. There are no studies that I know of that show that OHADA has or has not increased (foreign) investment or whether the Andean IP regime has improved innovation. One piece of evidence cited by OHADA scholars is that additional states are eager to join the organization (Mancuso 2007). The same is obviously true for the EU but less so for the Andean Pact.

### 5.3 Institutional Implications for Asia

What do these lessons mean for a potential judicial institution that could help stimulate transnational economic activity in Asia? It would be unwise to transplant one of the existing regional judicial institutions to Asia. Outright copying of formal institutional structure is common but rarely successful (Alter 2009). Yet, there are some lessons that could be learned. The most obvious negative one is that an institution that focuses solely on resolving inter-state disputes is unlikely to contribute much. There are few downsides to having a formal inter-state dispute settlement mechanism, such as ASEAN's, but it is not clear that such a mechanism will have significant effects either. A second negative conclusion is that given the present institutional structure, it would be unwise to create a court that primarily aims to reduce deliberate non-compliance by member states. Such courts can only function effectively in the presence of a strong supranational bureaucracy that can file infringement suits.

The most straightforward answer to the question why there are no active standing Asian courts is that there are few if any regional rules that create rights and obligations for private parties. To some extent this is answering a question by positing a different one: why are such rules absent? I suggest two answers. First, heterogeneity within Asia is greater than in other regions. This is true even within the most developed sub-regional institution: ASEAN. This diversity makes it difficult to coordinate on regulations that are appropriate across a region or sub-region. Second, many Asian states have traditionally been characterized as "developmental states," which seek to exercise social and political control over business through informal means rather than through independent regulatory agencies that are delegated the authority to apply a well-defined body of formal law (e.g. Woo-Cumings 1999). Recently, scholars have argued that several Asian countries are moving towards a regulatory state model (e.g. Ginsburg and Chen 2008, Jayasurya 2007, Pearson 2005). This trend is at least partially a response to economic interdependence and membership in international regimes (Ginsburg and Chen 2008), as it was in Europe (Majone 1994). Such reforms create a demand for administrative review as both governments and private actors become increasingly concerned that agencies are unable to implement the new rules well or even that they might abuse their authority.

Although regional law plays a limited role in Asian administrative review, a regional court could aid national courts and administrative agencies in areas where global international legal obligations are already important. Asian countries are party to various multilateral treaties that create obligations vis-à-vis private parties. Although there are no regional rules on government procurement, several Asian states are part of the WTO's Government Procurement Agreement (Hsu 2006). The WTO's intellectual property rights regime (TRIPS) also has important implications for regulatory regimes. Moreover, many Asian states are actively seeking to bring their business law in accordance with

international standards. All major Asian economies are members of UNIDROIT<sup>34</sup> and many are signatories to its conventions that seek to unify private law. Several Asian states are members of the Hague Conference on Private International Law (Hcch) and are parties to its various conventions.<sup>35</sup> Asian states are also active in UNCITRAL, the UN body that seeks to harmonize and modernize international business law through conventions and model laws.

There is some evidence that Asian countries have increased such commitments in recent years. For example after long remaining outside the regime, South Korea (2005) and Japan (2009) are the latest major trading powers to join the 1980 *UN Convention on Contracts for the International Sale of Goods (CISG)*,<sup>36</sup> leaving Brazil, India, the United Kingdom, and South Africa as the only major trading countries that have not signed what is arguably the most successful international contract treaty. Another example was discussed earlier in this paper: the frequency with which Asian countries are willing to delegate authority to ICSID to arbitrate in investment disputes between private parties and the government.

In short, several Asian states appear increasingly willing to make international legal commitments that create obligations vis-à-vis private parties. Moreover, they have recognized that harmonization of commercial law is desirable. Even if this has not led to new regional law, a regional judicial institution could improve the uniform implementation of those existing international legal commitments, improve the perceived commitments by Asian states to those legal rules, and create further momentum towards harmonization. The suggestion is to create a judicial institution that can, at the request of national courts or administrative agencies, offer advisory opinions on the interpretation of international rules, laws, and standards that are already applicable. The assumption is that governments want to see those obligations implemented but that national administrative agencies or courts may not always be well-equipped to do so. While a complete proposal for a new judicial institution is beyond the scope of this working paper, I want to offer some thoughts and suggestions as to what such an institution could look like and could reasonably seek to accomplish.

- The new institution would issue advisory opinions on a well-defined set of treaties and conventions that countries have already ratified.<sup>37</sup> It would leave the resolution of disputes to the national courts. This is appropriate as actual disputes often involve a mixture of domestic and international legal issues that can be better assessed by local courts. This may also alleviate some sovereignty concerns. It would specifically not be within the mandate of this institution to interpret domestic law or make judgments as to whether domestic law contradicts

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<sup>34</sup> <http://www.unidroit.org/english/members/main.htm>.

<sup>35</sup> [http://www.hcch.net/index\\_en.php?act=states.listing](http://www.hcch.net/index_en.php?act=states.listing).

<sup>36</sup> They were the only major countries that signed in this period: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

<sup>37</sup> The determination of the set of treaties and conventions that are relevant here should be determined by legal experts. States should then be able to choose among that list.

international legal obligations. Such determinations are left to the national review process.

- The judicial institution would be composed of experts of international commercial and business law. It could be hosted by the Asian Development Bank as part of its technical assistance mission. Indeed, the ADB already supports business law reform through this program.<sup>38</sup> A first step could be the creation of a working group of legal experts to investigate the sensibility of and demand for such an institution or other ways the ADB could help promote the harmonization of business law.
- I suggest an optional protocol that if ratified would give any party to a dispute in that country the right to refer a question about the appropriate interpretation of international law to the new judicial institution. It might make sense to limit this to disputes before appellate courts. Ratifying such a protocol would signal a commitment to uniform application of international obligations. I propose that governments that have not signed the optional protocol may still request advisory opinions in certain circumstances (perhaps on a pay-per-use basis). Such usage would obviously not send the same commitment but could well contribute to uniform interpretation.
- Since many of the laws that this institution would interpret are global in nature, it may seem odd to design a regional institution to interpret them. First, other regions already have judicial institutions that, among others, interpret the laws under discussion here. Given this, they would have little impetus in partaking. Second, international legal obligations are interpreted in a context. For example, CISG obligations have been interpreted differently in countries with different legal cultures and developmental status (Ryan 1996). Although Asia is a large and extremely diverse continent, the world is bigger and even more diverse. There is a demand for Asian cooperation that is at least partially driven by the perception that there are a set of common development challenges. Moreover, given high levels of intra-Asian trade, the benefits of uniform interpretation within Asia might encourage more Asian states to sign on to the various conventions that are already open for signature. Third, the institution may serve as a model or impetus for future innovation. It does not create new legal obligations but it could create a framework for future Asian conventions towards harmonizing business laws. Fourth, by not integrating the institution into one of the existing regional initiatives, it provides a model for harmonization that recognizes the enormous diversity among Asian states. Each state could sign on at its own pace and based on the conventions it has ratified. The model provides incentives towards harmonization but creates no obligations.
- The idea is not to create another institution for international commercial arbitration. There are two important limits to arbitration. First, as noted in the theory section, arbitral tribunals have limited capacity to clarify the meaning of

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<sup>38</sup> See for example "Technical Assistance Solomon Islands: Supporting Business Law Reform" Project Number: 38151: <http://www.adb.org/Documents/TARs/SOL/38151-SOL-TAR.pdf>.

legal obligations and thus do not contribute to their uniform interpretation. Indeed, it is plausible that the new institution could contribute to the uniform interpretation of the law by arbitral tribunals, which is a big issue in the arbitration literature (i.e. arbitral tribunals tend to be inconsistent in their interpretation of legal rules, contributing to uncertainty). For example, CISG is regularly interpreted in courts and arbitral tribunals<sup>39</sup> but their interpretations have diverged considerably; limiting the treaty's intended unifying effects (Ryan 1996). Second, international commercial arbitration is usually accessible only to large foreign investors; often only investors from certain countries. This regime is therefore frequently criticized for creating different rights for different investors. While large foreign investors are important, economic development is driven as well by smaller investors and domestic actors.

- The judicial institution operates on the assumption that governments are interested in assuring that their international legal obligations are implemented and interpreted in a uniform way across the region. Domestic courts and regulatory agencies are already regularly asked to interpret international rules, standards and regulations. They may be ill-equipped to do so. The judicial institution seeks to rectify this problem. The institution is not based on the naive assumption that deliberate non-compliance is not a problem but does assume that progress can be made by improving implementation and coordination in areas where governments do want to comply.

## 6. Conclusion

Effective regional judicial institutions perform two core tasks that can stimulate economic activity: they resolve disputes in efficient and impartial ways and they coordinate the interpretation of laws and treaties. In so doing, they could also have broader effects on regional cooperation such as improving incentives for compliance, increasing the perceived commitment of parties to a regional integration project, and contributing to the implementation of agreements. The analyses in this paper demonstrate that Asian states have not foregone these theoretical advantages because they are inherently adverse to legalized dispute resolution. Moreover, their reluctance to resolve inter-state disputes through regional judicial institutions is shared by states in other regions.

The examples of the Andean Community and OHADA illustrate that it is possible to use a regional court to help harmonize narrow areas of law relevant for transnational economic activity without creating a powerful supranational bureaucracy.<sup>40</sup> Moreover, these examples demonstrate that national institutions still play a major role in the extent to which such a regional court becomes active in a country, perhaps alleviating some concerns about sovereignty costs and that Asian states are too diverse to effectively harmonize laws. These courts mostly review decisions by administrative agencies that

<sup>39</sup> For a database, see: <http://www.unilex.info/>.

<sup>40</sup> Some international bureaucracy is required but such a bureaucracy need not have the power to issue binding directives, as in the case of the European Commission.

affect private actors. National courts may lack the expertise to review such administrative decisions and/or the law may be regional in character, as is the case with intellectual property rights law, which operates in the shadow of the WTO regime. Unlike with the resolution of inter-state disputes, there is no particular reason why a regional court of this type would interfere with political or consensual forms of dispute resolution between states. Yet, the theoretical benefits of harmonizing (and presumably improving the quality of) areas of corporate law could be substantial.

Neither the ATJ nor the CCJA are exemplary in their functioning. Indeed, the conditions for an effective regional court of this type may well be better in Asia, although there are also some obstacles. For example, OHADA was greatly helped by the fact that virtually all of its member states had similar laws on the book that were inherited from the French. Asian countries are more diverse in this regard. As such, the most suitable candidates may be areas of law where international obligations already play a major role, such as intellectual property rights and investment law. There may also be political advantages to developing a distinct Asian jurisprudence in such areas given that these issues are bound to emerge in future rounds of WTO negotiations or in bilateral trade and investment treaty negotiations. The institutional innovation suggested in this paper seeks to improve the way existing legal obligations are implemented throughout Asia, thereby contributing to a greater uniformity and predictability in the laws under which businesses that engage in transnational economic activity operate.



**Table 1: Trade Dispute Initiation**

Variable	Developing Countries	Developed Countries
Asia	.38 (.39)	-.16 (.37)
Previous Initiations	.09 (.03)***	-.01 (.00)**
Democracy	.19 (.09)**	.50 (.22)**
Log GDP	1.00 (.24)***	1.67 (.60)***
Log Population	-.48 (-.22)**	-.99 (.59)*
English	-.31 (.32)	1.31 (.41)***
WTO Period	-.08 (.26)	.58 (.16)***
Constant	-18.80 (3.22)	-29.04 (6.55)
Dispersion parameter	.74 (.17)	.32 (.08)
N	1314	543

\*p<.10, \*\*p<.05, \*\*\*p<.01 (two-tailed).

Source: Davis and Bermeo 2009, Tables 2 and 3.

**Table 2: Ordered Probit Results for Delegation to Delegate Dispute Settlement to ICSID**

Variable	Coefficient (Robust S.E.)
Asian Home Country	.48 (.17)***
Asian Host Country	.18 (.10)*
Both Asian Countries	-.18 (.29)
Presence of MNCs in Home	1.83 (.72)***
Strength of Legal Institutions in Home	.13 (.04)***
Strength of Legal Institutions in Host	.03 (.04)
Durability of Host Regime	-.00 (.00)
Political Constraints on Executive in Host	.38 (.19)*
Alliance Ties	-.05 (.08)
Colonial Ties	-.12 (.12)
Host Recently Independent	-.28 (.10)
Domestic Economic Growth Host	-.00 (.00)
Export Dependence Host	.00 (.00)**
Reliance on External Financial Assistance Host	.77 (.39)**
Right Wing Government Host	.02 (.08)
Ratio of Home to Host Economic Power	.66 (.16)***

N = 1032 Bilateral Investment Treaties, \*p<.10, \*\*p<.05, \*\*\*p<.01 (two-tailed). Wald  $\chi^2$  test (16df) = 97.12 (.00)

Source: Allee and Peinhardt, Table 2.

**Table 3: Multinomial Logit Results for the Outcomes of Rounds of Talks over Disputed Territory**

	<b>Legal Dispute Settlement vs. Bilateral Concessions</b>	<b>Legal Dispute Settlement vs. Stalemate</b>
Asian involvement	-.27 (1.06)	-.55 (1.05)
Both countries Asian	.22 (1.24)	.40 (1.22)
Strong domestic political opposition	1.36 (.48)***	.95 (.47)***
Democratic dyad (accountability)	1.35 (.60)***	1.29 (.58)***
Ethnic ties with territory	.92 (.41)***	.89 (.46)**
Enduring rivals	1.54 (.70)***	1.20 (.67)*
Hard-line stance in previous negotiations	.02 (.20)	-.47 (.19)***
Democratic dyad (norms)	-.70 (.65)	-.31 (.61)
Military asymmetry	-3.64 (1.48)***	-4.60 (1.46)***
Common security ties	.60 (.43)	.62 (.42)
Strategic value of territory	-.64 (.58)	-.75 (.57)
Constant	-3.02 (.51)***	-3.36 (.50)***

Note: N = 1490. Robust standard errors in parentheses. \*p<.10, \*\*p<.05, \*\*\*p<.01 (two-tailed).

Source: Allee and Huth 2006, Table 2.

## Appendix: Data Sources

**Table 1: Trade Dispute Initiation**

Variable	Description and Source
Democracy	Freedom House civil liberties
Log GDP	GDP in constant 2000 dollars,in purchasing power parity terms, World Bank's World Development Indicators
Log Population	World Bank's World Development Indicators
English	English language, which takes on the value of 1 if the CIA World Factbook listed English as "widely spoken" in a given country

Source: Davis and Bermeo 2009.

**Table 2: Investment Dispute Delegation**

<b>Variable</b>	<b>Description and Source</b>
Strength of Legal Institutions	International Country Risk Group measure of “law and order,” ranging from 1 to 6
Durability of Host Regime	the number of consecutive years since a three-point change in the Polity score over a period of 3 years of less (see Marshall and Jaggers 2005)
Political Constraints on Executive in Host	Henisz’s POLCONIII measure of political constraints on the executive in the host country (see Henisz 2002)
Alliance Ties	equals 1 if the home and host country share any type of alliance tie and 0 otherwise; taken from the Alliance Treaty Obligations and Provisions project (Leeds et al. 2002)
Colonial Ties	equals 1 if the home and host country share any type of colonial tie and 0 otherwise; taken from the Issue Correlates of War colonial history data set, version 0.4
Host Recently Independent	equals 1 if the host country achieved independence within the past 10 years and 0 otherwise; dates of independence are taken from the Correlates of War State System Membership List
Domestic Economic Growth Host	GDP growth in host country from last year to the current year; taken from World Development Indicators
Export Dependence Host	exports of goods and services as a % of GDP; taken from World Development Indicators
Reliance on External Financial Assistance Host	IBRD loans and IDA credits as a % of Host country GDP (in current US\$); taken from World Development Indicators
Right Wing Government Host	equals 1 if the host country is governed by a right-wing executive and 0 otherwise; taken from the Database of Political Institutions’ EXECRLC variable
Ratio of Home to Host Economic Power	the relative balance of home and host country GDP, calculated as home country GDP divided by the sum of home and host country GDP (all in current US\$); data taken from World Development Indicators

GDP = gross domestic product, IBRD = International Bank for Reconstruction and Development, IDA = international development assistance.

Source: Allee and Peinhardt 2009

**Table 3: Territorial Disputes**

Variable	Description and Source
Strong domestic political opposition	Equals 1 if in democratic countries are considered to face strong domestic political opposition governing coalition of executive does not control a majority of seats in the primary legislative or parliamentary body and if in nondemocratic countries there has been an attempted or actual coup within the country in the past year
Democratic dyad (accountability)	Those regimes that have a Polity net-democracy score of +6 or higher.
Ethnic ties with territory	Equals 1 if each state involved in the dispute has ethnic ties with a population living in the disputed territory
Enduring rivals	Equals 1 if the two disputants have experienced at least ten militarized conflicts during the past two decades
Hard-line stance in previous negotiations	Number of consecutive rounds of talks in the last five years have ended in stalemate
Democratic dyad (norms)	Equals 1 if both states possessed Polity net-democracy scores of +6 or greater for at least 16 of the past 20 years
Military asymmetry	Absolute difference in Correlates of War Composite Index of National Capability scores
Common security ties	Equals 1 if a formal security alliance exists

Source and Note: Allee and Huth 2006, more details on data in Huth and Allee 2002.

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## **Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?**

Why is Asia lagging behind other regions in creating regional judicial institutions? What lessons from elsewhere could be valuable to Asian regional economic integration? This paper shows that Asian states are not unusually averse to refer inter-state disputes to global judicial institutions. Moreover, Asian states are not unique in their reluctance to resolve regional inter-state disputes through judicial means. The most valuable lesson for Asia from experiences elsewhere is the role that regional courts can play in resolving disputes between administrative agencies and private parties about the implementation of international law.

## **About the Asian Development Bank**

ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries substantially reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to two-thirds of the world's poor: 1.8 billion people who live on less than \$2 a day, with 903 million struggling on less than \$1.25 a day. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

Based in Manila, ADB is owned by 67 members, including 48 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.