CHAPTER 23

REGIONAL DISPUTE SETTLEMENT

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One of the most striking developments in regionalism over the past decades is the rise in regional courts with a remit to adjudicate economic disputes, good governance, and in some cases non-trade disputes pertaining to human rights and mass atrocities (Alter, 2014; Hooghe et al., 2014; Romano, 2011). This rise has happened against the backdrop of proliferating regional agreements. There are a bewildering number—literally hundreds—of overlapping and increasingly specific bi-national and multinational agreements pertaining to trade, investment, security, the shared use of resources such as river basins, the protection of transborder species, human rights, etc. Regional organizations are central institutional settings for both these developments (Goertz and Powers, 2012; Marks et al., 2014; Powers and Goertz, 2011).

This chapter argues that the rise in regional courts is a game changer in regionalism that stands for more than just a commitment to use legal means to resolve economic disputes; it signals a commitment to uphold specific community values. Contrary to earlier waves of regionalism, many of these courts are not primarily engaged with trade. Instead, they are often activated to adjudicate cases involving good governance, human rights violations, as well as economic issues. But as we will see, their incidence and use across the globe is uneven. While Africa, Europe, and Latin America have multiple regional courts with sometimes overlapping jurisdiction, in Asia there is one non-operational appellate body to review non-existent panel decisions for disputes among ASEAN countries and in the Middle East there is a rarely used permanent court to adjudicate investment disputes among Arab investors and Arab states.

We place this development against the backdrop of a general rise in judicialized regional dispute settlement compared to so-called alternative dispute settlement mechanisms like negotiation, good offices, mediation, and binding arbitration. Most people see the lack of a regional court as signifying an aversion to legalized adjudication of disputes. This larger backdrop reveals, however, that the choice is really between a

multi-purpose regional court, binding arbitration, or relying on political bodies to resolve disputes. In this chapter, we document trends regarding regional agreements that have, at least initially, an economic focus. But this three-pronged choice also exists for human rights issues, and it may de facto be emerging regarding international criminal law.

Although we do not yet understand what drives the different choices, we do know that the legalized adjudication choice is consequential. Compulsory jurisdiction arguably renders credible any threat of litigation, and can enhance the negotiation leverage of actors with law on their side. Whether for clarification or enforcement, adjudication contributes to the greater specificity of the law, the construction of new law that provides focal solutions for disagreements, addresses unforeseen substantive issues, or generates a new status quo (Alter, 2000; Stone Sweet, 1999). International adjudication, then, reduces ambiguity for parties engaged in incomplete contracting (Cooley and Spruyt, 2009).

This chapter draws on existing studies of arbitration and adjudication to settle some basic conceptual distinctions. We then document the rising judicialization of dispute settlement at the regional level and the prominent role of regional courts in reshaping the terrain of international law. The next sections summarize what we know and do not know about the sources of proliferation, variation in design, and effects. Our analysis suggests the need for a scholarly focus on the choice of dispute settlement mechanisms. We conclude by discussing what is at stake: Scholars can continue to focus on dispute settlement as a problem-solving device that helps governments reach functional objectives, but doing so will create artificial blinders that keep us from understanding how international dispute adjudication promotes broader values that implicate the hopes and goals of individuals, firms, and civil society groups.

Concepts and Trends

An international dispute may be defined as a disagreement concerning a matter of fact, law, or policy in which a claim or assertion of one party is met with refusal, counterclaim, or denial by another, and in which these parties involve governments, organizations, legal persons, or private individuals in more than one country (Merrills, 2011, 1). This chapter concentrates on dispute settlement institutions that are regional in scope, governed by a legally binding inter-state agreement, and ~~legalized~~, i.e. they have the potential to lead to adjudication resulting in legally binding decisions.

We focus on agreements involving three or more proximate states. We exclude from our purview investment agreements, the vast majority of which are bilateral (although some can be regional in scope, such as NAFTA's Chapter 11).[1] We also say less about commercial arbitration of disputes among traders based in a private contract rather than a public treaty (Hale, 2012; Mattli and Dietz, 2014).[2]

Parties always have a dispute settlement option: negotiation, mediation or conciliation by a third party, arbitration, or adjudication. The first three are usually classified as diplomatic or political because the parties retain control over who mediates, whether they accept a proposed settlement, and because the process, including the resolution, is usually hidden from public view. The latter two are legal means of settlement that are potentially binding and often relatively more public. In many international agreements, these different dispute settlement techniques are sequentially bundled, but in this chapter, we focus on the latter two.

Arbitration requires the parties to set up, or choose, the machinery to handle disputes. There are many off-the-shelf arbitration options. Contracts and economic agreements often specify that disputes will be resolved via arbitration, sometimes designating the arbitration venue in advance. States and private actors can avail themselves of the Permanent Court of Arbitration, and there are many other options including the International Chambers of Commerce, and regional arbitration centers in Asia, Europe, North America, and Africa. One reason why arbitration is not much studied is that it can be harder to observe, since one must look within a myriad of hard-to-locate bilateral and multilateral agreements to see this choice in action. Judicial settlement involves the reference to a court or standing tribunal.

The judicialization of politics refers to a situation where bargaining takes place in the shadow of potential litigation, with each side supporting their cause via legal claims, and explicitly or implicitly suggesting that a failure to respect legal agreements may trigger litigation. When adjudication is compulsory, meaning when legal bodies will proceed with or without the assent of the defendant, out-of-court negotiations can become increasingly judicialized. Where there are regional courts, dispute resolution often still takes place through diplomatic means, including mediation by a regional secretariat. But the dispute could, in theory at least, end up in front of a regional court. As we explain in what follows, the many access points in regional courts can allow dissatisfied parties to keep the dispute alive. This reality contributes to the judicialization of politics.

Even where regional courts are an option, adjudication could be in the form of ad hoc processes. For example, Mercosur allows for inter-state adjudication of disputes by arbitral panels, whose rulings can be appealed to a Permanent Review Tribunal. Mercosur also channels private litigant complaints to the Common Market Group, an ad hoc body in which diplomats from all member states meet to hear and address complaints. The East African Community, Andean Community, and Organization for the Harmonization of Business Law in Africa have regional courts, but they also allow disputes to be resolved by arbitration.

Permanent legal bodies can be expected to cast a different sort of political shadow compared to arbitral panels. Permanent courts "pre-exist the question that is to be decided" so that the "adjudicators are selected, elected or nominated through a mechanism that does not depend on the will of the litigating parties" (Romano et al., 2014, 5). Permanent courts also continue to operate after any one dispute, and thus international judges must think about how a ruling in one case might affect future cases. In contrast, arbitrators are selected by the parties, and their service expires after the

particular dispute. There are other differences as well. Judges on permanent courts are public officials; they meet repeatedly to decide cases; permanent courts often, although not always, allow third-party participation or the submission of *amicus curiae* briefs; and their rulings are generally public. Arbitrators are "for hire" private lawyers, working for the parties, and studies find that the pool of international arbitrators tends to be very small (Karton, 2014).

At the turn of the twentieth century several scholars noted the rise of international legalization—"the decision in different issue-areas to impose international legal constraints on governments" (Goldstein et al., 2000, 386; Abbott et al., 2000; Abbott and Snidal, 1998, 2000). During the Cold War a number of international courts were proposed and created, but it is mainly in the last two decades that international adjudication has gone regional (Alter, 2014, 118–142).

A recent World Trade Organization (WTO) study looks beyond the creation of permanent courts, providing a glimpse of the rise in the judicialization of regional trade agreements (RTAs) from the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947 through 2012.[3] Until the early 1990s the growth of RTAs was modest; at the time of WTO establishment in 1995, only 43 of today's RTAs were in force, and the majority did not have judicialized dispute settlement. Since 1995, the number of RTAs has increased to reach 226 by 2012, and 70 percent of these had judicialized dispute settlement (Chase et al., 2013).

International arbitration for investment and commercial disputes is also growing. The oldest arbitration centers are still European—the Permanent Court of Arbitration (founded in 1899 and based in The Hague), Sweden's Arbitration Institute (founded in 1917), and the International Chamber of Commerce (founded in 1923 and based in Paris). Asia has been creating alternatives in Hong Kong, Singapore, Malaysia, Japan, Korea, and Beijing, and these centers rival and in some cases surpass in activity European and American counterparts (Mattli and Dietz, 2014).

This brief summary demonstrates that there is persistent variation. For many lawyers, diversification in dispute settlement mechanisms is regrettable because it makes delivering uniform legal justice more difficult. The alternative political science view is that regime complexity—the multiplication of overlapping, non-hierarchical, and varying institutions—is a response to persistent diversity in interests and preferences among states, regions, and actors (Alter and Meunier, 2009; Keohane and Victor, 2011).

Categorizing diversity is a step to explaining it. McCall Smith (2000) was one of the first to try to impose order by arraying dispute settlement from low to high legalism. His population of regional trade regimes was smaller than contemporary counts by Jo and Namgung (2012), Chase et al. (2013), and Dür et al. (2014). These recent efforts also code in more fine-grained ways. For example, Dür et al. (2014) code up to 14 components of dispute settlement. All these data sets point to the same fact: newer agreements are more judicialized than older.

At the high end of judicialization stand the regional permanent courts. Alter (2014) charts the rapid growth of permanent courts with supranational authority, global and regional, from six in 1985 to 24 operational courts in 2012. She calls them "new-style

courts" because dispute adjudication is compulsory and non-state actors can initiate litigation, changing the politics of legalization and judicialization in profound ways (Alter, 2014, 6–8). Twenty out of 24 of these standing tribunals are regional (see Table 23.1). We turn to these next.

The New Regional Courts

Dispute settlement is increasingly associated with regionalism, in that regions are creating their own forms of dispute settlement as an alternative to global institutions. Nowhere is this trend clearer than with respect to regional courts.

Regional courts can be a solution to many problems. Governments and peoples around the world often complain that European and American actors have disproportionate influence in global bodies. Regional courts allow countries to create their legal alternative.

Creating or augmenting the jurisdiction of a regional court is seen as part of the package for any serious regional institution, a signal of political resolve, and an indication that today's commitment to regional organization is different and more serious than what occurred, and failed, in the past. Indeed, an important precondition of judicialization is the emergence of a new-style international organization (IO): the general-purpose organization. IOs are general-purpose jurisdictions to the extent that they bundle an indefinite range of problems for a relatively given transnational community of states (Hooghe and Marks, 2003, 2009, forthcoming; Goertz and Powers, 2012). They are broad in policy scope: they may deal with security alongside trade, or they may engage not just economic development, but a variety of other problems such as culture, environment, transport, human rights, disease, or migration. Supranational courts can help reduce ambiguity in the open-ended commitments that characterize general purpose IOs (Hooghe et al., 2014).

Allowing private access to regional bodies is also an attractive way to demonstrate that regional institutions are concerned about citizens achieving the benefits promised by economic, development, and human rights international agreements. And since national ratification has proven to be a real problem, legal rules that are directly binding or made binding as part of the adoption process may facilitate the implementation of IO decisions. All these factors contribute to the emulation of "new style" courts that follow the European model of compulsory jurisdiction, the delegation of dispute settlement, enforcement, administrative and constitutional review judicial roles, and multiple access points that allow commissions, prosecutors, national judges and/or private actors to initiate supranational litigation involving state and international institutional actors (Alter, 2014, 3).

To appreciate the rise of new-style regional courts, it is helpful to put them in a comparative and dynamic context. That is easier said than done: we know of only one time series charting arbitration, adjudication, or lack of, in 38 regional organizations on an

Table 23.1 Regional Distribution of International Courts (year IC became operational)

	Europe	Latin America	Africa	Pan-Regional
International Economic Courts 16 ICs	European Court of Justice (1952) Benelux court (1974) Economic Court of the Commonwealth of Independent States (ECCIS) (1993) European Free Trade Area Court (1992)	Andean Tribunal of Justice (ATJ) (1984) Central American Court of Justice (CACJ) (1992) Caribbean Court of Justice (CCJ) (2001) Southern Common Market (MERCUSOR) (2004)	West African Economic and Monetary Union (WAEMU) (1995) Common Court of Justice and Arbitration for the Organization for the Harmonization of Business Law in Africa (OHADA) (1997) Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998) Central African Monetary Community (CEMAC) (2000) Court of Justice of the East African Community (EACJ) (2001) Economic Community of West African States Court of Justice (ECOWAS ~~C~~ MLCBCJ) (2002) Southern African Development Community (SADC) (2005)	World Trade Organization Appellate Body (1994)
International Human Rights Courts 5 ICs[1]	European Court of Human Rights (1958)	Inter-American Court of Human Rights (1979) CCJ[2]	African Court of Peoples and Human Rights (ACtPHR) (2006) ECOWAS CCJ (2005) [The EACJ envisions adding a human rights jurisdiction]	
International Criminal Tribunals 3 ICs	International Criminal Tribunal for Former Yugoslavia (ICTY) (1993)		International Criminal Tribunal for Rwanda (ICTR) (1994) [Special Court for Sierra Leone is a hybrid international criminal tribunal]	International Criminal Court (2002)

(*continued*)

Table 23.1 Continued

	Europe	Latin America	Africa	Pan-Regional
General Jurisdiction 8 ICs	BCJ	CACJ CCJ	WAEMU, CEMAC, EACJ, SADC	International Court of Justice (ICJ) (1945)
Specialized Jurisdiction 1 IC				International Law of the Sea Tribunal (ITLOS) (1996)
Total courts by region N = 25	6	5	9	4 Pan regional ICs

Source: Reprinted from Alter (2014: 88–89).

[1] We do not list the ECJ as a human rights court, since its human rights jurisdiction extends only to the review of European legislation.

[2] CCJ's de facto human rights jurisdiction applies to countries that allow the CCJ to replace the Privy Council as the highest court of appeals.

annual basis since 1950 (Marks et al., forthcoming). Their measure covers six dimensions, which capture the definitional features of Alter's new-style courts but also less demanding attributes of judicialization:

- state access to judicialized dispute settlement: none, political actors mediate, automatic;
- tribunal: none, ad hoc, standing;
- rulings: non-binding, conditionally binding, unconditionally binding;
- non-state access to proceedings: none, some (e.g. IO secretariats), private actors;
- compliance: none, court can authorize sanctions, direct effect;
- preliminary ruling: none, optional, compulsory for some domestic courts.

One could look at these as steps on a ladder from low to high legalization and judicialization of dispute settlement. But one can also conceive dispute settlement as configurational whereby the first three dimensions epitomize state-controlled dispute settlement and the last three differentiate new-style supranational courts from "old-style" state-controlled courts (see also Keohane et al., 2000; Helfer and Slaughter, 1997).

State-controlled dispute settlement may be non-compulsory, or it may specify automatic third-party review via arbitration or by a standing tribunal. The outcome of this dispute settlement may be binding, but one or more doors are usually left ajar to protect national sovereignty. The simplest escape route for states is to have conditionally binding rules or to allow opt-outs or derogations from the rules or from the institutions of dispute settlement. State-controlled dispute settlement also minimizes the involvement of non-state actors by denying them access, disallowing domestic courts from asking for a preliminary ruling, and depriving the adjudicators the means to compel compliance. Finally, state-initiated dispute settlement might leave the remedy for found violations unspecified.

Dispute settlement is supranational when the first three dimensions are met in full *and* there exists one or more mechanism to allow international legal rulings to "penetrate the surface of the state" (Helfer and Slaughter, 1997, 288). The inviolability of state sovereignty begins to diminish when dispute settlement with a permanent court is combined with full remedy, non-state actor access, and a preliminary ruling mechanism that allows domestic judges to communicate directly with international courts. The European Union's (EU) ~~European~~ Court of Justice has long been the standard bearer, and in recent years it has been joined by the courts of the Andean Community, the Council of Europe, CARICOM, COMESA, CEMAC, ECOWAS, SICA, SADC (till 2012), and the East African Community. All these emulate the European model.

Figure 23.1 charts supranational, state-controlled, and weaker dispute settlement choices across regional organizations since 1950. Most change has been in an upward direction, but the speed of judicialization has picked up in the 1990s. The number of regional organizations without dispute settlement has declined from a peak of 21 (60 percent) in 1992 to 13 (34 percent) in 2010. Nearly half of regional organizations have a supranational court. And these courts no longer adjudicate primarily trade, but also

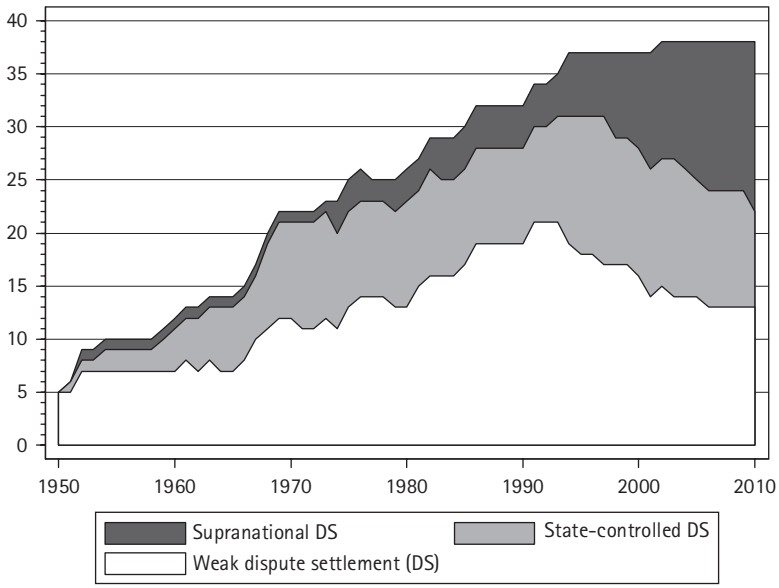

FIGURE 23.1 Trends in Third-Party Dispute Settlement in Regional Organizations

Note: Number of regional organizations with weak, state-controlled, or supranational dispute settlement. N = 38.

Source: Hooghe et al. (2014).

disputes involving human rights, good governance, or a variety of issues stemming from the regional organization contract (Alter, 2014; Hooghe et al., 2014). In other words, most regional new-style courts are associated with general-purpose IOs.

Alter (2014) looks deeper within the choice for a permanent regional court, documenting that regional courts often have similar institutional designs but they show meaningful differences in activation and influence (2014, 3). Recent scholarship shows that within a single court, there can be significant variation in the types of disputes that get adjudicated. Alter and Helfer, for example, document that over 90 percent of the cases heard by the Andean Tribunal of Justice involve disagreements over the registration of trademarks and patents, noting that the issue of intellectual property is an "island" of effective international adjudication (Alter and Helfer, forthcoming; Helfer et al., 2009). Gathii (2015) shows that in East Africa, human rights groups avail themselves of the regional East African Court of Justice while business groups regularly choose alternative means of dispute resolution. We are far from understanding the reasons for what is clearly a varying gap between the intent in specifying dispute settlement mechanisms and the actuality in using them (for states of the art, see Romano et al., 2014; Dunoff and Pollack, 2013; Alter and Helfer, forthcoming).

Most scholars have until now assumed that international courts are fundamentally the same, and so studying a few can generate theoretical insight relevant to all. But there are fundamental differences created by the subject matter that regional bodies adjudicate. These differences set regional courts apart from international courts—and they set some regional courts apart from others.

Regional courts associated with trade liberalization have delimited framework jurisdiction. They enforce reasonably complete contracts, such as NAFTA's 393-page tome of detailed rules on tankers, transistors, and trade in sugar and syrup goods. The chief function of third-party dispute resolution is to sustain trade over time by "providing a measure of certainty to each contractant and means of reconsecrating the terms of the contract over time" (Stone Sweet and Brunell, 1998, 64). These courts are often conceived as credible commitment devices for states and private economic parties alike (Abbott and Snidal, 1998).

Regional courts with a human rights jurisdiction are similar in that they oversee a predefined charter of human rights. But they are different in that, for these courts, the subject matter pertains to norms regarding how a state should treat its citizens. Also different is that adjudication may be intended to provide an individual remedy for a breach, even if the underlying policy remains unchanged.

In the future, we may well see regional courts increasingly involved in criminal law matters. Already, the European Court of Justice adjudicates disputes involving police and judicial cooperation; the European Court of Human Rights reviews questions regarding the administration of justice in the criminal law system; and the Inter-American Court of Human Rights exercises quasi criminal jurisdiction (Huneeus, 2013). And as dissatisfaction with the International Criminal Court (ICC) grows, we may also see a rise of regional criminal bodies outside the Western world, probably first in Africa. The gaps and limits of the ICC have already led governments to search for alternatives. For example, recently the International Court of Justice demanded that Senegal either prosecute Hissène Habré for his crimes in Chad, or extradite him to Belgium to face justice.[4] The ECOWAS court ruled that Senegalese courts lack jurisdiction to adjudicate these past crimes, and in February 2015, it was announced that he would be tried before a special pan-African Court, the Extraordinary African Chambers.[5]

Perhaps the most remarkable development has been the proliferation of powerful courts with broad jurisdiction (Hooghe et al., 2014). The charters of general purpose regional organizations—CARICOM, ECOWAS, EAC, ECCAS, SADC, SICA, and, of course, the EU—authorize courts to adjudicate disputes involving the creation and implementation of secondary legislation to realize open-ended goals such as economic development, welfare, peace, and political integration. The trigger for litigation will be the political and legal steps taken to achieve collective goals. Absent meaningful policy and legislation, the regional organization and its court may be left to oversee an empty construction site. But when courts are armed with preliminary ruling, non-state access, and direct effect, they are not so powerless. These new-style features, in combination with embedded international law, create the potential for regional international courts to build alliances with a range of domestic actors to pressure governments to respect international legal agreements. And so, regional courts—with the help of domestic lawyers, judges, administrative and other governmental or non-state bodies—can become essential in reminding governmental actors of the norms undergirding a general purpose IO, and importantly, they can anchor these norms in precedence and law. Regional

courts may become nurturers of regional norms for a(n incipient) political community (Goodman and Jinks, 2013; Hooghe et al., 2014).

For these reasons, it is important to study not only litigation, but also the construction of regional integration projects via law, politics, and contestation.

Drivers of Legalized Dispute Settlement, Regional, and Otherwise

Political scientists want to know why the demand for legalized dispute settlement has increased, and why we have seen the greatest judicialization at the regional level. They also want to be able to explain the choices states make when they opt for international dispute adjudication mechanisms. This section reviews the theoretical traditions in turn, but finds that the literature offers no definitive answers to these questions.

A number of studies have sought to explain the choice of legalized or more informal dispute adjudication systems based on the expected differences in the effects of the choice. For example, one explanation of the choice for legalization is rooted in rationalist functionalism. The premise is that governments include dispute settlement in international institutions to address collaboration problems and to enhance the credibility of their commitments (Keohane, 1982; Koremenos, 2007; Koremenos, forthcoming; Sandler, 1997; Stein, 1983; Zürn, 1992). In this view, judicialized dispute settlement is a helpful means to expose free-riding and, if judgments are binding and enforceable, penalize non-compliance (Hafner-Burton et al., 2012; Hasenclever et al., 1997; Johns, 2015).

The rationalist-functionalist argument has motivated scholars to investigate the link between regional dispute settlement and trade. Most analyses conclude that the deeper the economic agreement that undergirds a regional regime, the stronger is the legalization of dispute settlement. For example, McCall Smith (2000) finds a positive association between trade and more deeply legalized dispute adjudication systems for 60 regional trade agreements, and Allee and Elsig (2014) confirm this finding for a larger number of trade agreements.

A dynamic variant of the rationalist-functionalist argument relates deepening economic interdependence to stronger dispute settlement. Incipient in Ernst Haas' work on European integration, this argument is developed by Caporaso (1998), Mattli (1999), Yarbrough and Yarbrough (1992), and especially Stone Sweet and Brunell (1998). While there is nothing intrinsically "regional" about the argument, it has been picked up by scholars of regional dispute settlement. Thus Haftel (2013, 408) concludes that "strong trade links result in more independent regional bureaucracies and more legalized DSMs."

One problem with this line of thinking is that it presumes that most regional dispute settlement involves adjudicating trade or economic disputes, and we have shown here that this is increasingly less the case. Human rights, good governance, criminal law, and a variety of issues that may confront a political community may fall within the remit of regional courts.

The liberal-institutionalist argument does not hinge on trade, but emphasizes the intervening role of domestic factors. One fruitful line is how democratic politics can shape variation in incidence, strength, and use. Democracy encourages strong dispute settlement on the grounds that checks on executive power and transparent decision-making make cheating more costly (Davis, 2012; Kono, 2007; Jo and Namgung, 2012; Mansfield and Milner, 2012; McCall Smith, 2000; Simmons, 2009; Simmons and Danner, 2010). In research on preferential trade agreements, Jo and Namgung (2012) show that democracies are more in favor of judicialized dispute settlement. Moravcsik (2000) conjectures that democratizing governments were more likely to sign up to the European Court of Human Rights to signal their democratic credentials to Western states. And Simmons and Danner (2010) find that authoritarian regimes with recent violent pasts were first to sign up to the ICC, perhaps because they wanted to tie their opponents' hands. This takes the credible commitment argument outside its familiar terrain of collaboration problems (Chapter 21 by Pevehouse, this volume).

The democracy argument seems only mildly promising as an account for regional variation in dispute settlement. It is true that the most used, and arguably most effective, adjudicatory mechanisms tend to be in more democratic Europe and the Americas, but Africa's supranational courts are a puzzling contrast. One of the few studies that test the relationship between democracy and regional dispute settlement finds none (Haftel, 2013).[6]

Realist theory is skeptical that the choice to create a judicialized dispute settlement mechanism is all that meaningful. Realist scholars expect that great powers will be more likely to oppose binding adjudication clauses, because third-party dispute settlement can help level the playing field (Stone, 2011) and because legal rulings can set precedents that constrain future state behavior (Kono, 2007; Hawkins and Jacoby, 2008). But hegemons may be willing to shoulder the costs of regime creation provided binding rules reflect their interests (Abbott and Snidal, 1998). Martin (1992) observes that the rule of law is sometimes the cheapest way for hegemons to get others to comply. Tallberg and McCall Smith (2014) argue that the type of legal dispute settlement matters: a state-controlled design leaves space for power politics, and so big powers may not be averse to state-controlled dispute settlement but resist supranational dispute settlement.

The moderating influence of hegemons in regional arrangements has been much discussed (see e.g. Cooley and Spruyt, 2009; Hancock, 2009; Mattli, 1999), but it is one thing to say that hegemons facilitate regional integration and quite another that they promote deep regionalism (Chapter 3 by Börzel, this volume). It is also possible that regional hegemons are simply not consistent in their behavior. Krapohl et al. (2014) argue that in regional arrangements where intra-regional trade gains are modest, extra-regional economic interests guide regional powers' behavior. Where intra- and extra-regional

interests are in conflict, hegemons become Rambos. Most statistical studies indicate a negative relationship between power asymmetry and deep dispute settlement (Haftel, 2013; Hooghe et al., 2014; McCall Smith, 2000).

Finally, scholars have turned to theories of policy diffusion to understand dispute settlement that does not have an apparent rational basis in credible commitment (Chapter 5 by Risse, this volume). Comparison of regional bodies suggests the potential for institutional diffusion within and across regions, as well as for some bodies (in particular the European Court of Justice, but also NAFTA and the WTO—see earlier) to be a model (Alter and Helfer, forthcoming; Alter et al., 2012; Alter, 2014; Lenz, 2012; Jetschke and Lenz, 2013). Trading partners tend to adopt similar legal templates (Jo and Namgung, 2012; Allee and Elsig, 2014). While we cannot discount the possibility for this to be a functional response to similar circumstances, it seems reasonable that partners engage in learning when they address similar problems.

Careful process tracing of particular dispute settlement instances is beginning to suggest some systematic transmission belts along which global norms on democracy, human rights, or the "Washington Consensus" may be diffused into regional regimes (Alter et al., 2012; Dezalay and Garth, 2002, 2006; Duina, 2005). These include, among others, transnational legal communities, the extraterritorial assertions of American and European judges which can shape far away legal developments (Alter, 2014; Putnam, 2013), and the active leverage of the European Union influencing regional choices (Lenz, 2012). Diffusion seems to be particularly compelling in explaining variation in design, or the lack thereof, while functionalist, realist, and institutionalist theories seem better suited to explain the emergence and depth of regional dispute settlement (Chapter 5 by Risse, this volume).

Challenges to Theory-Building

The major theoretical traditions provide interesting lines of hypothesizing, but there appear two things missing to adjudicate arguments. One concerns data. There is a growing number of large-scale data sets that document variation in formal legal agreements. There is much less data on how these mechanisms work in practice. Studies that focus on dispute settlement in practice tend to zoom in on the highly institutionalized end of dispute settlement, and overwhelmingly bodies based in Europe.

The other challenge is to understand change over time. We know very little about the negotiation of regional initiatives. We know even less about proposals that were negotiated and abandoned, or abandoned early on before reaching the stage of a draft legal instrument.[7]

Even where there are data, the sources can introduce systematic bias. Often, our understandings begin with narratives constructed by participants in the regional project or by insiders who have unusual access to the creators. For many years scholars of European integration drew on Pierre Pescatore's account of his experience participating

in the negotiations over the European Economic Community (1981). Robert Hudec was not present during negotiations, but his insider access allowed him to construct the seminal account on the GATT's dispute settlement (Hudec, 1993). These insider views offer important insight, but the creators and insiders of regional systems have a stake in the narratives they construct. Only recently historians have begun to systematically examine how personal networks and global forces contributed to building European legal institutions (Madsen, 2010; Madsen and Thornhill, 2014). We now have a pretty good sense of the factors giving rise to Europe's supranational courts (Bates, 2011; Davies, 2012; Rasmussen, 2013), but this knowledge came more than 50 years after the institution's creation. We are some distance removed from a general narrative on the causes.

Effects of Regional Dispute Settlement

We know quite a lot about the impact of a handful of active regional courts and the aggregate impact of regional trade agreements. The challenge is to draw generalizable conclusions from bits of information. Here we pick up just one confounding source: the tendency to equate compliance with effects.

Much theorizing about the effect of dispute settlement institutions has been cloaked in the language of compliance—the degree to which state behavior conforms to what an agreement (or ruling) prescribes or proscribes (Von Stein, 2013, 478). But as Martin (2013, 605) warns, "studying patterns of compliance tells us nothing about the causal effect of institutions." It is possible to have low compliance but a substantial causal effect, or to have high compliance and a negligible institutional effect. One reason is that compliance rates are subject to selection effects. Compliance may be high, but it can be cheap. States may select agreements that they find easy to comply with, or they may exit agreements or provisions of agreements that they do not like (Downs et al., 1996; Helfer, 2005; Hafner-Burton et al., 2012). Taking selection effects into account is hard, particularly when the data on why states join, exit, comply, or defy are not precise.

A focus on compliance side-steps the multifaceted roles that adjudication of disputes plays. Courts and other mechanisms for dispute settlement do not only, and perhaps not primarily, exist to monitor and sanction (non-) compliance. As rational-functionalist scholars point out, even if adjudicatory bodies are never used, their creation can offer a credible commitment signaling device with behavioral effects on states and private actors. The shadow effect of these bodies can also contribute to helping parties reach out-of-court compromise solutions. Where cases do proceed to court, adjudicatory bodies can clarify, elaborate, and at times build legal rules. In their administrative review role, regional courts help to coordinate legal interpretation across borders, and they provide "a legal redress that fails as often if not more than it succeeds, thereby helping domestic and international administrators defend their actions against firm claims

of illegalities" (Alter, 2014, 14). In their constitutional and administrative review roles, regional bodies can offer remedies that domestic systems may be unable to provide, and they can serve as checks on international actors that would otherwise not exist (Alter, 2014; 2001, 282–285).

If we take the formally negotiated jurisdiction of these bodies seriously, then we must conclude that these are the intended effects of regional adjudicatory mechanisms. There are also unintended effects, some welcomed and some perverse. The most active regional adjudicatory mechanisms have long exceeded the founders' more minimalist objectives. The European Court of Justice has become a constitutional court for Europe; the European Court of Human Rights has extended the substantive and geographic reach of Europe's human rights charter; the Andean Tribunal of Justice has become deeply involved in the development of intellectual property and consumer protection law (Alter and Helfer, forthcoming, chapter 5).

Other times, dispute settlement is seen as contributing to rather than resolving conflict. Recent rulings by the European Court of Human Rights have created a backlash in Britain against the Court and its host the Council of Europe, with collateral damage to the EU's Court of Justice. The SADC Tribunal's 2009 landmark ruling on land claims in Zimbabwe led to its suspension, followed by its abolition in 2013 (Nathan, 2013), with knock-on effects on regional cooperation in SADC. Formal dispute settlement can also weaken norm conformity because it sets a price on a breach, and this can perversely make it easier to defect (Brewster, 2013, 540). The upshot is that one should be careful not to confound compliance with the effectiveness of regional dispute settlement, and effectiveness with effects.

Conclusion

Our assignment was to focus on dispute settlement, a common lens for studying international law and international adjudication. International and regional conventions are created by states to accomplish shared objectives. It is thus unsurprising that many conceive of adjudication as means for states to realize cooperation benefits, or as Posner and Yoo argue, international adjudication as "simple, problem-solving devices" (2005) of states. But contrary to what Posner and Yoo expect, some regional adjudication appears capable of altering the preferences of states and facilitating transnational politics.

Porous borders, a greater understanding of system effects including the recognition that poverty and underdevelopment generate problems that span borders, means that we increasingly consider the transborder implications of problems that used to be seen as purely domestic. For example, environmental degradation is felt most acutely at a local level, but a number of environmental problems—threats to animals and species, the cutting down of forests, the consumption of polluting fossil fuels—have global effects or require global solutions. How governments treat their citizens used to be considered a domestic issue. Today, there are many legally binding international and

regional human rights agreements, and regional adjudicatory bodies. And the sense that mass atrocities harm us all has been embodied in the ICC's Rome Statute.

Scholarship on international adjudication is trapped between the old and new realities of international law and regionalism. The rationalist-functionalist approach, and theories that employ the theoretical tools of economics to understand law and politics, prefer to focus on states and the interest-based benefits regionalism may provide. These theories prioritize efficiency, and the pursuit of government interests. Although one can fit environmental law, and perhaps even human rights and mass atrocities law, into these frameworks, the state-centric rationalist theorization tends to hold fast to the old world of dispute settlement, where international law is seen as a contract between governments for the promotion of mutually beneficial objectives.

The alternative perspective is that of the "rule of law" where respect for the law and the promotion of certain values is seen as crucial for legitimate governance. This difference is not purely academic; there is a real trade-off between these two perspectives. The economic view allows for the idea of "efficient breach." Where governments do not see regional agreements as positively contributing to shared inter-state objectives, the "efficient" solution is to violate the law. Non-compliance, exit, or paying damages in exchange for continued breach are potentially optimal solutions for helping states further individual and shared objectives (Posner and Sykes, 2011).

The rule of law perspective sees international law, and respect for the rule of law, as embodying shared social objectives and values. This view aims to subordinate governments to the rule of law, requiring that states either stick to the laws they agreed to, or reconvene to change the rules. This perspective also considers law's stakeholders in broader terms. The point of regional and international law is not merely to further collective government interests, but also to safeguard individual rights and to promote objectives that people care about. Where promoting respect for the law is the goal, non-compliance, exit, or paying damages instead of ceasing illegal behavior is neither "efficient" nor optimal.

The rule of law perspective has its most fertile ground at the regional level. It is here that one may begin to look for common societal norms and objectives, peoples who share some deep and extensive histories of interaction that are registered in similar social arrangements, political institutions, and religious beliefs, a transnational community, or in Habermas' words, a *gemeinsame Lebenswelt* (Habermas, 1981; Risse, 2010). It is at the regional level that we detect a major institutional innovation: the rise of new-style regional courts—supranational in authority, general purpose in scope, and reaching deep into the societies under their watch.

Notes

1. There are important contrasts between the international legal regimes for trade and investment (Simmons, 2014). The trade regime is governed multilaterally, largely through the global WTO, and regional trade agreements which generally complement WTO rules.

Investment, by contrast, occurs through thousands of bilateral investment treaties (BITs). There are a few central venues for investor dispute settlement, such as the International Center for Settlement of Investment Disputes (ICSID), but there are also many alternative venues.

2. As one scholar recently remarked, "no common definition of what constitutes international commercial arbitration may be found" (Crawford, 2007, 5). Most studies are written by legal scholars or practitioners, but see Hale (2012) and Mattli and Dietz (2014) for political science perspectives.
3. RTAs refer to regional trade agreements that have been notified to the WTO under Article XXIV of the GATT 1994; Article V of the GATS; or paragraph 2(c) of the WTO Decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (Enabling Clause).
4. "Hissane Habré" Questions relating to the Obligation to Prosecute or Extradite (*Belgium* v. *Senegal*). ICJ judgment of 20 July 2012.
5. "A Pan-African Trial, at last," *The Economist*, February 14–20, 2015, 29–30.
6. A variant of the domestic institutions argument points at legal traditions. From contrasting theoretical angles Duina (2005) and McLaughlin Mitchell and Powell (2013) find that countries with common law systems are less likely to embrace supranational courts than civil law systems.
7. Two recent efforts to examine success alongside failure are Katzenstein's study on excluded regional bodies (Katzenstein, 2014) and Saldias on Latin America (Saldias, 2010).

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