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The Global Spread of European Style International Courts

KAREN J. ALTER

Europe created the model of embedded international courts (ICs) where domestic judges work with international judges to interpret and apply international legal rules that are also part of national legal orders. This model has now diffused around the world. This article documents the spread of European style ICs: there are now 11 operational copies of the European Court of Justice (ECJ), and a number of ICs that do not copy the ECJ but use Europe's embedded approach to international law. After documenting the spread of European style ICs, the article then explains how two regions chose European style ICs, yet varied from the ECJ model.

This article is motivated by an observation – the global spread of European style international courts (ICs). Up until the creation of the European Court of Justice (ECJ) and the European Court of Human Rights, international courts were primarily designed to adjudicate disputes between states when both parties desired it. With consent required for litigation to proceed, governments could simply refuse to litigate cases where serious issues were at stake. The architects of the European Community, however, wanted meaningful international oversight of state behaviour. They added design features to make international oversight possible, including compulsory jurisdiction so that states could not block valid cases from proceeding and the right of non-state actors to initiate litigation. These design features, and others, have been copied. There are now 11 operational copies of the ECJ. The larger claim of this article, however, is that Europe's most important legal export is not so much its formal legal institutions, but rather the embedded approach to making international law effective. European style ICs exist where international legal rules are part of national legal orders, and where national and international judges mutually converse about the application of these rules in concrete cases. Because supra- and sub-national actors are applying the same or similar law to concrete cases, European style

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ICs are generally perceived to be better able to work with domestic lawyers, administrative actors and judges to facilitate the domestic application of international law than are inter-state courts.

The article begins with the creation of the ECJ. I return to this history to show that, despite its revolutionary design, the ECJ was neither very active nor effective in its early years. I briefly describe how Europe created its system of embedded international law through practice. Focusing on emulation of the ECJ model, I show how regional integration systems in Latin America and Africa have emulated the ECJ while adapting certain features to protect national sovereignty. I then examine comparative litigation data, which suggests that most ECJ emulators are at this point similar to the early ECJ; a dearth of secondary legislation combines with limited support from national judges to inhibit litigation.

We lack detailed histories about the creation of most ICs, which makes explaining ECJ emulation difficult. I briefly report on the findings of my research on the Community Courts for the Organization for the Harmonization of Business Law in Africa (OHADA), and the Economic Community of West African States. In these and other cases I have studied, policy-makers were drawing lessons from Europe while adapting the ECJ model to accommodate state concerns and to fit the particular needs of regional actors.

The conclusion argues that the existence of ECJ copies means that we can now hold constant the design of a court to investigate what makes different international courts more and less active and effective. But if the argument of this paper is correct, we should not focus too much on the fact of institutional copying. We should instead investigate the conditions that lead national lawyers, administrators and judges to be willing to work with international judges to apply international legal rules in the national legal order.

Creating European Style International Courts through Practice

The ECJ was from inception unusual in that it included compulsory international oversight of state actions (Levi 1976: 70–71). The motivation that led to the ECJ's unique design in itself created permissive conditions allowing for the ECJ system to be transformed through practice. The Nazi empire and World War II made Europeans suspicious about unfettered German power and about powerful political institutions – even democratic institutions – lacking meaningful legal and political checks. Created in the 1950s, Europe's regional integration and human rights systems were intended as partial remedies for unchecked power. Here I focus on the European Community.

The founding of the ECJ came in 1952 with the creation of the European Coal and Steel Community, which was meant to ensure that Germany did not use its market dominance in coal and steel to favour German reconstruction over reconstruction in other countries (Gillingham 1991). Member states feared that the High Authority might respond to the preferences of

the larger over smaller member states, and that it might abuse its extensive powers. The ECJ was designed as a legal check (Boerger-De Smedt 2008). The ECJ had compulsory jurisdiction and private access so that individuals could challenge arguably illegal High Authority actions. The ECJ also had a novel preliminary ruling mechanism that allowed national judges to send legal questions to the ECJ so that the ECJ could help national judges interpret technical Coal and Steel Community rules (Pescatore 1981). Member states retained these basic design elements when they created the European Economic Community (EEC). While the newly christened EEC Commission lost authority to rule itself on state or firm compliance with European rules, the ECJ remained the final arbiter of state compliance with Community rules. The ECJ's oversight authority was not optional, and in this respect the legal apparatus of the EEC reflected a greater self-binding commitment compared to the Council of Europe's human rights system. But the EEC legal system was not very muscular either. Non-compliance cases could result in the ECJ declaring that a member state had 'failed to fulfil its obligations' under the Treaty of Rome. Such a declaration was largely toothless in that no remedies were associated with an ECJ finding of a violation of European law.

Despite their revolutionary designs, in the 1950s and 1960s both of Europe's supranational courts were barely used. While the ECJ was busier than its human rights counterpart, according to Stuart Scheingold the role of the ECJ remained quite limited. Especially after the defeat of the European Defence Community Treaty in 1954, more disputes were resolved through out-of-court negotiation and the ECJ focused on procedural issues, avoiding entering the political fray where possible (Scheingold 1965: 265–6). In the 1950s and early 1960s the ECJ developed precedents and facilitated procedural regularity, but it was unable to help stem violations of ECSC rules or to promote the actual creation of a common market in coal and steel (Alter 2009: 47–63).

I repeat this early history for three reasons. First, this history reminds us that sovereignty concerns for many years affected the design and operation of Europe's supranational courts. Second, this history reminds us that even for ICs operating in democratic contexts, with independent and robust domestic rule of law systems, where the norms the ICs were asked to enforce overlap significantly with the norms and values of national governments and domestic populations, drafting bold IC charters is not enough to make ICs independent and effective in practice. Third, this history is relevant today because most ECJ copies are operating in contexts that are very similar to Europe of the 1950s and 1960s. Scheingold (1965) saw the weakness of the High Authority and the lack of state commitment to the integration process as fundamental limits on the ECJ's ability to develop a rule of law. This is exactly the situation of ECJ copies in Africa and Latin America.

Litigants, lawyers and judges helped to transform Europe's supranational courts through practice. The ECJ's bold doctrines regarding the direct effect

and the supremacy of European law, which authorised litigants to invoke European rules in front of national judges and made national judges co-enforcers of Community law, helped to build a constitutional federal legal order at a time when the political process of integration was largely paralysed (Stein 1981; Weiler 1991). Litigation rates and the political import of ECJ rulings rose as European member states passed secondary implementing legislation to build a common market, giving litigants legal texts worth invoking, engaging national administrations and judges in enforcing European law, and giving the ECJ a platform upon which to build integration promoting jurisprudence (Stone Sweet 2004: 59). Changing attitudes also mattered. In the 1980s European governments once again embraced the goal of completing the Single Market, because market integration was seen as a way to help European industries build global competitiveness (Hanson 1998: 68–69). Through living with an active and engaged supranational court, Europeans grew to accept, if not always appreciate, the contributions of the ECJ to European politics.

The slow transformation of Europe's supranational legal mechanisms showed the world that combining domestic enforcement with international legal oversight contributes to making international law more effective (Hathaway 2005; Helfer and Slaughter 1997). Europe also showed the world that robust international legal oversight can co-exist with important national values such as democracy, dealing with security threats, and respecting heterogeneous national values.

Spreading European Style Courts through Institutional Emulation

This section documents emulation of the EU's legal institution. The fact of legal emulation is not surprising. When faced with an institutional problem, lawyers typically look around the world for examples of how other legal systems have dealt with the issue. The result is a remarkable similarity in the formal structure of law and legal systems (Watson 1993). The earliest emulations of the ECJ were by the Benelux countries (1974) and the Andean Pact (1984). Both the Benelux and Andean decisions to emulate the EEC legal system makes sense when one considers that the alternative of the time was the GATT dispute resolution system, which in the 1970s was pretty much defunct.¹ By the 1990s, institutional emulators had a larger choice set. They could emulate the ECJ or the compulsory dispute settlement system of the World Trade Organization (WTO), or create their own amalgam. Since most members of regional integration systems are current or aspiring members of the WTO, the WTO's compulsory system is for many countries a default system for resolving trade disputes.

The GATT/WTO system has compulsory jurisdiction and the right for states to initiate non-compliance suits against other states. Four international economic systems emulate the WTO dispute resolution system — the North American Free Trade Area (created 1992), Economic Community of

the Commonwealth of Independent States (created 1992), Southern Common Market (Mercosur, revised in 2002) and the Association of Southeast Asian Nations Dispute Resolution Mechanism (created 2004). The ECJ model adds 1) a supranational Commission that monitors state compliance and brings non-compliance cases to the supranational court; 2) a preliminary ruling mechanism that allows national courts to send references to the supranational court; 3) systems of administrative and constitutional review that allow states, community institutions and private litigants to challenge community acts in front of the supranational court. Table 1 identifies 11 operational ICs that copy at least two features of the ECJ model. The European model has spread even further; a number of treaties for ECJ style courts await state ratifications, and other proposals for ECJ style courts

TABLE 1
ECJ COPIES (ORDERED BY THE YEAR THE COURT BECAME OPERATIONAL)

International Court	Supranational Commission can raise non-compliance suits	Preliminary ruling system of national court referrals	Explicit administrative review authority	Explicit constitutional review authority
ECJ (1952)	X	X	X	X
Benelux court (BCJ) (1974)		X	X	X
Andean Tribunal of Justice (ATJ) (1984)	X	X	X	X
Central American Court of Justice (CACJ) (1992)		X	X	X
European Free Trade Area Court (EFTAC) (1992)	X	Advisory Opinions Only	X	
West African Economic and Monetary Union (WAEMU) (1995)	X	X	X	X
Common Market for East African States (COMESA) (1998)	X	X	X	X
Central African Monetary Community (CEMAC) (2000)	X	X	X	X
East African Community Court (EACJ) (2001)	X	X	X	X
Caribbean Court of Justice (CCJ) (2001)	Currently under discussion		X	X
Court of Justice of the Economic Community of West African States (ECOWAS) (2001)	X		X	X
Southern African Development Community (SADC) (2005)	X	X		X
Total ICs with this feature (including ECJ)	9	10	11	10

are yet to be embraced,² And there are ICs that do not copy the ECJ but use the European embedded law approach, such as the Organization for the Harmonization of Business Law in Africa, discussed later, and human rights courts. One could even see the International Criminal Court as using an embedded approach where countries are supposed to adopt national war crimes statutes so that either domestic judges or the ICC can prosecute war criminals.

ECJ copies were created after the ECJ's legal revolution, with perfect hindsight. Table 2 identifies key differences in the design of the ECJ copies, focusing on the preliminary ruling mechanism and the non-compliance procedure. Even though the Benelux Court (created in 1974) copied a fairly inactive ECJ, the creators of the Benelux Court nonetheless felt the need to state that the court could only respond to questions posed to it. Starting in the 1980s, emulators had an even better sense of the activism of the ECJ. Some of the emulators wrote into their court's founding treaties provisions designed to limit judicial activism. For example a number of ECJ copies make national court references optional.³ Others require the consent of supranational political bodies before non-compliance cases can proceed to the court. Some emulators, however, have designs that are in theory even more politically intrusive than the ECJ. For example, the Common Market for East African States system explicitly allows its IC to review the validity of community *and* national acts and the South African Development Community, Central African Monetary Community and Andean Community systems allow private actors to bring disputes with states directly to the international court. Some ECJ copies explicitly incorporate the direct effect and supremacy of community law, and include requirements for national judges to respect the rulings of the community court; others come with this understanding attached. There are some variations in the system of remedies, but the embedded law approach tends to rely on national court enforcement rather than sanctions to induce compliance.

Litigation Patterns across European Style International Courts

The ECJ emulations are not just paper entities. Together they have issued over 2100 binding legal rulings. Figures 1 and 2 focus on the first 20 years of judicial activity of the international economic courts for which I could find data, dividing courts based on whether they are European style systems that allow national courts to dialogue with supranational courts and non-state actors to initiate litigation or WTO style inter-state dispute resolution bodies.⁴ To capture the reality that building legal authority takes time, I compare ICs by age, taking the first year that the court issued a ruling as the first year of effective operation and counting years of operation from there (the legend indicates when the IC became operational and when it issued its first ruling). Litigation rates end based on the age of the system; for example

TABLE 2
DESIGN VARIATIONS IN TRANSLATING ECJ MODEL
(ORDERED BY YEAR THE COURT WAS CREATED)

IC	Preliminary ruling mechanism	Non-compliance procedure and remedies for non-compliance
ECJ (1952, amended 1958) ¹	National courts can refer questions of interpretation to the ECJ, and courts of last instance must refer questions to the ECJ	The European Commission monitors compliance and works with states to address non-compliance complaints. If non-compliance persists, the Commission brings the case to the ECJ. Since the coming into force of the Maastricht Treaty (1993), states that ignore ECJ rulings can face hefty fines. There are also judge-made rules about state liability for failing to promptly and correctly implement European directives
Benelux Court (1974) ²	Same as the ECJ, but the Benelux court can only respond to the question posed to it	Not applicable in part because all Benelux states were in the European Economic Community, but there may be state liabilities for state errors that harm individuals
Andean Tribunal of Justice (ATJ) (1984) ³	Same as ECJ, but the ATJ's interpretation must be limited to specifying the contents and scope of the Andean law. Since 1996, the ATJ can consider the facts that are 'essential for the requested interpretation'	At first the supranational monitoring body could only investigate complaints raised by other states. Since 1996, private actors are authorised to bring non-compliance cases to the Secretary General, and if necessary directly to the ATJ. The Andean system allows WTO style retaliation sanctions for ongoing non-compliance
Central American Court of Justice (CACJ) (1992) ⁴	The court can hear preliminary ruling references, but national judges are not obliged to refer cases	The Court can hear non-compliance cases, including cases raised by affected private litigants, but there is no supranational body monitoring state compliance. No remedies specified
European Free Trade Area Court (EFTAC) (1994) ⁵	National court references give rise to advisory opinions only	Non-compliance procedure is the same as the ECJ. The Surveillance Authority can impose unspecified penalties
West African Economic and Monetary Union (WAEMU) (1995) ⁶	Same as ECJ. Court rulings are explicitly made binding on national judges and administrators and the Commission can seize the Court if it suspects that a national court has failed to refer a case	Non-compliance procedure is the same as the ECJ. Political bodies may agree to additional unspecified sanctions for ongoing non-compliance

(continued)

TABLE 2
(Continued)

IC	Preliminary ruling mechanism	Non-compliance procedure and remedies for non-compliance
Common Market for East African States (COMESA) (1998) ⁷	Same as ECJ except that references are only mandatory if they are 'deemed necessary'. The treaty clearly states that Community Court decisions have precedence over national court decisions on similar matters	A Council of States must agree before legal violations are referred to the Court. The Court may prescribe unspecified penalties it deems necessary should parties not implement its ruling
Central African Monetary Community (CEMAC) (2000) ⁸	Same as ECJ. The Treaty explicitly states that CEMAC rulings are binding on national administrative authorities and judges	Non-compliance procedure is the same as the ECJ. The treaty also allows any organ of CEMAC and any person to raise a case alleging that a member state has misinterpreted the treaty or subsequent conventions. A Council of the Heads of States can be convened to authorise additional unspecified sanctions for ongoing non-compliance
East African Community Court (EACJ) (2001) ⁹	National courts only need refer to the EACJ cases where it considers an answer to the question is necessary for it to deliver a judgment. The treaty clearly states that EACJ decisions have precedence over national court decisions on similar matters	The Secretary General first refers non-compliance cases to a Council of States. If the Council does not resolve the matter, they will direct the General Secretary to refer the matter to the court. No remedies are specified
Caribbean Court of Justice (CCJ) (2001) ¹⁰	National courts only need refer to the CCJ cases where it considers that an answer to the question is necessary for it to deliver a judgment	There is no non-compliance provision, although this system is new and evolving. The CCJ can agree to let private actors raise cases, but subject to conditions, one of which is that member states declined to raise the suit themselves

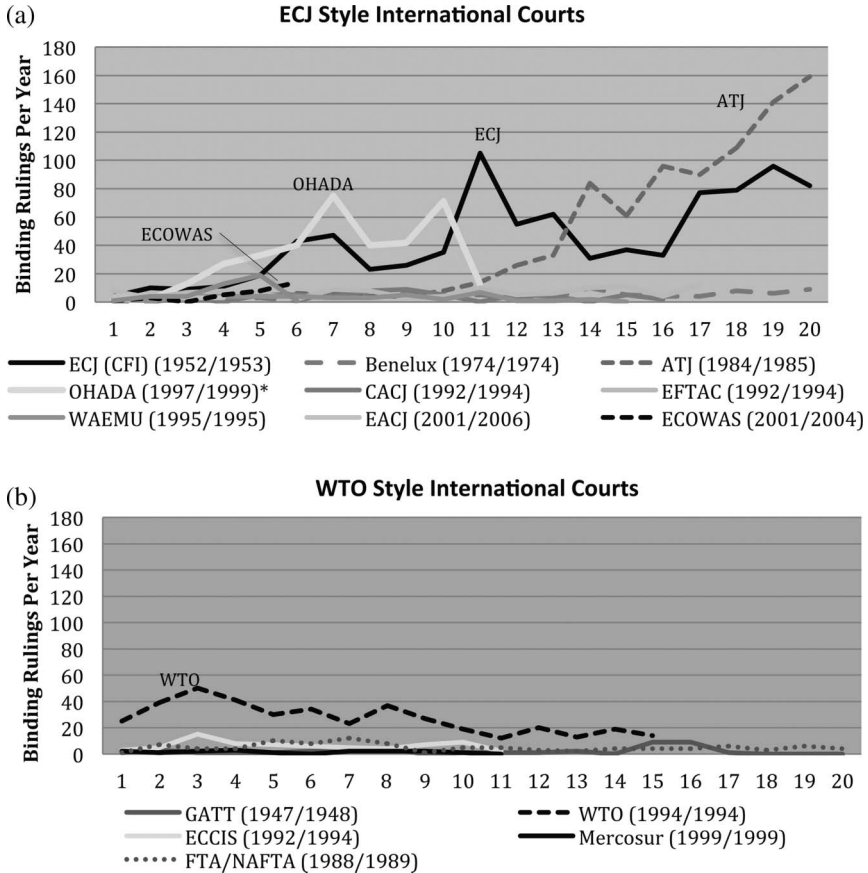
(continued)

TABLE 2
(Continued)

IC	Preliminary ruling mechanism	Non-compliance procedure and remedies for non-compliance
Court of Justice of the Economic Community of West African States (ECOWAS) (2001) ¹¹	The Court has jurisdiction over any national proceeding referred to it, but there is no requirement that national judges refer cases	Member states can bring non-compliance actions on behalf of their citizens. The supplementary protocol of 2005 allows the Commission to also raise non-compliance suits. The treaty allows the suspension of Community loans, assistance, appointment to posts, and voting rights as a remedy for non-compliance. As the case study discusses, the ECOWAS court can hear private appeals regarding human rights violations
Southern African Development Community (SADC) (2007) ¹²	The Court has jurisdiction over any national proceeding referred to it, but there is no requirement that national judges refer cases	There is no monitoring commission, but private actors can bring non-compliance suits after domestic remedies are exhausted. SADC includes a parallel inter-state dispute resolution system that is modeled on the WTO system

¹Articles 234, 228 and 229 of the Consolidated Treaty Establishing the European Community Treaty establishing the European Community.²Article 6 of the Treaty Establishing the Benelux Court, 31 March 1965; modified via protocols 10 June 1981 and 23 November 1984. The Treaty Establishing the Benelux Economic Union 381 UNTS 165 (1960).³Article 34, 23–25 and 27 of Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol).⁴Article 22 (k) and (b) of the Statute of the Central American Court of Justice 34 *ILM* 921 (1995). For more see: Nyman Metcalf *et al.* (2005: 62).⁵Article 19 and 35 of *Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice*. OJ L 344, 31 January 1994.⁶Protocol 1 article 8, 13, 5 and 14 and Article 74 Treaty Establishing the West African Economic and Monetary Union and Additional Protocol No. 1 relative to the Organs of Control of WAEMU (UEMOA).⁷Articles 29, 25.3, 30 and 34 of the Treaty Establishing the Common Market of Eastern and Southern Africa.⁸Articles 17 and 18, 19 and 16 of the Convention Governing the Court of Justice of the CEMAC (5 July 1996).⁹Articles 33 and 34, and 29 of the Treaty for the Establishment of the East African Community (Chapter 8).¹⁰Article XIV and Article XXIV of the Agreement Establishing the Caribbean Court of Justice.¹¹Article 9 and 10 of the Supplementary Protocol Amending the Protocol of the Relating to the Community Court of Justice and Article 77 of the Revised Treaty for the Establishment of the Economic Community of West African States.¹²Article 16, 15 and 18 respectively of the Declaration and Treaty Establishing the Southern African Development Community, Protocol on Tribunal and Rules of Procedure thereof (2000/2001).

FIGURE 1
LITIGATION RATES BY IC AGE (1 = FIRST YEAR COURT ISSUED A RULING)



*Reporting of and then actual litigation rates for OHADA declined due to unrest in the Ivory Coast, where the court is located.

the OHADA system created in 1998 generates only 12 years of data. I combine data for the similarly designed North American Free Trade Area and the US/Canada Free Trade Area but include the GATT system and the WTO system as separate entries; the GATT system lacked compulsory jurisdiction whereas the WTO system (1994–present) has compulsory jurisdiction (and more rules to be applied, and more member states).

These comparisons are crude; they do not take into account numbers of member states in each system or the extent of member state trade. Still, they are revealing. The graphs show that more active ECJ style courts tend to be busier than WTO style courts, with the busiest ECJ style courts being the

Andean, Benelux, OHADA and European Free Trade Area Courts, which oversee fairly detailed secondary legislation. They show that many ECJ and WTO style ICs are clustered at the bottom of the graph. I suspect that copying the ECJ design is neither necessary nor sufficient for an IC to be active because the extent of secondary legislation may be more important in shaping both trade and litigation rates.

Explaining Emulation: Two Case Studies

It is easy to see a revealed preference to emulate the ECJ. Explaining this preference is harder. We can see that common market systems tend to emulate the ECJ, whereas free trade systems tend to copy the WTO model. One can thus surmise that the ECJ model is especially appealing for common market systems where states intend to create secondary implementing legislation that domestic actors will be applying. But not all regional common market systems create a supranational court. Indeed the discussion of the Economic Community for West African States (ECOWAS) demonstrates that states may wilfully refuse to draw lessons from the ECJ experience.

One can fairly easily eliminate some of Börzel and Risse's potential explanations (Börzel and Risse 2012). There is no evidence of coercion influencing the adoption of European style ICs. The EU supports initiatives related to regional legal systems in Africa and Latin America,⁵ but I have found no evidence that the EU uses support to pressure regions to copy their model. Socialisation also does not explain the diffusion of European style ICs. The ECJ is clearly seen as a successful supranational court that has furthered regional integration through its many rulings. Lawyers and judges in regional systems regularly look to the ECJ and its doctrines as a guide; indeed one can easily find citations of ECJ rulings in the legal rulings of European style ICs. But the ECJ's doctrines are in no way considered legally authoritative outside of Europe. Blind mimicry also does not explain ECJ emulation. As Table 2 reveals, most ECJ copies have adapted the ECJ model.

The best I can say by way of explanation is that the European model appears to supporters as a way to promote compliance with the law and perhaps spur integration through law. Pro-integration advocates tend to lobby for ECJ style courts, making it fairly easy to find official and unofficial proposals for ECJ style ICs in many if not most regional systems. These proposals, which are often proffered by people inspired by the European model, can languish for years. My studies of the Andean and ECOWAS systems suggest that governments may be more easily convinced to create formally binding oversight mechanisms when they want to signal a heightened commitment to market integration. As was true in Europe, governments also seem convinced that they can avoid or ignore supranational litigation.

The rest of this paper explores the founding of the OHADA and ECOWAS systems, both European style international courts where states chose to adapt but not replicate the ECJ model. Along with the Andean Tribunal of Justice, these two judicial systems are the most successful European style copies, with many rulings and with mobilised enforcement constituencies. Elsewhere I explain the Andean decision to emulate the ECJ, showing that, as happened in the ECOWAS system, Andean officials initially adapted the ECJ model and thereby created a hamstrung international court. Over time, however, Andean officials adopted reforms that brought the Andean Tribunal closer in form to the ECJ model (Alter *et al.* 2012).

The Organization for the Harmonization of Business Laws in Africa (OHADA)

The Organization for the Harmonization of Business Law in Africa, formed in 1993, creates unified business codes for African countries. Its members are predominately francophone African countries, all of which had anachronistic business rules left over from French colonialism and adapted in a hodgepodge fashion so that few lawyers or judges even knew what governing law applied. The result, everyone seemed to agree, was legal uncertainty that was worrisome to potential investors (Mouloul 2009: 10–11).

The impetus to create OHADA came both internally and externally. Foreign investment in the region fell in the 1980s due to political instability and the reorientation of financial supports in the post-Cold War era. Political leaders wanted more foreign investment, and they became convinced that legal and juridical insecurity made investing in their markets less desirable. Adopting a common commercial code offered many advantages. By having the same set of rules across countries, foreign investors could save on the legal expertise needed for each national system. OHADA Uniform Acts were also adapted specifically for the needs of developing countries, so that they became more attractive than competing rules – existing French, American or EU business law (Dickerson 2005: 25–30; Mouloul 2009). Member states may not amend the Uniform Acts, and the Acts are widely available on the internet and in source books, providing legal stability and certainty. The promulgation of 10 detailed multilaterally crafted Uniform Acts have activated the OHADA system. OHADA's legal system was also one of OHADA's chief attractions. Foreign lawyers have little faith in Africa's national legal systems, where judges are perceived to be ill-informed and often corrupt. International dispute resolution is an alternative, but it is expensive because cases are litigated outside of the region. OHADA created its own arbitration system that is managed by the Common Court of Justice and Arbitration (CCJA) and it provides an international review of national judicial rulings.

Externally the OHADA system was strongly supported by the French government, with the encouragement of the Conseil Francais des

Investisseurs en Afrique (CIAN). The French government was interested in any solution that might help to stabilise the Franc zone, because regional instability could generate currency pressures felt in France. A 1991 meeting of African finance ministers from African Franc countries, held in France, led to the commissioning of a study on the feasibility of creating regional business law (Tiger 2001: 23–4). The French Foreign Ministry reached out to Kéba Mbaye, a former Senegalese Supreme Court judge and President of the International Court of Justice, who in the 1960s had advocated legal harmonisation among newly independent states. The French Foreign Ministry underwrote and provided technical support for Mbaye's efforts, which led to the founding of OHADA (Katendi and Placca undated). France, other EU and non-EU countries, and other international institutions provided financial support to pay for OHADA (Mouloul 2009). While member states now also provide support for the system, it is safe to say that foreign support has been instrumental to the functioning of OHADA. Also, the French Foreign Ministry to this day has at least one attaché at the OHADA Secretariat.

When it appeared that the soon-to-be-implemented OHADA Uniform Acts had been largely forgotten, French patrons, with the support of funding from various international institutions, created a non-governmental organisation to promote awareness of OHADA and its laws. The Association for the Unification of African Law (UNIDA) plays an analogous role to Eurolaw associations, which formed in the 1950s and 1960s to help promote European Community law (Alter 2009: 63–91). UNIDA helps with training sessions and maintains a website – OHADA.com – that makes available OHADA Uniform Acts, and CCJA and national court rulings applying OHADA law. The French journal *Juriscope*, with the support of Coopération Française, publishes commentary and compendiums of Uniform Acts and community case law, which they help to distribute throughout the region. This is important because in many African countries journals publishing laws and legal rulings are irregularly maintained and hard to access. Members of UNIDA's network regularly visit national courts to collect rulings that pertain to OHADA. The rulings are transcribed and published online. While the collection of national legal rulings on OHADA.com is surely incomplete, UNIDA's website supplies what may be the only publicly available searchable source for case law in OHADA member states.

The combination of the Uniform Acts and international review of national court rulings makes the OHADA system a 'European style' IC. Why not create, however, a supranational court modelled on the ECJ? One reason perhaps is that OHADA is intentionally different from a common market. If OHADA had a larger political objective, like establishing a monetary union or good governance norms, it would be in direct competition with the West and Central African Economic and Monetary Unions, which promote economic integration among former French colonies.⁶ Moreover, OHADA aspires to provide a set of business laws that any country can adopt. OHADA is also primarily designed for business

contracts, thus it does not need to replicate the inter-state dispute resolution mechanisms of the WTO or the supranational enforcement mechanism of the EU. The 2008 Quebec reforms have brought OHADA institutions closer in form to the EU,⁷ but the format for creating Uniform Acts in OHADA remains multilateral more than supranational. There is thus no reason to create administrative and constitutional review roles as checks on supranational authority.

The existence of detailed OHADA law and mobilised enforcement communities explains why the OHADA court has become the fourth most active permanent IC today, with 358 rulings by the end of 2009. But while OHADA law is formally speaking the supreme business law of the land, and CCJA decisions the highest legal authority on the meaning of OHADA law, much of the economies of member states remains informal and thus outside of the sphere of OHADA law (Dickerson 2007). Within the sphere of business adjudication, litigants may choose arbitration, and sometimes litigants choose to remain in the national system instead of appealing to the CCJA. Also hindering OHADA is that national supreme courts remain wary about working with the CCJA (Dickerson 2005: 57), and many national judges are ignorant of the workings of OHADA. For all of these reasons there is a real question how much of Africa's business affairs are truly governed by OHADA rules.

The Economic Community of West African States (ECOWAS)

The ECOWAS Community Court of Justice (ECCJ) did not start out as an ECJ style IC. The original treaty for the Economic Community of West African States, adopted in 1975, expected that the governing authority would adopt – and member states would then implement – a series of legally binding protocols to promote economic integration. The treaty included a provision that contemplated the establishment of a Community court, but no court was ever created. In the late 1980s, member states began discussing a new charter for ECOWAS, creating an 'Eminent Persons Group' to make recommendations. In the meantime, states adopted a *Protocol on the Community Court of Justice (A/P.1/7/91)* (the 1991 protocol) which authorised the ECCJ to hear disputes between member states and suits brought by states on behalf of their citizens. The secretariat had no role in monitoring or helping to enforce community rules, and neither national judges nor private actors could refer cases to the Community court. According to Kufuor, the Eminent Persons Group expressed dissatisfaction with the 1991 protocol, recommending that a revised ECOWAS charter should allow private actors to invoke certain ECOWAS legal rights directly before the ECCJ (Kufuor 1996). These recommendations were not heeded. But the 1991 protocol did include what in retrospect was a portentous decision; in their expectation of a major relaunching of regional integration, the protocol made the new court a permanent body.

It took until 1996 for the requisite number of states to ratify the Court protocol, and until 2001 for the first group of judges to be appointed. Then the fully staffed ECCJ sat unused because states never brought any cases. The ECOWAS Secretariat grew frustrated that judges consumed significant community expenses without actually contributing to the goals of the community. The problem was the Court's extremely limited access rules. One obvious flaw in the original design was that private actors had no means of filing complaints against their own country. A second limitation was that few national justice ministries or attorney generals knew about the ECOWAS legal system, and mobilising them to raise a case on behalf of private actors was not easy.

In 2003 a case finally reached the ECOWAS court. A Nigerian goods trader challenged Nigeria's closing of its border with Benin in clear violation of ECOWAS law. The plaintiff asked the ECCJ to purposively interpret its jurisdiction and access rules to overcome the 'absurdity' that expects a state to be both a plaintiff and a defendant when it violates Community rules. The ECCJ refused the invitation, sticking to the plain wording of its mandate that only allowed 'disputes instituted by member states on behalf of its nationals against another Member State'. The Court recognised that the ECJ had interpreted its mandate expansively 'in the interest of justice'. But it also expressed concern that, because some ECJ decisions have attracted criticism, 'we therefore do not want to tow on the same line'.⁸

The ECCJ then used the dismissal of the suit to lobby for an expansion of its jurisdiction. The ECCJ printed and disseminated copies of the ruling and the parties' legal arguments, and in 2004 the judges drafted a proposal to expand the ECCJ's jurisdiction. In interviews, we learned that judges asked for changes that included bringing the ECCJ closer in design to the ECJ model by adding a preliminary ruling procedure similar to what exists in the West African Economic and Monetary Union (WAEMU). Instead, they got something different. The future role of the Court was discussed at a 2004 'Consultative Forum on Protecting the Rights of ECOWAS citizens through the ECOWAS Court of Justice'. A number of human rights groups participated in this forum, which produced a declaration calling on the ECOWAS Legal Secretariat to draft a supplementary protocol to revise the ECCJ's jurisdiction (Nwogu 2007: 352). The 2005 supplementary protocol allows national courts to refer cases involving community law to the ECCJ, but it does not copy the WAEMU provision that requires national courts of last instance to refer such cases. The protocol also authorises the Executive Secretariat to initiate non-compliance suits. But by far the most important revision was the decision to grant the ECCJ jurisdiction to review complaints from individuals alleging human rights violations (Ebobrah 2007).

According to participants, these changes went through with little controversy. A member of the ECOWAS Legal Secretariat told us that member states 'did not give much thought to what the changes to the Court's jurisdiction and access might mean for them'. In addition, the 2005

protocol went into effect provisionally; its permanent legal status required formal ratification by nine member states. As a result, adopting the protocol was viewed as a sort of ‘trial and error’ decision that states expected they could revisit.

Two later events had the effect of making this change difficult to reverse. In yet another drive to improve the functioning of the ECOWAS system, member states agreed in 2006 to a series of institutional changes that emulate the EU. These included transforming the Executive Secretariat into a Commission that helps to monitor compliance with community rules, agreeing to greater supranationality, and making ‘Supplementary Acts’ binding on member states and a primary mode of amending the founding treaty. With these changes, the 2005 protocol’s provisional status has de facto become permanent. Second, when The Gambia proposed revisions to the Community court’s jurisdiction following an embarrassing ECCJ judgment against that country, the rejection of the proposals served as a political ratification of the status quo. The Gambian proposals were actually fairly reasonable; they required litigants to exhaust domestic remedies and allowed the ECCJ to apply only human rights agreements that member states had ratified.⁹ Both of these proposals were rejected because the other member states knew the proposals were in response to ECCJ decisions finding Gambia guilty of detaining and torturing political opponents. While the ECCJ’s jurisdiction may yet be adjusted should the court become overrun with suits, the key stakeholders we interviewed consider the 2005 supplementary protocol to be firmly entrenched in the ECOWAS system (Alter *et al.* 2011).

In ECOWAS, the ECJ model served as an inspiration to the Eminent Persons Group charged with making recommendations for a new ECOWAS charter; it shaped the arguments and ECCJ decision-making in the Alafabi case; and it shaped the WAEMU preliminary ruling system that ECOWAS judges wanted to replicate. Governments have refused, however, to directly copy the ECJ model. Also interesting is that human rights activists have decisively shaped how the ECCJ has evolved. The counter-intuitive outcome is that private actors cannot challenge state non-compliance with ECOWAS rules; instead they can only challenge patently illegal economic policies if they give rise to human rights abuses.

Conclusion: Diffusing the European Approach to International Law

The ECJ model has clearly diffused around the world. The best explanation for this fact is that regions are drawing lessons from the ECJ’s experience. What, however, are regional systems learning? In the 1960s, many regions copied Europe’s approach to regional integration, without creating supranational courts. Most of these regional economic systems remained lacklustre, failing to achieve their primary economic and political objectives (Mattli 1999). Legal observers noticed that the ECJ was helpful in overcoming legal

difficulties arising in the process of regional integration, and they frequently proposed creating ECJ style ICs. These proposals languished until member states sought to relaunch regional economic integration endeavours. Adopting provisions to establish a community court became part of a package of reforms aimed at making regional integration systems more robust.

Supranational legal architects also learned from the ECJ's experience. Some regional integration projects wrote safeguards to protect national sovereignty into their Court's founding charters, such as not requiring national court references or limiting the content of the Court's reply. But they also explicitly incorporated the ECJ's revolutionary doctrines of the direct effect and supremacy of community law, and the idea that 'community law' is distinct from traditional international law. Judges and lawyers working in regional ICs also learn from the ECJ's jurisprudence, although they use this jurisprudence as a guide rather than as dogma.

Many local factors hinder regional ICs from following the ECJ's trajectory. Most regional ICs remain hampered by a lack of secondary legislation that might spur litigants to invoke community law and judges and administrators to work with Community institutions. Also challenging is that ECJ emulators are located in the developing world, where national judges are weak, reluctant and at times corrupt partners. The limited political and judicial support means that ECJ copies in practice more closely resemble the ECJ during the 1950s and 1960s than the ECJ of today.

While I have documented the emulation of the ECJ, I argued that one should not focus too much on institutional copying. Europe has contributed in many ways to the expansion of the global judiciary, by offering models of human rights, war crimes and economic courts that others could emulate, and by being a constant force facilitating the creation and development of international legal mechanisms (Alter 2011). The European Union does not need to pressure or coerce others to follow its lead; the ECJ model has its own attractions and adherents. The existence of ECJ copies allows us to hold constant the design of the IC, to explore how ICs build their authority. We can take variation in litigation rates as a sign of varying demand for IC rulings, which itself reflects limited social and political mobilisation around community goals.

Wade Jacoby (2006) argued that institutions diffuse through a combination of external pressures and internal mobilisation. A coalitional approach to building domestic institutions based on foreign models, he argues, tends to result in more robust domestic institutions compared to imitations that are imposed or simply put in to substitute for what existed before. I have explored in greater depth ECJ copies where litigation rates are growing. Jacoby's argument appears to hold. Faithfully copying the ECJ is not as likely to ensure institutional success as is building an international legal system that local actors find useful. Promoting regional free trade is not necessarily locally useful, which may be why regional integration systems lack secondary legislation and remain politically marginal. The OHADA system

aims to attract foreign investment, and the ECOWAS system increasingly focuses on promoting good governance practices in the region. Both of these objectives are politically popular. The dependence of international courts on national interlocutors means that ECJ copies may not become lawmaking engines of market liberalisation. This does not mean, however, that one should count these ICs out. We may find that they instead become promoters of good governance, and dispute resolution bodies for foreign actors that see litigation as a useful means to promote their objectives.

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Notes

1. The GATT system required state parties to consent for a case to proceed and before any panel finding would be made binding, and in the 1970s Europe and the United States were blocking most cases from proceeding (Hudec 1993: 29–42).
2. Treaties for the African Court of Justice, the Economic Community of Central African States Community Court, and the Court for the African Maghreb Union await state ratification. There are shelved and outstanding proposals for ECJ style courts for the Central American Common Market, the Commonwealth of Independent States and the Mercosur system.
3. It is not clear that an ‘obligation’ to refer cases makes much of a difference either way, as national judges are able to generate reasons not to refer cases.
4. The counting is conservative; I exclude staff disputes and omit interim rulings. GATT/WTO includes panel rulings but not appellate body rulings.
5. For example, the EU provides in-kind consultants, sponsors conferences and exchanges among judges, subsidises projects to support fledgling regional legal systems such as web pages and outreach for regional ICs.
6. Benin, Burkina Faso, Ivory Coast, Guinea, Mali, Niger, Nigeria and Senegal are members of OHADA, the West African Economic and Monetary Community and the Economic Community of West African States. Cameroon, Central African Republic, Republic of Congo, Equatorial Guinea and Gabon are members of both OHADA and the Central African Monetary Community.

7. The reforms created a Council of Ministers that can adopt and amend Uniform Acts and oversee the operation of the OHADA Secretariat and Court. The Permanent Secretariat manages the legal affairs and accounting, and it works with the Council of Ministers to propose new areas of business law harmonisation and to draft new laws.
8. *Olajide Afolabi v. Federal Republic of Nigeria*, ECW/CCJ/APP/01/03 (judgment of 27 April 2004) at para. 56.
9. See 'ECOWAS Court and the Promise of the Local Remedies Rule', a Human Rights Brief by the Center for Human Rights and Humanitarian Law, available at <http://hrbrief.org/2009/11/ecowas-court-and-the-promise-of-the-local-remedies-rule/> (accessed 14 June 2011).

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