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Article

## Legal Traditions as Economic Borders

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### Abstract

This article makes two main claims: A state's legal tradition is embedded into its domestic institution in each issue area and a state that has a common/civil law-type domestic institution in a certain issue area (not necessarily a state that has common/civil law tradition) prefers common/civil law-type international agreements in the same issue area. The consequence of these two claims is that states' legal tradition is often one of the primary sources of international cooperation, especially issue-specific cooperation. This in turn means that the difference in legal traditions is often a potential factor that would induce economic disintegration. By conducting theoretical and empirical investigations of three issue areas covered by free trade agreements (i.e., trade in goods, trade in services, and investment), this article demonstrates that different modes of governance are preferred by civil and common law states domestically and internationally, and that the difference in domestic systems partially explains participation and non-participation in international agreements.

### Keywords

civil law; common law; international cooperation; investment; legal traditions; trade

### Issue

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### 1. Introduction

This article argues that legal tradition is often a powerful factor in the drawing of economic borders, especially in terms of concluding economic arrangements. Further, the difference in legal traditions is often a potential factor in inducing economic disintegration. This study highlights differences in social and economic governance observed between states with common law traditions and those with civil law traditions. Common law states prefer a bottom-up flexible approach to governance. Conversely, civil law states, where all laws are written, prefer a top-down systematic approach to governance. Cooperation among states with similar legal traditions is relatively easy, but when states with different legal traditions try to cooperate, they often encounter disagreements associated with the institutional design of economic agreements.

This study analyzes international cooperation in various issue areas covered by FTAs, namely, (a) flow of trade in goods, (b) flow of trade in services, and (c) flow

of investment. Those are studied because they are critical components of FTAs, which are often called EPAs. Although there are several interesting areas where common law states and civil law states might have different approaches to managing the issue (e.g., intellectual property), the three areas studied here are expected to give us a good starting point for discussing the relationship between legal traditions and domestic institutions, on the one hand, and international cooperation, on the other.

However, because each issue area is huge, we must limit our analytical focus. Among various important points, this article introduces one aspect for each issue area where states' preferred form of international cooperation exhibits interesting variations that could be explained by factors associated with legal traditions. For trade in goods, variations in the approach to preferential tariff treatment under FTAs are examined. What is interesting is that upon embarking on multilateral FTAs (among more than two parties), some states, but not others, offer different tariffs for different members despite

all of them belonging to the same FTA. From among the wide range of trade in services, this article deals with international trade in professional services. There are interesting differences across states with regard to the preferred methods for evaluating who is “qualified” as a professional. Some states take the position that international harmonization of paper-based examinations for qualifications is useful, while others are against it. For investment, dispute settlement will be analyzed. The ideas regarding who can initiate investment dispute cases against the government and how this is done differ between states. While Investor-State Dispute Settlement (ISDS) is widely known as a mechanism to solve investment disputes, it is just one of many options.

This article is structured as follows: After reviewing the literature, this study deductively develops a theoretical argument on the forms of domestic and international governance preferred by each of the common law states and civil law states. We then move to empirical discussion. We will have three empirical sections: trade in goods, services, and investment. The purpose of these empirical sections is to examine whether there is any correlation between legal traditions and domestic institutions, on the one hand, and international cooperation, on the other. The final section concludes with some discussion of policy implications.

## 2. Gaps in the Literature

The relationship between domestic legal tradition and international agreements has attracted considerable scholarly attention (Simmons, 2009). The recent trend is to quantitatively examine the impact of domestic legal tradition on being a party to international treaties and/or (bilateral) international agreements. Efrat and Newman (2018) conducted an interesting quantitative study on the signing of legal assistance treaties. They found that states with similar types of legal traditions tend to sign legal assistance treaties with each other, while the tendency to sign such treaties does not differ much between the two types of states. Link and Hafel (2021) argue that common law states are, in general, less likely to participate in international investment agreements.

The studies on this subject to date, particularly quantitative studies, have two major problems. First, there is little analysis of international agreements in terms of legal tradition. While previous studies have devoted considerable effort to statistically identifying whether common law traditions have a positive or negative impact on participation in international agreements, theoretically informed qualitative analysis of international agreements is underdeveloped (Elkins et al., 2006, p. 840). There are two notable exceptions in this regard. Powell and Mitchell (2007) find that civil law states are more likely to accept compulsory jurisdiction of the ICJ. According to that study, civil law states are more positive toward the ICJ, which is similar to a civil law court system. Efrat (2016) finds that the United Nations’ Model

Commercial Legislation, which is a non-binding international agreement, is more likely to be joined by common law states. This is because non-binding international agreements, which may be adapted to local needs and circumstances, are more consistent with common law. Second, there has been little analysis of domestic systems. It is often assumed that a state’s domestic system is different when legal traditions are different. In other words, quantitative studies generally use a binary variable of common/civil law state (or a common/civil law binary) from a certain database or previous studies (Efrat, 2006, p. 629; Elkins et al., 2006, p. 834), assuming that legal traditions are embedded into domestic institutions in a fairly consistent manner.

Some recent theoretical qualitative studies have sought to look into the different forms of international agreements and domestic systems preferred by civil and common law states. On international agreements, Duina (2016) reports a comparative case analysis of FTAs and argues that civil law states prefer international harmonization of laws and permanent courts to solve international disputes, whereas common law states prefer recognition of foreign laws and technical ad hoc mechanisms for international dispute resolution. For domestic systems, based on their case analysis of professional qualifications, Hamanaka and Jusoh (2018) argue that both common and civil law states have developed distinct types of domestic qualification systems that are in line with the fundamental values of each legal tradition. They posit that civil law states, which rely heavily on written laws, tend to rely on paper-based examinations for the governance of professional qualifications.

## 3. Theoretical Argument

The main thesis of this study is that common law states and civil law states often have different types of domestic institutions and they consequently tend to embark on different types of international cooperation. There are two important points here. First, a state’s legal tradition is embedded into its domestic institution in each issue area, yet this does not mean that non-legal factors are powerless in shaping domestic institutions. Second, a state that has a common or civil law-type domestic institution (not necessarily a state that has common or civil law tradition) prefers a corresponding common or civil law-type international agreement or institution. The international preferences of states are determined by their domestic systems because states regard international mechanisms as an extension of their domestic mechanism. We should not overlook the possibility that a common law state has civil law-type domestic institutions due to non-legal factors and, in that case, such a common law state is likely to prefer civil law-type international systems in the area concerned. This section discusses the common/civil law types of domestic institutions and the international cooperation in each issue area in a theoretically informed manner.

### 3.1. Goods: Preferential Tariff Concession

The levels of distinction in terms of the origins/roots of various things, ranging from people to products, differ between common law societies and civil law societies. Because common law societies tend to think that there are common laws/norms applicable irrespective of origins/roots, the designation of origin/roots is not a critical issue. As a result, in common law societies, for example, the distinction between domestic and foreign parties is blurred. The fact that the extraterritorial application of “common” law to foreign entities is prevalent in common law societies supports this argument (Meyer, 2014). By contrast, since the time of *jus civile*—Roman civil law—the scope of the parties covered by civil law is relatively clear (Kassan, 1935, p. 246). In civil law societies, the distinction in terms of origins/roots is also relatively clear, because they are designated in a top-down matter. In fact, extraterritorial application of laws is less prevalent in civil law courts (Zerk, 2010, p. 148).

This difference in the level of distinction in terms of origin/roots is embedded into trade policy regimes, though this has recently become less evident. Two types of norms regarding trade are associated with distinctions in terms of origin/roots. The first is the distinction between domestic and foreign products, which is called national treatment. The second is the distinction among foreign products, which is called most favoured nation (MFN) status. These two norms are already common for both common and civil law states and the difference in the level of distinction of origin/roots is less apparent, partly because of the membership in the WTO, owing to the impact of international membership on domestic trade regimes. However, it is interesting to note that historical anecdotes are consistent with the theoretical argument above. The idea of free trade, meaning that there is no distinction between domestic and foreign products in terms of tariff, originated in common law societies (Holdsworth, 1934; Letwin, 2011). The UK has also been a supporter of MFN status. The first modern FTA was signed between the UK and France in 1860 (Cobden-Chevalier Commercial Treaty; Lampe, 2009). Interestingly, the UK unilaterally offered the same tariff reduction to all states (unilateral MFN), whereas France did not do so (Lampe, 2009). The trade practices of the united Germany in the late 19th century were highly discriminatory and protectionist (Spigelman, 2018).

In international or regional cooperation on trade liberalization, approaches to tariff reduction differ between states with a common law-type trade regime and those with a civil law-type trade regime. When states with a common law-type trade regime sign a multi-party FTA, they give the same tariff treatment to all other members of the FTA, which is referred to as “common concession.” Because FTA generally pursues tariff elimination, they usually give zero tariffs to all other members. In contrast, states with a civil law-type trade regime give different levels of tariff concession to different members of even the

same FTA. This is referred to as a “country-specific concession.” They often give zero tariffs to some members but a positive tariff to other members.

### 3.2. Services: Professional Services and Qualifications

Civil law states prefer a systematic legal system where written laws play the central role. Judges apply specific written laws to each case at hand and precedent court cases are usually not laws per se (Pejovic, 2001). By contrast, in common law states, there are many sources of laws other than statutes and case laws play a critical role. Judges examine the case at hand and judge by applying case law, comparing both commonalities and differences between cases. Case laws should be interpreted in each specific context (Pelc, 2014).

This difference is embedded into regulatory regimes for domestic services. There is no doubt that only “qualified” people are allowed to supply professional services in both common law states and civil law states. However, how the competency of candidates is assessed differs between the two types of states. In assessing the competence of professionals, civil law societies ask candidates to sit and take a paper-based examination where the score can be calculated in a fairly automatic way (Nollent, 2002). What applicants write down on paper forms the basis of their competence assessment. In common law countries, on the other hand, competence is assessed by an authority (e.g., professional associations) and continuous assessment is valued. Common law societies do not consider the score of candidates at a one-time uniform written examination to be critical. Typical common law qualification regimes value track-record assessment and competence is assessed given the applicants’ experiences (course work and work experience) on a case-by-case basis (Nollent, 2002). Performance during the coursework and interviews are the primary components of track-record assessment. Based on this continuous assessment, candidates are recognized as professionals by a board or association.

International cooperation preferred by common law-type qualification regimes involves international recognition of foreign professionals. Authorities in common law qualification regimes examine the track record of foreign professionals on a case-by-case basis and recognize competent candidates as professionals, just like in the assessment of domestic applicants (this means assessment and recognition are conducted in a non-discriminatory manner, irrespective of nationality/origin). Because they may not be familiar with the experiences acquired by foreign candidates outside their jurisdiction, the authority in common law societies often refers to the track-record assessment conducted by the home country of the candidate. This type of practice of obtaining a reference sometimes develops into a mutual recognition agreement (MRA). Mutual recognition is not automatic and each authority can unilaterally decide whether to confer qualifications to foreign

candidates. However, MRAs facilitate the process of unilateral recognition of foreign candidates. In contrast, the type of international cooperation preferred by civil law qualification regimes is the harmonization of examinations. Harmonization is possible largely because it is paper-based examinations that are harmonized. In some cases, the same paper-based examination is introduced as a result of international cooperation.

### 3.3. *Investment: Dispute Settlement*

Civil law states prefer a systematic court system and provide a uniform interpretation of (written) laws. In contrast, in common law states, the court system is more ad hoc. Because of the nature of this legal system, it is more difficult for common law societies to provide a uniform interpretation of laws. Instead, laws are interpreted in common law courts on a case-by-case basis (Duina, 2016).

This difference is embedded into the domestic judicial regime for challenging the government's measures and laws. In civil law states, the constitutionality of laws and policies is examined abstractly, without a specific case (Lopez Guerra, 1994). The constitutional court is a typical court where abstract constitutional review is conducted, but this is also done at a supreme court in some civil law states. A primary example of this is the Austrian *Verfassungsgerichtshof*, established in 1919, based on the legal theory of Hans Kelsen (Lopez Guerra, 1994). In principle, the party that can challenge the constitutionality of laws or policies is limited to "authorities," such as ministers, political parties, and bar associations. Individuals are usually not allowed to initiate an abstract constitutional review process (Steinberger, 1994). In contrast, in common law states, courts judge the constitutionality of laws in a concrete manner (a constitutional court is often absent in common law states). Review is only done when an actual case arises in which the constitutionality of laws becomes an issue (Lopez Guerra, 1994). Hence, the party that can initiate this concrete constitutional review process is individuals or private entities that believe they were injured by new laws or policies implemented by the government. Even lower courts may decide that a law is unconstitutional (Utter & Lundsgaard, 1994). Of course, the above is a conceptual argument and in the contemporary real world, there is some convergence in the constitutional review process. In fact, civil law courts examine the constitutionality of laws and policies with a specific case in mind, while common law courts review constitutionality abstractly. That said it is also true that differences in the legal culture surrounding constitutional review still exist between common law states and civil law states, even today.

States with common law-type judicial regimes prefer an investor-state dispute mechanism at the international level. In such mechanisms, investors can freely sue foreign governments. The point here is that private parties (private investors) have the right to bring a dispute into the international dispute settlement mechanism if they

believe their rights have been infringed. This is in line with the concrete judicial review process, which is initiated by individual plaintiffs. In contrast, states with civil law-type judicial regimes prefer state-state dispute resolution for investment. They prefer that international investment disputes do not occur in a disorganized manner. The point here is that private parties (private investors) first need to convince their government that their rights have been infringed, and, once convinced, the government must raise the issue with the treaty partner government, which could either take the form of state-state negotiations or state-state dispute settlement processes. In other words, in civil law societies, only states (authorities) can sue other states (authorities).

## 4. Empirical Argument

This section examines whether states' domestic institutions (common law or civil law-type) and their international preferences are correlated. This is a very preliminary analysis that aims to assess the plausibility of the deduced theories, based on various cases. An important caveat here is that it is wrong to consider that domestic institutions that embed specific values regarding a certain legal tradition are the only factor affecting the international preferences of the states. This is especially true for the issues areas studied in this article, which are highly complex. For example, there is no doubt that factors other than legal tradition affect states' attitudes toward ISDS because it is a highly politicized issue with a distinct historical background. Economic factors (capital exporting or importing and technological needs) also affect states' attitudes toward ISDS (Hamanaka & Chi, 2022). Nevertheless, this does not mean that a preliminary examination focusing on legal traditions embedded in domestic institutions will be fruitless. Rather, it is an interesting exercise to see the degree to which legal tradition alone explains states' international preferences, bearing in mind that non-legal factors may explain "deviant" cases. I acknowledge that the empirical evidence in this study needs further solid empirical examination, either qualitative or quantitative, which should be conducted in future work.

### 4.1. *Methodology*

Following the presented context, the "endogeneity problem" deserves some discussion. While this study argues that domestic factors affect states' international preferences, reverse causality could be true, namely, that participation in international institutions forges domestic institutions. This means that even if we observe correlations, causality cannot be clearly determined. One way to overcome this problem is the use of a "proxy" as an independent variable. By looking into domestic institutions that embed the same particular value in a different issue area, we are more likely to account for the causality (see Subsection 4.4 for further details).

The question is how to qualitatively assess states' domestic institutions and their international preference. First, on the domestic side, it should be noted that we do not analyze legal traditions per se but domestic institutions that embed some common/civil law values. Hence, we should go beyond the binary application of legal tradition from a database. This section qualitatively analyzes whether test countries' domestic institutions have common law or civil law characteristics. A state that is usually considered to have a common or civil law tradition may have civil/common law-type domestic institutions in certain issue areas. Second, on the international side, as mentioned in the first section, for each issue area studied, this article introduces only one aspect, where interesting differences in states' international preferences are observed. However, the methodology to reveal states' international preferences varies. In the case of preferential tariffs for trade in goods, members can usually decide the method of tariff concession (common or country-specific), so the difference in preference can be directly observed. In the case of professional qualification in services, there are usually opt-in or opt-out options, meaning that states can decide whether to participate in international cooperation on qualification. Hence, participation status reflects states' international preferences. In the case of ISDS, analysis is not straightforward because FTA members cannot opt out of ISDS obligations. Hence, we should compare several international agreements to arrive at a speculative but plausible explanation of states' international preferences in investment management.

This study focuses on international cooperation in the Asia-Pacific region, which was chosen because it has a wide variety of states in terms of legal tradition. There

are both states with common law tradition and civil law tradition. In addition, because there are many agreements in this region, we can identify states' preferences in international cooperation for each issue area in a relatively convincing manner. In the case of tariff concessions, agreements such as the Regional Comprehensive Economic Partnership (RCEP) and TPP are useful because both allow members to choose their preferred concession method. For services, international cooperation on qualification under the auspice of ASEAN+3 and APEC is useful because both ASEAN+3 and APEC members can choose whether or not to participate in particular international qualification cooperation projects. With respect to ISDS, we will analyze the ASEAN Comprehensive Investment Agreement (ACIA), ASEAN+1 FTAs, RCEP, TPP, and several BITs. The membership of regional institutions analyzed in this study is illustrated in Figure 1.

Below, each section first classifies states' domestic institutions in terms of legal traditions (common law-type governance or civil law-type governance). We then analyze states' international preferences in each issue area to examine whether there is any correlation between the two.

#### 4.2. Trade in Services

Among various professional services, we will analyze engineer services, because the difference in regulatory governance between common law and civil law states is significant domestically and internationally. Domestic qualification regimes for professional engineer services of Asia-Pacific states are classified into four types. Civil law-type qualification regimes only require a paper-based examination without any other requirement

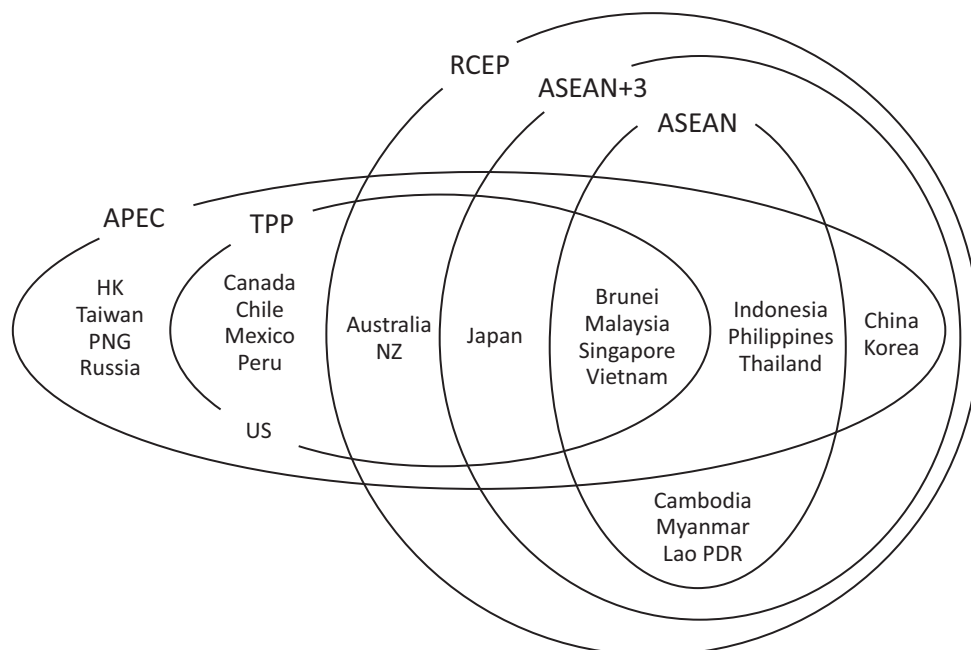


Figure 1. Institutions and agreements in Asia-Pacific.

(Japan). Common law-type qualification regimes do not require a uniform, one-time paper-based examination. The competence assessment relies on track-record assessment (Malaysia). Countries other than the two above have mixed qualification regimes, which require both paper-based examination and track-record assessment. Mixed qualification regimes that entail substantial interviews are regarded as quasi-common law qualification regimes because interviews allow examiners to take into individual backgrounds on a case-by-case basis. Taiwan, Korea, and Singapore fall into this category. The Philippines, Vietnam, Thailand, and Indonesia also have mixed qualification regimes, but there are no interviews or they play a relatively small role.

The Information Technology Professionals Examination Council (ITPEC) is set up under ASEAN+3 to facilitate international cooperation among engineers, particularly information technology engineers. The primary objective of ITPEC is to introduce a common paper-based examination. Interestingly, ITPEC is an “opt-in” program under ASEAN+3. Participation in the ITPEC is not compulsory and each ASEAN+3 member can freely decide whether to participate and what degree to participate (full participation or partial participation). ASEAN members’ attitudes toward ITPEC are as follows: Japan, which initiated the ITPEC is the most active among all members; Vietnam, the Philippines, and Thailand actively send applicants to take the ITPEC harmonized paper-based examination; Taiwan and Korea are inactive in the ITPEC, however, while they do not participate in the ITPEC per se, they agree to cooperate with Japan on this matter; and Malaysia, Singapore and Indonesia are very inactive. Malaysia decided to withdraw from

the ITPEC in 2017, and Singapore’s participation in ITPEC excludes its core component (Hamanaka & Jusoh, 2023). Table 1 shows the relationship between domestic qualification regimes and their attitudes toward the ASEAN+3 ITPEC examination. There is a clear correlation: States that have civil law-type qualification regimes prefer internationally harmonized paper-based examination than states with common law-type qualification regimes.

APEC Engineer is APEC’s project for international cooperation on engineer qualifications. APEC Engineer facilitates the signing of bilateral MRAs between APEC members. APEC MRAs have an opt-out option. While APEC members are encouraged to participate in MRA-related activities, each APEC member can freely decide whether or not to sign bilateral MRAs, also the scope and coverage of each MRA can be customized. APEC members’ attitudes toward APEC Engineers are as follows: Australia, New Zealand, Malaysia, and Korea are very active in signing MRAs under APEC Engineer and they are also original members of the International Professional Engineer Agreement (IPEA), a sister organization of APEC Engineers; Singapore is active in signing MRAs under APEC Engineers, but it is not an original member of IPEA; other states (except Vietnam) are inactive—they decided to participate in APEC Engineers scheme, but seem reluctant to sign bilateral MRAs under it; and, finally, Vietnam is very inactive in APEC Engineer project. While it is a member of APEC, Vietnam decided not to participate in the APEC Engineer scheme (Hamanaka & Jusoh, 2023). Table 2 shows the relationship between domestic engineer qualification regimes and attitudes toward activities related to APEC MRA. Clear correlations can be observed, which is the opposite

**Table 1.** Qualification regimes and ITPEC harmonized examination.

	Common law-type qualification regime	Mixed qualification regime (quasi-common law type)	Mixed qualification regime (quasi-civil law type)	Civil law-type qualification regime
Very active	—	—	—	Japan
Active	—	—	Philippines, Vietnam, Thailand	—
Inactive	—	Taiwan, Korea	—	—
Vary inactive	Malaysia	Singapore	Indonesia	—

**Table 2.** Qualifications regimes and APEC Engineer MRAs.

	Common law-type qualification regime	Mixed qualification regime (quasi-common law type)	Mixed qualification regime (quasi-civil law type)	Civil law-type qualification regime
Very active	Australia, NZ, Malaysia	Korea	—	—
Active	—	Singapore	—	—
Inactive	—	—	Philippines, Indonesia, Thailand, Taiwan	Japan
Vary inactive	—	—	Vietnam	—

of the case of ITPEC, where states that have common law-type qualification regimes prefer mutual recognition than states with civil law-type qualification regimes.

#### 4.3. Investment

The court system for administrative disputes in Asia-Pacific states can be classified into two types. Several states have a constitutional court. Among ASEAN members, Indonesia and Thailand have a constitutional court. Among non-ASEAN states, Korea has a constitutional court. Other than these three, Asia-Pacific states do not have constitutional courts and the constitutionality of laws is examined based on specific cases, not in an abstract manner. China's constitutional review system is debatable. China is classified as a state with an abstract review system simply because it is difficult for private parties to bring an actual case to court in order to challenge the constitutionality of Chinese government policies. The Standing Committee of the National People's Congress engages in ex-ante constitutional review upon request from certain state organs and also has a role in delivering authoritative interpretations to courts upon request (Ginsburg & Versteeg, 2022). While this is a unique system, it is closer to abstract constitutional review rather than to concrete review. Vietnam's constitutional review is also conducted by the legislature, positioning it closer to the abstract review system (Ginsburg, 2008).

ASEAN has its own investment agreement, called the ACIA (signed in 2009). The ACIA includes ISDS, implying that all ASEAN members find ISDS useful. However, there are nuanced differences among ASEAN members with regard to the usefulness of ISDS outside the ACIA. It is worth noting that Indonesia recently decided to cancel all BITs. This implies that the country is cautious with respect to ISDS, although it does not have a plan to cancel investment arrangements attached to FTAs, including ACIA (Hamzah, 2018). In contrast, several ASEAN members joined TPP, which includes ISDS, and they can be regarded as states that are positive toward ISDS (Singapore, Malaysia, Brunei Darussalam, and Vietnam). The position of the Philippines and Thailand toward ISDS outside of ACIA is unclear. What about the position of states other than ASEAN member states? RCEP, for which the negotiations were launched in 2012 and the signing of the agreement occurred in 2020, is an interesting case

because it involves many ASEAN partners (China, Japan, Korea, Australia, and New Zealand). The RCEP decided not to include ISDS. However, just because of this, we cannot argue that all RCEP members are negative toward ISDS. The situation of each "ASEAN plus one" agreement gives us some idea about ASEAN FTA partners' attitude toward ISDS. The five parties that have signed agreements with ASEAN at almost the same time as ACIA are useful in this regard: ASEAN–Japan was signed in 2008, ASEAN–China in 2009, ASEAN–Australia–New Zealand in 2009, and ASEAN–Korea in 2009. Among them, only the one with China does not include ISDS. This clearly shows that China is most cautious toward ISDS. Further, the TPP also gives us some idea regarding states' attitudes toward ISDS. Japan, Korea, Australia, and New Zealand are members of the TPP.

Table 3 shows the relationship between the domestic constitutional review system and their attitudes toward ISDS. The Philippines and Thailand are excluded because their international preference is unclear as discussed above. It is unclear whether there is a solid correlation between the two, but several interesting patterns can be identified. First, countries that have concrete constitutional reviews are usually positive toward ISDS. Interestingly, countries that are often regarded as civil law states, such as Japan, have a common law-type constitutional review (concrete review) and accept ISDS. Second, three states have an abstract constitutional review and two of them are against ISDS (Indonesia and China). One important reservation is that the states' positions on this sensitive issue area have changed over time. For example, Australia, which has a common law-type concrete constitutional review mechanism, traditionally signed many investment agreements with ISDS, but recently has started to maintain some distance from it. This is partly because of the Philip Morris case (Australia was sued by Philip Morris under the Hong Kong–Australia BIT; see Chaisse & Hamanaka, 2018, for details).

#### 4.4. Trade in Goods

As discussed in Section 3.1, differences in domestic trade regimes between common law and civil law states are no longer prominent nowadays, unlike in the 19th century, when the Cobden-Chevalier Commercial Treaty was signed. This is partly due to participation in international institutions such as the WTO. However, states' preferred

**Table 3.** Constitutional review and ISDS.

	Concrete constitutional review	Abstract constitutional review
Relatively positive to ISDS	Singapore, Malaysia, Brunei Darussalam, Australia, NZ, Japan	Korea, Vietnam
Relatively negative to ISDS	—	China, Indonesia

Notes: The Philippines and Thailand are not included because their preference for ISDS is unclear; the Philippines has a concrete constitutional review, while Thailand has an abstract constitutional review.



level of distinction in terms of origin/roots is also embedded into domestic regimes covering issues other than trade (Figure 2). For example, the preferred level of distinction in terms of origin/roots is also embedded into states' nationality regimes. The concept of the nationality of individuals in common law societies tends to be open as well as fuzzy. A typical common law nationality regime recognizes the holding of multiple nationalities. Citizenship/nationality can be obtained not only by descent but also by place of birth (where birth within a territory automatically confers citizenship/nationality) and by naturalization. A good example is the UK, where the concept of nationality has been ambiguous (Cesarani, 2002). Nationality in common law societies can be blurred because they use "domicile" as a connecting factor for jurisdiction (Kruger & Verhellen, 2011). In a typical civil law nationality regime, dual nationality is not recognized and citizenship is not conferred by place of birth, naturalization, or marriage. In a typical civil law society, nationality is conferred only by descent (de Groot & Vonk, 2018) and serves as a connecting factor or basis for jurisdiction (Kruger & Verhellen, 2011).

There is one advantage of using nationality regimes as a proxy: We can address the endogeneity problem to a certain degree. While this study argues that domestic institutions shape international commitment ("inside-out"), we cannot rule out the reverse causality, that international commitments shape the form of domestic institutions ("outside-in"). Even when correlations between domestic trade institutions and international trade preferences can be observed, some may argue that they are the result of the outside-in effect. By using nationality regimes, however, we can solve this problem to a certain degree. Participation in international trade agreements may shape domestic trade regimes but certainly does not shape nationality regimes. Thus, when a correlation between a domestic factor (nationality regime) and international participation (trade agreements) can be observed, the inside-out effect is likely to be the case.

However, the argument can be made that nationality regimes are not necessarily a good proxy for trade administrative regimes because states' nationality regimes are "disrupted" by political sensitivities. For example, hypothetically speaking, there is a possibility that nationality regimes in states like Singapore and Malaysia could be disrupted by the political sensitivities of overseas Chinese. In other words, their nationality regimes are not akin to the common law because of the factors associated with overseas Chinese, which implies that they are not a good proxy for the real preference for the treatment of foreign entities such as foreign products. Hence, only when we can safely assume that each state's unique factors associated with its nationality regime are not crucial can nationality regimes be a good proxy for trade regimes.

Nationality regimes of Asia-Pacific states are classified into three types. In this study, nationality regimes, where dual nationality is allowed, are referred to as common law-type nationality regimes. These countries are Australia, Canada, New Zealand, Peru, and the US. Civil law-type nationality regimes refer to those where nationality is conferred only by descent. China, Japan, Korea, and Vietnam fall into this category. Other states are classified at mixed regimes, where dual nationality is not recognized, but nationality is given not only by descent but also, for example, by birth and naturalization.

Under RCEP, members can decide whether to opt for a common concession or a country-specific concession. Table 4 provides the relationship between domestic nationality regimes and their tariff concession methods under RCEP. Some correlation can be observed. Among RCEP members, states that have common law-type nationality regimes employ common concession without exception. Likewise, states that have civil law-type nationality regimes employ country-specific tariff concession without exception. The concession method of states with mixed nationality regimes varies without clear correlations. Some opt for common concession, while others opt for country-specific concession.

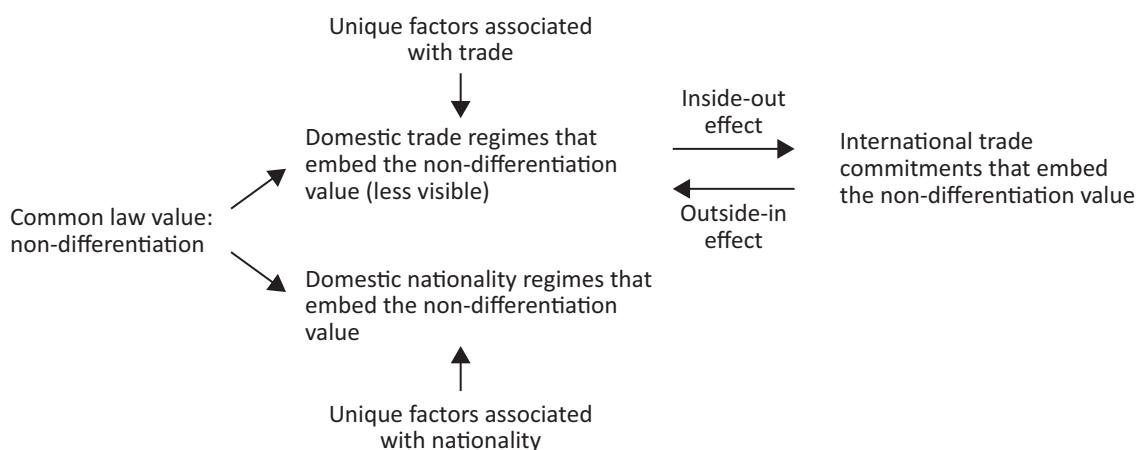


Figure 2. Trade and nationality regimes.

**Table 4.** Nationality regimes and tariff concession methods under RCEP.

	Common law-type nationality regime	Mixed nationality regime	Civil law-type nationality regime
Country-specific concession	—	Thailand, Philippines, Indonesia	Japan, China, Korea, Vietnam
Common concession	Australia, NZ	Singapore, Malaysia, Brunei Darussalam, Cambodia, Laos	—

**Table 5.** Nationality regimes and tariff concession methods under TPP.

	Common law-type nationality regime	Mixed nationality regime	Civil law-type nationality regime
Country-specific concession	—	Chile, Mexico	Japan
Common concession	Australia, NZ, US, Canada, Peru	Singapore, Malaysia, Brunei Darussalam	—

Note: The US and Canada have differentiated tariffs for motor vehicles from Japan.

While common concession is the norm in the TPP, each member is allowed to give different tariff treatments to other TPP parties, though this is rather exceptional. Table 5 shows the relationship between domestic nationality regimes and their tariff concession methods under the TPP. Five TPP parties have a common law-type nationality regime and all of them adopt the common concession method (although Peru is generally regarded as a civil law state, its nationality regime is akin to common law, meaning that dual nationality is usually recognized). It may well be the case that states in the Western hemisphere tend to recognize multiple nationalities. Importantly, however, Latin American states that are largely classified as civil law states tend to have a common law-type regime regarding origin/roots (nationality) and they employ the common concession method for tariffs. Two TPP parties have civil law-type nationality regimes (Japan and Vietnam). It is important to note that Japan decided to employ country-specific concessions even under the TPP. Vietnam's concession method in the TPP is not included in the correlation analysis because, while it employed common concession in TPP, Vietnam was allowed to exclude an exceptionally large portion of sensitive products from the TPP liberalization list. In fact, for the manufacturing sectors, upon entry into the TPP Vietnam immediately abolished tariffs on 70.2% of all manufacturing products (tariff lines). For agricultural sectors, it immediately abolished tariffs on 42.6% of all agricultural products (tariff lines). These figures are the lowest among all TPP members for both the manufacturing and agricultural sectors (World Economic Forum, 2016, pp. 5–6). If Vietnam were requested to commit a higher level of liberalization under TPP, it would have been imperative for the country to adopt country-specific concession. Finally, the concession method of states with mixed nationality regimes does not show a clear tendency. Some opt for common concession, while others

opt for country-specific concession. We can find some correlation between nationality regimes and the concession method among TPP members as well.

## 5. Conclusion

Legal traditions have some influence on states' preferences in international cooperation in an issue-specific area. Existing quantitative studies often attempt to estimate the impact of legal tradition codified as a binary variable on participation in international agreements. When the impact is positive, studies often speculate that such an international agreement is common law-like.

However, what matters is not legal tradition per se but domestic institutions that embed the legal tradition. Because domestic institutions embed non-legal traditions as well, states that are usually considered common or civil law states may have domestic institutions of the other type. States that have a common or civil law-type domestic regime in a certain issue area prefer the corresponding common or civil law-type for international cooperation in the same issue area. Hence, we need to carefully examine domestic institutions that ended various traditions including legal traditions to identify domestic factors that influence international cooperation.

Common law states and civil law states have different approaches to social governance. The differences are clear in the three issue areas studied in this article. Common law states often have vague concepts of origin/roots, emphasize the significance of case law and value individuals' rights. Hence, they prefer a non-discriminatory trade policy, continuous case-by-case assessment for professionals, and concrete constitutional control. In the international arena, these preferences are translated into their strong support of MFN, MRAs, and ISDS. In contrast, civil law states often have a top-down definition of foreign and domestic,

value the stability of written documents, and emphasize the importance of systematic interpretation of laws. Hence, they prefer tailor-made trade policy, across-the-uniform paper-based examinations for professionals, and abstract constitutional control. In the international area, these preferences are translated into differentiated treatment of products depending on origin, internationally harmonized paper-based examinations, and state-state negotiations and/or dispute resolution for investment.

Finally, I would like to discuss the issue from a policy perspective, especially policies on international and strategic cooperation. One important finding of this article is that what matters for international cooperation is domestic institutions, not legal tradition per se. Issue-specific international cooperation is likely to face difficulties when participants' domestic institutions are inconsistent. States with common/civil law traditions tend to have common/civil law-type domestic institutions, but this is not always the case. This in turn means that if a potential partner's domestic regulatory regimes can be adjusted, international cooperation is more likely to succeed. With technical and other forms of assistance, a state can help develop the regulatory regimes of potential partners in line with its own. Hence, to realize desirable international cooperation, changing the potential partner's domestic institutions is critically important.

What does this mean for ongoing international integration projects, going beyond the Asia-Pacific region? The EU adopted the new Economic Security Strategy in June 2023, which includes "partnering" as one of its three pillars. The critical component of the EU's partnership strategy is the signing of FTAs or EPAs, which encompass regulatory issues. The competition between the EU and the US in the field of economic diplomacy will intensify. This is especially true for the post-Brexit era. The EU is likely to prefer civil law-type international cooperation, while the Anglo-Saxon states (the US and the UK) support common law-type international cooperation. For example, since 2015, the EU has worked toward the establishment of a permanent multilateral investment court as an alternative to ISDS (Puig & Shaffer, 2018). The EU-Vietnam FTA foresees the establishment of a permanent multilateral investment court and contains a reference to it. This is interesting because, as the analysis above suggests, Vietnam has an abstract constitutional review system, but still agrees to ISDS under the TPP. Ways to expand strategic engagement with countries like Vietnam will be critical for both the EU and the US and the real question here is how to adjust or alter potential partner's domestic systems to be in line with those of the EU or the US. Currently, Vietnam can go either way in investment management: ISDS or permanent investment court. The bottom line is that, without strategic engagement to adjust the policies of potential partners' domestic systems, international strategies are unlikely to be successful.

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## Conflict of Interests

The author declares no conflict of interests.

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