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Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice

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Abstract:

The Andean Tribunal of Justice (ATJ) is the third most active international court and the oldest and most successful of eleven transplanted copies of the European Court of Justice (ECJ). Drawing on over a decade of interviews, archival research, and case coding, *Transplanting International Courts* examines the ATJ's creation, doctrinal development, and contributions to the law and politics of the Andean Community. Alter and Helfer evaluate the ATJ in a wider perspective, seeking to understand how transplanted supranational institutions operate in practice and the strategies that international judges deploy to navigate turbulent political environments, especially in developing country contexts.

Transplanting International Courts begins by analyzing how the European judicial model shaped the ATJ's original design and foundational legal doctrines. But the ATJ has since charted its own path, most strikingly in the area of intellectual property (IP). The ATJ has built deep and mutually supportive relationships with domestic IP administrative agencies that have allowed it to confront governments pressured by the U.S. and by multinational drug companies to abandon limits on IP that promote public health and protect consumers. Outside of this IP island, the ATJ is less legally and politically influential. The tepid support of national judges and the lack of jurist advocacy movements prevent the tribunal from gaining greater legal and political traction.

This pattern has continued even as Andean Community has faltered. Riven by ideological divisions among the member states, in some respects the regional integration project has moved backward over the last decade. Even in this fraught political climate, the IP island is flourishing and the Andean legal system continues to confront state noncompliance. As they explore multiple aspects of the Andean legal system, Alter and Helfer's interdisciplinary analysis elucidates the many factors that contribute to and limit the effectiveness of all international courts.

This working paper includes the table of contents and introductory chapter of the book.

KEYWORDS: International courts, Preliminary references, Andean Community, Andean, Tribunal of Justice, Regional integration, European Court of Justice, Intellectual property, Patented medicines, Legal transplants, Jurist advocacy networks

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TRANSPLANTING INTERNATIONAL COURTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE

BY KAREN J. ALTER AND LAURENCE R. HELFER

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PART I: SUPRANATIONAL LEGAL TRANSPLANTS

CHAPTER 1: LESSONS FROM THE ANDEAN TRIBUNAL OF JUSTICE: THIRTY YEARS

AS A LEGAL TRANSPLANT FEJL! BOGMÆRKE ER IKKE DEFINERET.

COMPARING STAGGERED TWENTY FIVE-YEAR PERIODS OF INTERNATIONAL ADJUDICATION:

THE ECJ (1958-1983) AND THE ATJ (1984-2007)

FEJL! BOGMÆRKE ER IKKE DEFINERET.

LESSONS LEARNED FROM STUDYING THE ANDEAN TRIBUNAL

FEJL! BOGMÆRKE ER IKKE DEFINERET.

A ROADMAP OF THE BOOK

FEJL! BOGMÆRKE ER IKKE DEFINERET.

CHAPTER 2: TRANSPLANTING THE EUROPEAN COURT OF JUSTICE TO THE ANDES

TRANSPLANTING, EMULATING OR APPROPRIATING: THE DIFFUSION OF SUPRANATIONAL LEGAL INSTITUTIONS

COPYING THE ECJ: CREATING THE ANDEAN TRIBUNAL OF JUSTICE

ADAPTING THE ECJ MODEL

CONCLUSION: SUPRANATIONAL TRANSPLANTS – LESSONS FROM THE ANDEAN TRIBUNAL OF JUSTICE

PART II: LAW AND POLITICS IN THE ANDEAN TRIBUNAL OF JUSTICE

CHAPTER 3: THE ANDEAN TRIBUNAL OF JUSTICE AND ITS INTERLOCUTORS: UNDERSTANDING

LITIGATION PATTERNS IN THE ANDEAN COMMUNITY

THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE ANDEAN PRELIMINARY RULING MECHANISM

AN OVERVIEW OF PRELIMINARY REFERENCE PATTERNS IN THE ANDES

ACTIVATING AND SUSTAINING THE LINKS BETWEEN NATIONAL COURTS AND THE ATJ

DOMESTIC INTELLECTUAL PROPERTY AGENCIES AS THE ENGINE OF ANDEAN PRELIMINARY REFERENCES
ANALYZING THE OUTLIER CASES: A REVIEW OF NON-INTELLECTUAL PROPERTY PRELIMINARY RULINGS
AND NONCOMPLIANCE JUDGMENTS
BROADER IMPLICATIONS OF THE DIFFERENCES BETWEEN THE ANDEAN AND EUROPEAN LEGAL
SYSTEMS
CONCLUSION: ENERGIZING THE ATJ'S INTERLOCUTORS

CHAPTER 4: THE DIVERGENT JURISPRUDENTIAL PATHS OF THE ANDEAN TRIBUNAL OF JUSTICE AND

THE EUROPEAN COURT OF JUSTICE

THE ATJ DEMANDS LESS OF MEMBER STATES THAN DOES THE ECJ
DOCTRINAL DIVERGENCES REGARDING THE RELATIONSHIP BETWEEN COMMUNITY LAW AND OTHER
INTERNATIONAL LAW OBLIGATIONS
CONCLUSION: BALANCING RESPECT FOR ANDEAN LAW WITH DEFERENCE TO NATIONAL ACTORS

CHAPTER 5: ISLANDS OF EFFECTIVE INTERNATIONAL ADJUDICATION: CONSTRUCTING AN

INTELLECTUAL PROPERTY RULE OF LAW IN THE ANDEAN COMMUNITY

THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE ANDEAN COMMUNITY
CONSTRUCTING AN EFFECTIVE IP RULE OF LAW IN THE ANDEAN COMMUNITY
WHY ANDEAN LITIGATION HAS NOT SPILLED OVER TO OTHER ISSUE AREAS
CONCLUSION: THE STABILITY OF THE IP RULE OF LAW ISLAND IN CHALLENGING POLITICAL TIMES

CHAPTER 6: THE JUDICIALIZATION OF ANDEAN POLITICS: CIGARETTES, ALCOHOL AND ECONOMIC

HARD TIMES

THE ANDEAN LEGAL SYSTEM PROVIDES MULTIPLE ACCESS POINTS FOR LITIGANTS TO
CHALLENGE REGIONAL AND NATIONAL LAWS AND POLICIES
TOBACCO AND ALCOHOL LITIGATION: FORCING OPEN NATIONAL AND REGIONAL MARKETS
THE ATJ AND MEGA-POLITICS: NATIONAL AUTONOMY DURING ECONOMIC HARD TIMES
CONCLUSION: A JUDICIAL STRATEGY TO NAVIGATE FRAUGHT POLITICAL TERRAINS

CHAPTER 7: THE AUTHORITY OF THE ANDEAN TRIBUNAL OF JUSTICE IN A TIME OF REGIONAL

POLITICAL CRISIS

THE ATJ IN ITS GLOBAL AND REGIONAL CONTEXT
THE PERSISTENCE OF THE ATJ'S DE FACTO AUTHORITY IN THE IP ISLAND DURING THE CRISIS PERIOD

THE ATJ OUTSIDE OF THE IP ISLAND DURING THE CRISIS PERIOD: CHANGING DE JURE AND DE FACTO
AUTHORITY
CONCLUSION: REFLECTIONS ON THE POWER OF THE ATJ IN THE ANDEAN LEGAL SYSTEM

PART III: RECONSIDERING INTERNATIONAL ADJUDICATION IN EUROPE

IN LIGHT OF THE ANDEAN EXPERIENCE

CHAPTER 8: NATURE OR NURTURE? JUDICIAL LAWMAKING IN THE EUROPEAN COURT OF JUSTICE AND THE ANDEAN TRIBUNAL OF JUSTICE

THEORIES OF EXPANSIONIST JUDICIAL LAWMAKING BY INTERNATIONAL COURTS
DOES ACTIVE MEAN ACTIVIST? ECJ AND ATJ LAWMAKING COMPARED
EXPLAINING THE DIVERGENT SUPPLY OF EXPANSIONIST LAWMAKING
CONCLUSION: EXPANSIVE JUDICIAL LAWMAKING AT THE INTERFACE OF REGIONAL LAW AND POLITICS

CHAPTER 9: ADVOCACY MOVEMENTS IN EUROPE AND THE ANDES

WHAT IS A JURIST ADVOCACY MOVEMENT?
FOUNDING NATIONAL EURO-LAW ASSOCIATIONS: 1952–1975
THE IMPACT OF EURO-LAW ADVOCACY MOVEMENTS ON EUROPEAN LEGAL INTEGRATION
LEGAL INTEGRATION WITHOUT JURIST ADVOCACY SUPPORT—THE ANDEAN TRIBUNAL OF JUSTICE
CONCLUSION: DO INTERNATIONAL COURTS NEED JURIST ADVOCACY MOVEMENTS TO FLOURISH?

CHAPTER 10: RECONSIDERING WHAT MAKES INTERNATIONAL COURTS EFFECTIVE

REVISITING TOWARD A THEORY OF EFFECTIVE SUPRANATIONAL ADJUDICATION
CONCLUSION: TOWARD EFFECTIVE INTERNATIONAL ADJUDICATION IN A DEVELOPING COUNTRY
CONTEXT

Chapter 1: Lessons from the Andean Tribunal of Justice: Thirty Years as a Legal Transplant

Most international courts (ICs) today are regional courts, tasked with adjudicating treaties that bind states within a defined geographic area. The first generation of regional ICs was established in Europe—the European Union’s Court of Justice (ECJ) and the Council of Europe’s human rights court (ECtHR).¹ Later regional ICs copied key design features of one of these courts, in effect transplanting a European model of international adjudication to other regions of the world—mostly comprised of developing countries—in which law and politics operate very differently.

This book provides the most in depth analysis to date of a transplanted regional IC. In particular, we investigate the origins, evolution, successes and failures of the Andean Tribunal of Justice (ATJ or the Tribunal), an IC with jurisdiction over a small group of developing states in South America. In addition to analyzing one of the oldest transplanted ICs (now in operation for more than three decades), our study of the ATJ seeks to shed light on the challenges facing regional courts operating in developing country contexts and the strategies their judges use to address those challenges.

In 1979, Andean political leaders added a court to their struggling regional integration project to help improve respect for Andean legal rules. They turned for inspiration to the highly successful ECJ, copying that court’s design features and legal doctrines. The ATJ has since become the world’s third most active IC, with over 2,800 legally binding rulings to date.²

The Tribunal’s impact, however, has been uneven. The ATJ has been strikingly successful in one domain of Andean law—intellectual property (IP)—a subject that accounts for the overwhelming majority of its rulings. In areas traditionally associated with regional integration—such as trade restrictions, non-tariff barriers, and other barriers to the free movement of goods and people—the Tribunal, unlike its European cousin, has been much less active and influential. Yet Andean judges have continued to receive complaints and issue rulings even during periods when ideological schisms sapped political support for the Andean integration as a whole.

Our interest in the ATJ began as a sort of natural experiment. The Andean Tribunal and Andean Pact’s founding charter, the Cartagena Agreement, are very similar to the ECJ and the European Community’s Treaty of Rome. Both tribunals also have very active dockets. Comparing

¹ (Alter 2014, 87-94) We use the original titles for the European Court of Justice (ECJ) and European Community (EC) rather than the present-day Court of Justice of the European Union (CJEU) and European Union (EU) because our comparison between the Andes and Europe focuses on an earlier period of European integration.

² The ATJ issued 2853 rulings from its founding through 2014. In comparison, as of that same date the ICJ had issued 85 judgments in contentious cases and 26 advisory opinions and had denied jurisdiction or admissibility in 26 cases; the WTO dispute settlement system had adopted 201 panel reports and 134 AB rulings; the ITLOS court had issued 18 decisions and 2 advisory opinions. In 2015 the ICC had at different stages of investigation and prosecution 22 cases involving 26 individuals and 9 “situations.”

the two ICs side-by-side allows us to explore judicial institutions with similar structures and doctrines that operate in very different legal and political contexts.

As we learned more about the ATJ, we became interested in a second issue—how the Tribunal has survived and even prospered in a relatively inhospitable climate. The Andean Community has endured numerous travails—years of economic and political instability, armed insurgencies and transborder military skirmishes, and deep ideological differences among its member states. In addition, all Andean countries share the reality that their relationships with non-Andean countries, such as United States, the European Union and China, are more politically and economically consequential than relations with their regional neighbors. The ATJ's resilience despite this ongoing turbulence makes it an important topic for understanding whether and when ICs can shape international law and politics, especially when the going gets tough.

In terms of theory, our study of the Andean Tribunal engages with three strands of legal and political science literature on ICs. First, we consider how the ATJ's thirty-year trajectory has been shaped by its origins as a legal transplant. The Andean officials who created the ATJ hoped to emulate the ECJ's contributions to European integration.³ Yet they also feared that a bold IC, one that fully embraced the European model of expansive judicial lawmaking, might exacerbate political tensions in the region and strengthen the hand of integration opponents. A key contribution of this book is to investigate the extent to which the ATJ has achieved the aspirations of its founders who transplanted an ECJ-style court to the Andes. Chapter 2 analyzes the decision to copy and adapt the ECJ model, and then to revise the ATJ's initial design to more directly emulate the ECJ. Chapter 3 compares the subject matter caseload of the two ICs and their differing relationships with national judges. Chapter 4 explains where Andean judges have followed the ECJ's doctrinal lead and where they have diverged and developed distinctive doctrines tailored to the political realities of the Andean legal system. Chapter 8 investigates the two courts' different penchants for expansive judicial lawmaking, and Chapter 9 investigates the role of jurist advocacy movements in the two regions. The lessons we draw can help us think about the eleven other regional ICs that adopt the design features and legal doctrines of the ECJ,⁴ and about the politics of supranational international legal transplants more generally.⁵ We argue that the ATJ's experience is probably more informative for these other ICs than that of the ECJ progenitor.

The second theoretical contribution is the use of detailed coding and analysis of ATJ rulings to revisit debates about the effectiveness of ICs. Early scholarship on IC effectiveness asked a simple question—do states comply with judgments against them?⁶ For the ATJ, compliance with its preliminary rulings is the norm, while states have mostly ignored the Tribunal's judgments finding them in breach of Andean law. But these simple statistics mask a more complex and multifaceted reality, one that aligns with recent scholarship that distinguishes compliance from

³ On the ECJ's contributions to European integration, see (Weiler 1991, Stone Sweet 2004, Burley and Mattli 1993, Dehousse 1998, Tallberg 2003, Pollack 2003).

⁴ See (Alter 2012)

⁵ (Madsen and Huneus Currently Under Review for publication).

⁶ (Helfer and Slaughter 1997, 282-4)

effectiveness and evaluates the latter by reference to a court's mandate and goals⁷ and the extent to which its rulings lead to "observable, desired changes in behavior."⁸

We had contrasting expectations about the ATJ's effectiveness when we launched our study of the Andean legal system more than a decade ago. Because the Tribunal is modeled on its European cousin, we were not surprised that its docket is dominated by preliminary rulings. Our intuition was that private litigants would not file complaints and national judges would not send references to the Tribunal unless there were economic or other benefits from doing so. The large number of preliminary rulings thus suggested that the ATJ was having an impact on Andean law and politics. On the other hand, considering the region's history of economic and political turbulence, strong presidents, weak judiciaries and fragile rule of law, we thought it highly unlikely that the ATJ could change state behavior to the same extent as had its European counterpart.

The reality revealed by our study lies between these two extremes. The ATJ is effective by any plausible definition of that term, but only within a single issue area—intellectual property—an island that remains isolated from other areas of Andean law, where the Tribunal is underutilized and mostly ignored. Equally as surprising, although national courts send many preliminary references to the ATJ, the predominant domestic support for the Tribunal has come not from national judges but from the IP administrative agency officials who actively seek out the ATJ's guidance on unsettled issues of Andean IP law. This is revealed in our analysis of the ATJ's interlocutors (Chapters 3 and 5), in our analysis of how the Tribunal has navigated four politically fraught cases (Chapter 6), and in our exploration of the lack of an Andean jurist advocacy movement (Chapter 9).

Our book also contributes a new dimension to the study of IC effectiveness by analyzing the ATJ's resilience during times of political turmoil. Since Venezuela's exit from the Andean Community in 2006, the member states have been divided between two neoliberal-leaning governments (Colombia and Peru) and two leftist-populist regimes (Bolivia and Ecuador). This ideological schism has blocked all meaningful advances in regional integration and diminished support for Andean institutions. In some respects, in fact, the Community has moved backward over the last decade, as reflected in the abrogation of the common external tariff in 2015, discussed in Chapter 7. Yet the deep relationship between the Andean judges and domestic IP administrators has sustained and protected the ATJ during this period of crisis. Moreover, the Tribunal has remained a viable judicial forum even for high-stakes noncompliance suits, although one such suit—a challenge to Ecuadorean President Rafael Correa's extensive violations of Andean free trade rules—risks exacerbating the current crisis and may call into question the survival of the Andean Community, and thus the ATJ (Chapter 7).

These findings have important implications for the effectiveness of other ICs. Regional courts in the developing world operate in challenging environments that more closely resemble those in the Andes than those in Europe. The judges on these fledgling courts are struggling to overcome major legal and political hurdles to removing regional trade barriers, creating a common market and protecting human rights. As discussed in Chapters 8 and 10, the

⁷ (Shany, 2014; Helfer, 2014)

⁸ (Raustiala 2000, 393-4)

ATJ's experience suggests that even if ICs cannot fully overcome these challenges, cultivating and maintaining the support of a core domestic constituency may be necessary both for effectiveness and for survival in tough political times.

A third theoretical contribution of our Andean research relates to a recently developed framework for analyzing the variable authority of international courts. Our revisions to this book coincided with a project we co-directed that explores variations in the creation, expansion and dissipation of an IC's de facto authority. This framework enables comparative assessments of IC authority along multiple dimensions—between tribunals, over time, across issue areas, and in different countries—and evaluates how different institutional, political, social and other contextual factors shape IC authority.⁹ In this book, we apply the authority framework to analyze how the wider geopolitical context in which the Andean Community is situated helps to explain the changes to the ATJ's authority during the last decade of political turbulence. The authority framework also helps us to conceptualize the difference between an IC's legal authority and its political power, an issue we explore in Chapter 7 and Chapter 10, the conclusion.

In addition to considering the ATJ's contributions to these three theoretical debates, this book provides an opportunity to revisit our own scholarship. Our previous work, written separately, focused on the ECJ and the ECtHR—two ICs that have issued thousands of judgments, many of which have boldly and expansively developed regional law, significantly changed the behavior of governments and profoundly reshaped the law and politics of European integration and human rights protection. Emphasizing the importance of compulsory jurisdiction, private access provisions and direct effect to explain the relative success of Europe's two ICs, our earlier publications implicitly suggested that replicating these key design features could lead to similar outcomes by other tribunals.

Karen Alter launched her career by studying how the ECJ convinced national judges to accept its authority. Her first two books, *Establishing the Supremacy of European Law* (2001) and the *European Court's Political Power* (2009), explore variation in the ECJ's political influence over time, within member states, and across issue areas. Our coauthored comparison of the Andean and European experiences led us to reassess Alter's earlier understanding of EC legal integration. In particular, superficial similarities between the two institutions—the predominance of national court references on both courts' dockets, the common assertion of the direct effect and supremacy of Community law, and the ATJ's frequent citations to ECJ rulings—are belied by a more complex reality. Whereas in Europe private actors have invoked a broad range of European law to challenge national policies and practices, in the Andes private litigant primarily invoke Andean IP law. In addition, the ATJ's mostly timid and formalist interpretations of Community rules diverges from the ECJ's bolder, purposive approach. These surprising findings led us to reconsider whether mobilization in favor of ECJ litigation was as spontaneous as prevailing theories had suggested, and whether all ICs are expansionist judicial lawmakers. This questioning is reflected in the conclusion of Chapter 3 on the ATJ's interlocutors, and in Chapter 8's comparison of the two court's

⁹ The project was spearheaded by iCourts, the Danish National Research Foundation's Center of Excellence for International Courts, based at the University of Copenhagen Faculty of law. It is published as: (Alter, Helfer, and Madsen 2016, 2017)

lawmaking across time, and in Chapter 9’s discussion of the importance of jurist advocacy movements.

Laurence Helfer, writing with Anne Marie-Slaughter in 1997, published *Toward a Theory of Effective Supranational Adjudication*, a pioneering study of the ECtHR and ECJ.¹⁰ Helfer and Slaughter examined the success of both European tribunals, explained the importance of private litigant access to that success, identified a checklist of factors associated with effective adjudication in Europe, and considered the prospects for building a broader community of law to support such adjudication elsewhere. In the ensuing years, states have created new global and regional courts and quasi-judicial review bodies in human rights, criminal law, international economic law, and the law of the sea. The dockets of many of these institutions are growing, mainly in response to suits by private litigants and other non-state actors. A deep study of the ATJ—the third most active IC by number of rulings and one of the oldest regional judicial body outside of Europe—provides an opportunity to revisit Helfer and Slaughter’s theory of effective international adjudication in the context of developing countries characterized by weak domestic judiciaries, limited protection of individual rights, and less deeply embedded commitments to the rule of law. This reassessment is the subject of Chapter 10.

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The remainder of this chapter situates our study of the Andean Tribunal as an international legal transplant. The next section provides an overview of Andean and European integration and the role of the ATJ and ECJ in the two regional integration processes. We also explain the decision to compare the ATJ’s first twenty-five years of operation (1984-2007) to the ECJ’s first quarter century (1958-1983), supplemented by an analysis of seven additional years of litigation and legal and political developments in the Andean Community. We then identify five key findings that have general relevance to the comparative study of IC authority and power. We conclude with a roadmap of the book that explains the issues analyzed in each chapter and previews the chapter’s major findings. The book’s conclusion focuses more broadly on the ATJ as the most successful ECJ transplant, drawing lessons for other ICs operating in developing country contexts.

Comparing Staggered Twenty Five-Year Periods of International Adjudication: The ECJ (1958-1983) and the ATJ (1984-2007)

Throughout this book, we compare and contrast the experiences of the Andean Tribunal to the ECJ, the judicial body on which it was modeled. Our comparative analysis encompasses several dimensions, including institutional design, legal doctrine, judicial lawmaking, and impact on regional and national law and politics.

Our decision to examine the two courts side by side raises a methodological challenge. The ECJ is an older institution than the ATJ, one that operates in a far more favorable legal and political environment than its junior cousin in the South America. It would thus be

¹⁰ (Helfer and Slaughter 1997). Chapter 10 will update this analysis, and explain the switch from a focus on “supranational” to “international” courts.

misleading to evaluate the two courts over their entire lifespans, or to investigate each court's activities in the same calendar year.

To address these concerns, we focus our comparison on roughly the first quarter century of each tribunal, two staggered twenty-five year time periods—1958-1983 for the ECJ, and 1984-2007 for the ATJ—during which the two courts faced a number of similar challenges.¹¹ We also include data and analysis of the next seven years of ATJ activities to highlight the two courts' divergent trajectories during a period of political crisis within the Andean Community.

To situate this comparative analysis, we first provide an overview of the early years of the Andean and European integration projects. We then explain how we selected the beginning and end points for each staggered time period. We conclude by briefly contrasting the marked divergence of the two Communities and their respective courts after these periods of comparison.¹²

Andean integration project was launched in 1969 when the small and underdeveloped nations on the mountainous western edge of South America formed a regional pact to promote economic growth, regulate foreign investment, and harmonize national laws. The fundamental drivers of Andean integration have remained the same over time. Andean states have relatively small economies and are deeply dependent on trade with richer and bigger countries in Latin America, the United States and elsewhere. Political leaders in the region believed that integration would make Andean markets more attractive to investment and trade. They also sought to benefit from adopting collective solutions to shared problems, as well as the added leverage of presenting a united front when negotiating with larger trading partners. Although governments have often disagreed about the substance of Andean policies and the strategies to achieve them, they continue to assert that integration is desirable for these reasons.¹³

For its first sixteen years of existence (1968-1983), the Andean Pact did not include an international court. Although political leaders expressed a long-term desire to build a common market for which a judicial body might have been helpful, their more pressing goal was to speed the region's economic and industrial development. The principal policy instrument they adopted—import substitution—sought to replace expensive imported goods with local substitutes whose production would generate jobs across the region. The Pact also heavily regulated foreign investment with the goal of transferring technology from foreign firms to local producers and retaining profits within the region. As we later explain, these policies soon floundered, and the resulting flouting of Andean rules was one of the motivations for creating the Tribunal. We do not dwell on this early period, however, since our focus is on the origins and evolution of the ATJ.

¹¹ We recognize, of course, that there are many significant differences between the two regional integration projects. The Andean Community today has four small member states that together are less than one-fifth the population of the EU. Their economies are less developed and tiny by comparison. In addition, terrain in the Andes is rugged and regional infrastructure is under-developed, creating significant logistical barriers that hinder intra-Community trade and industrial growth.

¹² The European Community grew from six members in 1958 (France, Germany, Italy, Luxembourg, the Netherlands, and Belgium) to nine in 1973 (when the United Kingdom, Ireland, and Denmark joined) to ten members in 1981 (when Greece joined). Spain and Portugal joined the EC in 1985. During most of the period that we study, the Andean integration project had five member states. The original Andean Pact included Bolivia, Chile, Colombia, Ecuador, and Peru. Chile withdrew in 1976. Venezuela joined in 1973 and withdrew in 2006.

¹³ For more on the origins of the Andean Pact and the ATJ see (Saldias 2014, 84-97)

European integration began with the Schuman Plan of 1950, a proposal to put Germany's coal and steel industries under collective supranational management. The European Coal and Steel Community, formally constituted in 1952, included a Court of Justice. The ECJ's role in this Community was to review actions and omissions of the supranational High Authority and to facilitate uniform interpretation its rules and regulations.¹⁴ The six original member states enlarged the ECJ's jurisdiction in 1958 with the founding of the European Economic Community.¹⁵

We thus begin our staggered comparison of the two courts at the point in each regional integration project when international judges acquired the authority to interpret their respective Community's founding charters—the Treaty of Rome and the Cartagena Agreement. For the ECJ, this date is 1958; for the ATJ is it 1984.

As originally drafted, the Treaty of Rome and the Cartagena Agreement were similar in content and goals. Both instruments created supranational governance structures and set out a framework for building a common market. In Europe, these structures included the European Council of Ministers, a legislative body comprised of national executives that adopted legally binding regulations and directives, and the European Commission, a supranational institution tasked with proposing and overseeing the implementation of Community rules.

The Andean Pact emulated these European institutions using different names for analogous bodies. The Andean *Comisión*, comprised of national executives from each of the member states, adopted Andean secondary legislation (known as *Decisiones*) that were directly applicable in national legal orders. A regional executive body, the *Junta* (later the restructured and renamed the General Secretariat), supervised the implementation of those *Decisiones*. The Treaty of Rome also contained a chapter defining the ECJ's jurisdiction, subject matter competences, and access rules. These provisions were absent from the Cartagena Agreement. However, the 1979 Treaty establishing the ATJ, which was closely modeled on the Treaty of Rome's articles pertaining to the ECJ, completed the suite of Andean governance institutions.

In terms of substantive obligations, the two Communities' founding charters prohibited governments from imposing new barriers to intra-regional trade and required national treatment of goods from other member states. The treaties also provided for the phased removal of tariff and nontariff barriers via secondary legislation—regulations and directives in the EC; *Decisiones* in the Andean Pact. In both regions, these timetables proved to be overly optimistic and states later extended them.

In addition to formal similarities in institutional architecture and substantive rules, the European legal system of the early 1960s and the Andean legal system of the mid-1980s faced comparable practical challenges. Although sometimes forgotten today, the European integration project was, in its early years, widely viewed as precarious and unlikely to succeed.¹⁶ Reviews of Andean integration in the 1980s expressed similar skepticism. Governments continued to exempt

¹⁴ (Boerger-De Smedt 2008)

¹⁵ For more on how the ECJ's jurisdiction and mandate changed in this shift, see: (Alter 2001, 5-11)

¹⁶ France's De Gaulle refused to accept a shift to qualified majority voting, using his 'empty chair policy' to block all community decision-making until his terms were met. In the 1960s and 1970s, European governments showed little appetite for European integration. See: (Dinan 2004, 104-164) (Hoffmann 1966, 863-4)

many economically important industries from the Andean Free Trade Program,¹⁷ and the Latin American debt crisis late in the decade created pervasive economic instability that brought the Andean integration project to the brink of failure.¹⁸

For ECJ and ATJ judges, the tenuous political foundations of the two integration schemes raised a daunting question—how to attract the cases needed to establish their legal authority? In their early years, both courts faced wide variations in the willingness of national judges in different member states and at different levels of the judicial hierarchy to refer cases involving issues of Community law. Both tribunals capitalized on the opportunities of the early cases that did arrive, adopting rulings that were doctrinally important but whose political significance was not immediately apparent.

Both the ECJ and ATJ were similarly active during their first twenty-five years. The ECJ issued 305 noncompliance judgments and 1,808 preliminary rulings (an average of 86.1 cases per year). The ATJ, part of a much smaller geographic, demographic and economic region, issued 85 noncompliance judgments and 1,338 preliminary rulings between 1984 and 2007 (an average of 71.5 per year).¹⁹

As the legal and political significance of these decisions became apparent, both courts attracted repeat players—legal entrepreneurs who sought out cases to promote regional integration.²⁰ Many of these private litigants urged both courts to overcome the political impediments to integration with teleological interpretations of Community legal rules. The ECJ responded with a series of bold and expansive decisions that were influential in advancing the EC's goals. The ATJ was more modest, declaring violations of Andean rules where the judges discerned a political commitment to common policies but otherwise giving broad deference to national governments.

Our period of comparison ends in Europe in the mid-1980s when a crisis in the European Monetary System led France to commit to deeper regional integration.²¹ France's move paved the way for national political leaders to adopt the Single European Act of 1985, an overhaul of the EC that established a fully functioning common market and a long-delayed shift to qualified majority voting.²² The Single European Act also increased the pace and scope of regional integration, triggering an expansion of EC secondary legislation, the vigorous pursuit of noncompliance actions by the Commission to push states to implement that legislation, and a marked rise in ECJ litigation by private actors.

¹⁷ (Avery and Cochraine 1973, Vargas-Hidalgo 1979)

¹⁸ (O'Keefe 1996)

¹⁹ ECJ data from (Stone Sweet 2004, 72-9) Stone's data covers 1960-1985. The Andean data is from Chapter 4 in this book, which also provides a more complete comparison of litigation patterns.

²⁰ On the role of repeat players in ECJ litigation, see Mattli and Slaughter 1998, 186-89; Rawlings 1993. ATJ repeat players include firms in the aluminum and alcohol sectors, pharmaceutical companies and businesses with lucrative trademarks in the area of IP, and importers and exporters subject to Andean taxes.

²¹ (Parsons 2003, 149, McNamara 1998, Chapter 6, Moravcsik 1998, Chapter 4)

²² (Moravcsik 1998, chapter 5)

In the Andes, the twenty-five year period ends in 2007, the effective date of Venezuela's departure from the Andean Community. By this time, the regional consensus in favor of economic liberalization and free trade had badly fractured. Two states—Colombia and Peru—remained mostly committed to these policies and pursued free trade deals with the United States and Europe. The election of three populist presidents—Hugo Chavez in Venezuela in 1999, Evo Morales in Bolivia 2005, and Raphael Correa in Ecuador in 2006—created a tense political climate that impeded further advances in integration. The final break came in 2006, when Venezuela withdrew from the Community after Colombia and Peru announced that they would enter into bilateral free trade agreements with the United States.

These two dates—1985 in Europe and 2006 in the Andes—mark the point when the two regional integration projects diverged sharply. The EC continued to take bold steps toward building a single market and a closer economic union. In South America, the political and ideological schisms among the four remaining member states and a focus on other regional cooperation schemes—most notably Mercosur and UNASUR—sapped political support for the Andean integration project and Community institutions.

The trajectories of two regional ICs also diverged after these dates. In Europe, the creation of the Tribunal of First Instance in 1988 doubled the capacity of European judges to adjudicate cases. Additional reforms followed in response to the shift from the EC to the European Union and the expansion into Eastern Europe—events that added fresh complaints and new subject matter competences to the ECJ's docket.²³

For the ATJ, the decade following Venezuela's departure is best described as a struggle to maintain the status quo in the face of growing political turbulence. Preliminary references involving IP registrations remained the bread and butter of the Tribunal's work. But referrals involving other areas of Andean law increased modestly, and ATJ judges cultivated relationships with new domestic partners, including the Peruvian and Bolivian IP agencies and a new specialized IP court in Peru. Suits alleging noncompliance with Andean law, however, all but vanished from the Tribunal's docket. Given the wider political turmoil in the Community, is remarkable that the rule of law island for IP disputes that the ATJ helped to build has survived.

Lessons Learned from Studying the Andean Tribunal

Our study of the ATJ adds to a flourishing literature on comparative international courts. Scholars have comprehensively analyzed a small number of these judicial bodies, most notably the ECJ, the ECtHR, WTO dispute settlement system and the Inter-American Court of Human Rights. We know far less, however, about the other twenty international tribunals operating in the world today, even as their dockets are growing.

Our contribution to this body of knowledge draws upon a rich variety of sources. Working over a decade with the help of research assistants, we coded and analyzed most of the ATJ's more than 2,800 decisions. We made four trips to the region and conducted more than fifty interviews in Spanish and English with government officials, lawyers, national and Andean judges,

²³ These reforms are summarized in (Alter 2014, 86)

and Community officials. Our investigations in the Andes were also shaped by our research and field work on the two European tribunals, as well as other ECJ-style transplants in West, East and Southern Africa, and the differently-structured integration systems in MERCOSUR and ASEAN.

We highlight below five broad lessons from our research and findings that contribute to the comparative study of international courts.

Adapting transplanted international legal institutions to local contexts

Our book provides new evidence to evaluate theories about transplanted legal institutions. The literature on legal transplants, discussed in Chapter 2, indicates that slavish copies of existing legal institutions are likely to be ignored or resisted by local actors. This is especially true of transplants in developing countries, whose officials often adopt formal institutions and laws in response to pressure from multilateral organizations, foreign donors, and trading partners. This institutional mimicry may appear significant on paper, but it often occurs without any meaningful change in actual practices.

In contrast, scholars find that efforts to adapt legal institutions to local contexts helps transplants take root. Modifications of a preexisting template often reflect efforts by proponents of importation to respond to local actors' needs. The decision to add an ECJ-style court to the Andean integration project supports this finding. National political leaders added sovereignty-protective elements to the ECJ model, limiting which noncompliance suits that the Andean *Junta* could investigate as well as the guidance that the ATJ could provide in preliminary rulings. They later discovered, however, that these modifications undermined the ability of the Andean legal system to induce compliance with Community rules.

Most studies of legal transplants take a single snapshot of an imported institution, usually at or close to the moment of transplantation. Our analysis of the ATJ reveals this focus to be incomplete. The willingness of political leaders to revisit initial transplant decisions—often years later—provides an opportunity to assess how well a transplant has grafted onto the local context and to revise the original model in light of experience.

The first cohort of Andean judges faithfully adhered to the original ATJ Treaty. They rejected invitations from litigants to adopt ECJ-style purposive interpretations of the Cartagena Agreement to overturn political compromises that impeded the broader goals of Andean integration. The ATJ's circumspection helped to build trust with national governments, and with that trust came a greater willingness to expand the Tribunal's mandate. When governments overhauled the Andean legal system in the mid-1990s, they also restructured the ATJ, granting private litigants the ability to file noncompliance suits with the Tribunal and authorizing judges to examine the facts of preliminary rulings. These changes contributed to the increasing activity and influence of the Andean Tribunal over the next decade.

Not all international courts seek to expand their influence and authority

All international courts are called upon to adjudicate cases in which the applicable legal rules do not, on their own, clearly dictate the outcome of the dispute. In this limited sense, all

international judges are lawmakers, and such lawmaking is generally uncontroversial and even welcomed. The ATJ is no exception.

Yet some international courts do more, identifying new obligations or imposing constraints on states that have little if any basis in legal texts or the intentions of their drafters. Both the ECJ and the ECtHR regularly engage in such expansive judicial lawmaking. Because much of the early literature on international courts focused on these two longstanding tribunals, many commentators assumed that all international judges are predisposed to expand their influence and authority.

This assumption has been called into question as our knowledge of other international courts has expanded. The WTO Appellate Body and panels, for example, adhere closely to treaty texts, often favoring dictionary definitions of key terms over contextual or purposive interpretations. And recent studies of courts in East and West Africa reveal that international judges rarely expand the law or demand that governments adopt major policy change. Instead, the judges on these courts are generally circumspect in their interpretive approaches and in the remedies they award to successful litigants.²⁴

Our study reveals that the Andean Tribunal is situated closer to the latter group of more restrained international courts. This finding is theoretically interesting not only because the ATJ is modeled on the bolder and more audacious the ECJ, but also because we identify specific instances when Andean judges had clear opportunities to emulate their European colleagues but consciously chose not to do so.

We do not suggest that the ATJ has never engaged in lawmaking. For example, the Tribunal's earliest rulings unequivocally asserted the direct effect and supremacy of Andean secondary legislation in national legal orders. But these assertions were part of the bargain that national political leaders agreed to when they created the Tribunal. When later cases provided an opening to take the next steps in building legal integration, Andean judges pulled back. As we explain in Chapter 4, they either copied ECJ doctrines in form but not in substance or eschewed those doctrines altogether in favor of local alternatives—such as the *complemento indispensable* principle—that give greater deference to national decision-makers.

We also analyze the ATJ's default preference for legal circumspection and explain why that formalist approach may well be appropriate for the politically fraught context in which the Tribunal operates. Circumspection implies a strict textual adherence to legal rules, even if judges dislike the normative or political implications of such interpretations. Since this approach reflects a similarly cautious conception of adjudication held by national judges in the Andes, this legal formalism increases the palatability of ATJ rulings to local legal audiences.

The predominance of formalism in the region also means that, unlike their counterparts in Europe, national courts in the Andes rarely refer bold or provocative questions to the ATJ even when pressed to do so by private litigants. Instead, they often pose the same questions in case after case, knowing in advance what the ATJ's answer will be. To outsiders, this repetition may appear pointless and inefficient. It also sometimes frustrates attorneys who participate in Andean litigation. Yet as we explain in Chapter 5, formalism and repetition served an important

²⁴ (Alter, Helfer, and McAllister 2013, Gathii 2016)

purpose. They habituated respect for legal rules so that when politically contentious cases later arose, legal actors could defend their decisions by invoking longstanding and deeply entrenched rules and procedures.

The larger theoretical point is that circumspection may be more prevalent than early scholarship on international courts assumed. In particular, formalist reasoning may be a prudent strategy for tribunals that face legally and politically inhospitable environments. By scrupulously adhering to their delegated powers, international judges may survive long enough to gain a toehold of support among litigants who challenge unequivocal legal violations that fall within their jurisdiction. If the Andean experience is any guide, future studies should thus not assume that international judges either seek out or inevitably capitalize on opportunities to expand their authority and influence.

Expanding the interlocutors and compliance partners of international courts

The first generation of scholarship on international courts—including our own early writings—emphasized the links between national and international judges in activating international litigation and providing a mechanism for compliance with international court rulings. To be sure, not all such relationships have been mutually supportive or beneficial. Karen Alter analyzed the resistance of some national courts in Europe to referring cases to the ECJ and to accepting foundational EC legal doctrines.²⁵ In a different part of the world, Laurence Helfer attributed the backlash against human rights treaties in several Caribbean countries to negative interactions between national and international judges over challenges to the death penalty.²⁶ Yet most scholars have long presumed the centrality of court-to-court relationships to the success or failure of international adjudication.²⁷

Our extensive study of the ATJ reveals that this view is inaccurate in at least two respects. First, the Andean Tribunal's primary interlocutors and compliance partners are not national courts but domestic administrative agencies that review applications for IP protection and regulate other market subjects. The agencies' trademark and patent registration decisions account for the overwhelming majority of ATJ preliminary rulings. Agency officials actively consult and apply the Tribunal's interpretation of Andean IP *Decisiones*, offer advice on revising those *Decisiones*, and seek out the ATJ's guidance by encouraging national courts to refer cases. This close relationship has also helped the ATJ survive skepticism by national judges, and structural reforms of national legal systems in Venezuela and Ecuador.

The Tribunal, attuned to the interests of its principal audience, recently overturned its past practice and now hears cases referred directly from administrative agencies. Direct references bypass appeals to national courts. They also reduce the time and expense of ATJ litigation for private businesses, and enable Andean judges to be more responsive to requests for interpretive guidance from the IP agencies.

²⁵ (Alter 2000)

²⁶ (Helfer 2002)

²⁷ For example, see (Alter 1998, Nollkaemper 2011)

Meanwhile, as we explain Chapter 3, most national judges in the Andean Community at first resisted sending preliminary references to the Tribunal. Their opposition stemmed in part from a belief that their “independence and exclusive judicial function,” to quote a decision of the Supreme Court of Peru, would be infringed by surrendering interpretive power to a tribunal outside of the national judicial hierarchy.²⁸ But the courts’ resistance can also be attributed to the absence of jurist advocacy movements—groups of pro-integration attorneys, self-interested litigants, legal academics and government officials who banded together to educate national judges about the Andean legal system and actively promote references to the ATJ to build integration through law.

The importance of jurist advocacy movements to the effectiveness of international adjudication is the second corrective insight offered by our study of the Andean Tribunal. As discussed in Chapter 9, the conventional explanation for the ECJ’s success in building integration through law is the pursuit of self-interest by private litigants and judges. This explanation overlooks the crucial support that national Euro-law associations provided to the fledgling ECJ, by providing test cases, serving as the ECJ’s kitchen cabinet, building support for the ECJ’s bold doctrinal moves, and creating an impression that integration was gaining acceptance in national legal orders.

The absence of similar jurist advocacy networks in the Andes helps to explain why sporadic efforts by pro-integration legal entrepreneurs to increase the ATJ’s profile and influence never gained traction. The broader lesson is that future studies of why international adjudication succeeds or fails should look beyond the formal connections between national and international judges and the atomistic pursuit of self-interest by attorneys and litigants. Equally if not more important may be other public and private bodies—such administrative agencies, national human rights institutions, bar associations and social movement organizations—whose members mobilize, whether openly, behind the scenes or both, to support or oppose international courts.

Judicial strategies for building the international rule of law in fraught environments

The ATJ created an island of effective international adjudication for IP disputes in an environment that is fraught in at least three respects. First, Andean countries have experienced multiple waves of economic, political and social instability since the Andean Pact’s founding in 1969. The resulting turbulence has whipsawed Andean-level policies and led to a major overhaul of regional institutions in the 1990s. Second, Andean countries lack strong domestic rules of law or longstanding commitments to judicial independence. Laws and institutions on the books have often been ignored in practice, and executives in several states maintain tight control over judicial appointments and promotions. Third, progress in the Andean Community has faltered over the past decade. National political leaders remain bitterly divided over whether to continue Andean integration or dismantle it and pursue other regional cooperation projects.

Most observers would expect an international court faced with these unfavorable conditions to have little if any impact. Where political connections and corruption are endemic, individuals and firms are often dubious of invoking domestic legal rules and institutions, let alone

²⁸ The Peruvian Supreme Court’s decision is discussed in Resolution 771, General Secretariat Noncompliance Decree No. 173-2003.

placing their trust in a distant tribunal that oversees an unfamiliar legal system to which governments are only sporadically or half-heartedly committed. Yet these difficult conditions more closely resemble those confronting most international courts today—especially courts in developing countries that are modeled on the ECJ and ECtHR—than the far more supportive legal and political contexts in Europe on which many theories of international adjudication are based.

How do international judges operate in such challenging environments? The ATJ's experience suggests several plausible answers. First, the ATJ has developed interpretive techniques to avoid direct confrontation with political actors. For example, Chapter 4 discusses the *complemento indispensable* doctrine which the ATJ has applied to allow governments set the pace and scope of Andean integration. Where Andean law is unequivocal, the Tribunal will enforce it in full. But the ATJ allows the member states to legislate in areas not governed by Andean law so long as national legislation does not directly conflict with Andean *Decisions*.

Second, the ATJ has built alliances with the IP legal community. Intellectual property is generally viewed as a complex and technical subject by non-specialists. Chapter 5 explains how IP came to be regulated by Andean law, and why local IP stakeholders preferred to have Andean bodies interpret this law. Because national administrators and litigants repeatedly requested preliminary references of IP cases, the ATJ was able to elicit the support of national judges for such referrals. The Tribunal has maintained this support despite changes in national judicial systems and even when government enthusiasm for Andean integration has waned.

Third, the ATJ has occasionally benefitted from the efforts of judicial entrepreneurs. These rare individuals stepped out of a judge's traditional role to promote the Tribunal and actively cultivate a wider network of supporters. Chapter 7 discusses a number of judicial entrepreneurs who at different times provided opportunities for the ATJ to rule, or helped overcome judicial and political resistance.

Our in-depth investigation of the ATJ's thirty-year history suggests that scholars who study other international courts should investigate other examples of facilitating or impeding circumstances and judicial entrepreneurship—combinations that can enhance or reduce a court's visibility, catalyze or impede the flow of cases and augment or diminish the impact of its decisions. We return to this subject in Chapter 10, the book's conclusion, where we discuss the broader lessons of our study of the ATJ for the effectiveness of international courts more generally.

Defending regional IP laws that protect local values and interests

Intellectual property laws are usually adopted at the national level, influenced by the requirements of multilateral IP treaties and by pressure from countries with powerful IP industries, especially the United States and Europe. In the Andes, however, IP rules are collectively negotiated and adopted at the supranational level.²⁹ These Andean *Decisiones* have direct domestic effect, so that Andean IP law *is* national law. Chapter 5 will explain how the ATJ and national IP agencies built an island of effective supranational adjudication. Of interest to scholars of IP is how the ATJ-agency relationship has helped to develop and retain a distinct set of IP rules in the region.

²⁹ Governments can supplement Andean IP legislation with complimentary national laws and regulations pursuant to the indispensable complement doctrine, a topic we explore in Chapter 4.

As we explain in Chapter 5, Andean governments restructured national IP agencies as part of the neoliberal reforms of the “Washington Consensus.” This restructuring including adding consumer protection, competition, bankruptcy, and other market regulation subjects to the agency’s purview. In applying this wider mandate, the agencies sought to balance IP protection against other public values and policy goals. For example, Andean IP agencies worry that consumers may be confused by similar trademarks. They have thus adopted legal doctrines to avoid such confusion, including carefully scrutinizing coexistence agreements and claims that a mark is famous and thus protectable across the Community, and permitting the owner of a trademark registered in one Andean country to oppose an application by a third party to register a confusingly similar mark in another Andean country.³⁰ The agencies also assist indigenous communities and small and medium enterprises—actors often left out of the IP system—to protect their intellectual know-how using collective trademarks and distinctive signs.³¹

The IP rule-of-law island has also created an institutional space to resist powerful foreign interests that have pressured individual Andean governments to defect from regional IP legislation and adopt stronger IP protection standards. International IP treaties such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) permit ratifying states (especially developing countries) to tailor IP protection to other important societal objectives. The Andean countries have capitalized upon the flexibility provisions in TRIPS by making a collective decision to limit IP protection—especially drug patents, pharmaceutical test data, and certain trademark rights—to promote public health, reduce local drug prices, and protect consumers.

When the United States, pharmaceutical firms, and some trademark owners pressured Andean officials to provide stronger IP protection than Andean law allows, the ATJ provided a hospitable forum for generic drug companies and other opponents of such protection to challenge these efforts as contrary to regional rules. The backing of the ATJ also provided cover for domestic IP agencies and some national courts to reject arguments for expansive protection made by foreign IP rights holders. As a result of these developments, Andean law today retains limitations on patents and trademarks that many other developing countries have abandoned in the face of pressure from the United States and foreign IP industries. Our findings in Chapter 5 should thus be of particular interest to policymakers and scholars interested in the ongoing contestations over international and domestic IP law.

A Roadmap of the book

We began our collaboration ten years ago with a shared interest in understanding the ATJ’s surprisingly high litigation rates and the predominance of intellectual property cases on the Tribunal’s docket. This book consolidates, deepens and augments our previously published studies with updated research, case coding and interviews.

³⁰ Barreda Moller, Advantages of Andean trademark system from a Peruvian perspective, Lexology (Oct. 28, 2014), <http://www.lexology.com/library/detail.aspx?g=46778d51-d30e-4739-ae1-ae6c6203cb69>.

³¹ INDECOPI (Peru): The Promotion of Marks and Other Distinctive Signs to Compete in the Market, http://www.wipo.int/sme/en/best_practices/peru.htm.

The Andean legal system continues to surprise us. Although the Community is undergoing a major crisis, the IP island of effective international adjudication has remained remarkably resilient—the total output of ATJ decisions has doubled, and the number of non-IP rulings has also increased. Our updated and expanded analysis thus raises an important new question—can an international court survive or even flourish when the states subject to its jurisdiction are questioning the very foundations of the legal integration enterprise that is the court’s *raison d’être*?

Most of the chapters in this book began as freestanding articles, each of which explores a different aspect of the ATJ’s origins, evolution, and survival. We edited our earlier publications, cross-referencing to material covered elsewhere in the book to avoid repetition. Where relevant, we updated the analysis to reflect developments occurring in the last seven years. Each chapter engages the legal and political science literatures relevant to the questions posed in that chapter. We also added four new chapters, including this introduction. The roadmap below guides readers through the chapters, highlighting our updated and revised findings and identifying areas for future research.

Chapter 2, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, explains why national political leaders decided to add a court to their integration project. After considering a variety of options, governments chose to model the Andean Tribunal on the ECJ. But they did not slavishly copy the ECJ’s design features and legal doctrines. Instead, they selectively adapted those that were appropriate to the more sovereignty-protective Andean context, preserving greater state control over the Tribunal and its role in interpreting regional legislation. Chapter 2 explains why these original adaptations later came to be seen as undermining the effectiveness of the Andean legal system and why, in a 1996 revised treaty, member states revised the institution to bring the ATJ jurisdiction and access rules closer to those of its European predecessor.

Our theoretical objective in Chapter 2 is to explore systematically how the decision to copy and adapt the ECJ model affected the ATJ’s subsequent trajectory. To achieve this goal, we engage with the literatures on legal transplants, neofunctionalism, and the global diffusion of ideas about European integration. We find the legal transplant literature to be the most useful, but we also explain how the politics of international judicial transplants differs from imports and exports of domestic legal institutions.

Chapter 3, *The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, presents data on national court interactions with the Andean Tribunal. We analyze case referral patterns from each of the five member states and discuss cross-country variations. We also explain the resistance of some national courts to referring cases and how that resistance was eventually overcome. Chapter 3 also highlights the fundamentally different nature of the ATJ’s relationships with national judges as compared to the analogous relationships in the EC. In Europe, the symbiosis between the ECJ and national courts helped to build integration through law. In the Andes, effective international adjudication is mostly an island confined to intellectual property disputes. Domestic administrative agencies that review IP applications are the ATJ’s primary interlocutors and compliance partners; national judges have remained largely passive intermediaries.

We significantly revised our previously published research to take account of developments after our analysis ended in 2007. The changes in the ensuing years are substantial—a doubling of national court references, a tripling of cases concerning legal issues other than IP, and ATJ rulings that encourage references from new judicial and administrative interlocutors. We also expanded the scope of our investigation. Our original research focused on preliminary references. For this update, we investigated whether private litigants challenged national laws via the Andean noncompliance procedure. We find considerable evidence to support this claim from our analysis of noncompliance cases. Chapter 6 further explores the interplay of preliminary ruling and noncompliance suits by litigants challenging arguably illegal national laws and policies.

Chapter 4, *The Divergent Jurisprudential Paths of the Community Courts in Europe and the Andes*, explains how the ATJ has significantly diverged from several foundational integration law doctrines developed by the ECJ. Our updated analysis discusses how the ATJ refined the *complemento indispensable* principle—a doctrine that permits national laws and regulations to implement and fill gaps in Andean *Decisiones*—to more clearly delineate the boundary between Community and national legal authority and to uphold the primacy of clear Andean rules. The ATJ has also asserted the supremacy of Andean law over conflicting bilateral and multilateral treaties, and accepted preliminary references from administrative agencies and arbitral panels. In addition, the Tribunal has for the first time addressed human rights, stating, albeit in dictum, that governments must prioritize the socio-economic rights of Community citizens over free trade and integration rules.

Chapter 5, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, explains how the ATJ became both active and effective with respect to IP disputes, and why IP remains an island of effective adjudication that has not expanded to other areas of Andean law. We describe the ATJ's interactions with the domestic administrative agencies responsible for IP and explore how the Tribunal's rulings shaped agency decisions and procedures to bolster adherence to the rule of law.

Chapter 5 also documents how the relationship between Andean judges and agency officials enabled the Tribunal to confront national governments under pressure from the United States and multinational drug companies to violate Andean law. We demonstrate that Andean IP rules, especially those relating to pharmaceutical patents, differ from those elsewhere in Latin America due largely to the Tribunal's defense of public health and consumer protection and to political leaders' reluctance to interfere with the enforcement of ATJ judgments by the IP agencies. A new coda to this chapter explains how the legal and institutional contexts within which Andean IP rules are embedded help to bolster the island's stability and protect it from significant meddling by governments.

Chapter 6, *The Judicialization of Andean Politics: Cigarettes, Alcohol, and Economic Hard Times*, published here for the first time, offers a different lens through which to examine the law and politics of the ATJ. Whereas other chapters in the book systematically study different categories of Tribunal decisions or preliminary reference patterns, Chapter 6 follows the twists and turns of four politically and legally fraught disputes. These disputes were contentious in that they were linked to wider political fights among national leaders and Community officials, were

carefully monitored by influential foreign actors, and had the potential to establish precedents with far reaching consequences for Andean integration.

As a group, the four cases show governments, interest groups and litigants mixing adjudicatory and policy-making strategies to affect policy outcomes. We find that the ATJ protects itself by being faithful to laws on the books while policing good governance practices. However, the four disputes also reveal the ease with which member states respond to ATJ rulings by changing Andean secondary legislation. The Tribunal's preference, it seems, is to apply Andean rules as written and put the onus on member states to act collectively to change the law.

Chapter 7, *The Authority of the Andean Tribunal of Justice within a Diminishing Regional Integration Project*, also new to this book, considers the geopolitical factors now threatening the Andean Community and explains how the ATJ has responded to this crisis. We also explain why the ATJ's IP island continues to thrive even as threats to the larger integration project loom larger. We then return to the Ecuador noncompliance dispute, introduced in Chapter 6, and consider how developments in the Andean integration process may affect the influence and power of the ATJ going forward.

Chapter 8, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, explores a different issue raised by the ATJ's origins as a legal transplant—when do international judges engage in expansive judicial lawmaking? Although many scholars assert that international courts are hard-wired for self-aggrandizement, our comparative study of the ATJ and the ECJ reveals that the political contexts in which courts are embedded are critical to how expansively they interpret their authority. Chapter 8 develops the Andean Community analogue to Joseph Weiler's famous account of the ECJ's transformation of Europe.³² We explore how variations in political support for integration over time have influenced lawmaking by international judges in the Andes and in Europe. We focus in particular on the ATJ's refusal to follow the ECJ in transforming the Andean Community's founding treaty, the Cartagena Agreement, into a constitutional blueprint for regional integration.

When first published as a journal article, *Nature or Nurture* ended with a conjecture about the ATJ's future as the political consensus supporting Andean integration had begun to unravel. Seven years of additional data allows us to explore how the ATJ has fared during the decade following Venezuela's withdrawal from the Community and the ensuing schism between the remaining four member states. We explore examples of lawmaking in the crisis period that could develop into, or come to be seen, as expansionist lawmaking. We find that over the last decade of crisis, the Tribunal has mostly stayed the course it charted during the heyday of regional integration. It has continued to enforce regional rules whose texts reveal member states' intent to create common Andean policies and eliminate or restrict national regulations, and confined its bolder pronouncements to nonbinding dicta that plant a seed for potential doctrinal growth in the future without imposing contemporary restrictions on governments.

Chapter 9, *Jurist Advocacy Movements in Europe and the Andes*, builds upon Chapter 8's insight that not all international courts are expansionist by nature. We use a socio-legal method of analysis, examining the actions and behavior of legal entrepreneurs and Euro-law associations to

³² (Weiler 1991)

document the nurturing that lay behind the ECJ's legal revolution. Our analysis finds that lawyers in both Europe and the Andes migrate across legal roles, helping to draft legislation as members of supranational institutions, litigating cases as cause lawyers or when representing private litigants, serving as sympathetic national judges, and acting as academic commentators to help to amplify the impact of judicial rulings.

While legal entrepreneurs existed in both regions, we contrast the combined efforts of an extensive jurist advocacy network in Europe to the isolated and limited impact of legal entrepreneurs in the Andes, who are not part of a larger advocacy network. We argue that expansive judicial lawmaking requires careful nurturing by jurist advocacy movements—groups of sympathetic judges, attorneys, academics, and government officials united by a political objective that is larger than any one actor. Jurist advocacy movements encourage and facilitate lawmaking that promotes legal integration by vetting test cases, publicizing a court's doctrinal achievements, and contributing to the formation of a new legal field. Originally written by Karen Alter to reconsider her prior understanding of the ECJ's legal revolution, our revised analysis offers a more general treatment of the role and functions of jurist advocacy movements for effective international adjudication.

Chapter 10, *Reconsidering the Effectiveness of International Courts*, revisits the arguments and predictions in *Toward a Theory of Effective Supranational Adjudication*, Helfer's ground-breaking 1997 study, with Anne-Marie Slaughter, of the ECtHR and ECJ. Many scholars continue to assert that the large caseloads and generally high compliance rates of the two European tribunals are a product of the legal and political values shared by Europe's liberal democracies, including their commitment to the rule of law, the protection of individual rights, and a history of addressing common problems through international institutions.³³

The nearly two decades of international adjudication that followed the publication of Helfer and Slaughter's article reveal that this claim is incomplete in at least two respects. First, the ECtHR and ECJ are facing new challenges to their authority by national executives and national judges. This is true not only in countries, such as Russia and Hungary, where the rule of law and judicial independence are fragile and increasingly under threat, but also in longstanding democracies such as the United Kingdom. Second, and more relevantly for this book, international courts are beginning to function in developing countries and in regions of the world where Helfer and Slaughter expected they would have difficulty doing so.

The Andean Tribunal is the oldest, most active, and in some respects the most successful of regional court operating outside of Europe. Yet as this book reveals, the ATJ's ability to induce member states to respect Andean law has significant limits. We find the Tribunal to be bold, legally innovative, influential, and effective within an island of intellectual property law where the ATJ enjoys the active support of lawyers and administrative agencies and the tacit support of national judges. The flourishing of this island reveals that establishing an international court in a developing country context does not per se hinder the efficacy of international adjudication. Outside of the domain of IP law, however, the ATJ is limited by its lack of compliance partners and by significant economic and political turbulence. Andean judges still

³³ (Posner and Yoo 2005)

demand that states respect clear Community rules, even where there are no compliance partners to ensure respect for its rulings, and even if member states then respond by changing Andean law or withdrawing from the regional integration project.

The balance among these competing forces involves letting member states set the scope and pace of Andean integration, revising and retrenching Andean rules to fit political realities. The ATJ also allows states to suspend core legal commitments in response to economic crises, so long as governments follow proper legal procedures and convince either the Secretariat or the other member states to sanction a temporary derogation from Andean free trade rules. This give-and-take between political and legal actors breaks down, however, when member states are deeply divided and thus unable to act collectively. In Europe, the ECJ used these moments to promote integration through law. In the Andes, however, the ATJ's involvement may actually exacerbate conflicts by reducing the possibility for quiet noncompliance as a political safety valve. This is the situation that the ATJ currently faces, a reality that potentially threatens the future of the Tribunal and of the Andean integration project more generally.

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