

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

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Andean leaders founded the Andean Pact in 1969 to build a common market in South America. Andean leaders copied the institutional and treaty design of the European Community, but they did not include a court. In the 1970s, member states decided to add a tribunal, again turning to the European Community as its model. Since its first ruling in 1987, the Andean Tribunal of Justice (the ATJ or the Tribunal) has exercised authority over five developing countries that are members of the Andean Community. However, the Tribunal's significance extends far beyond these geographic boundaries. The ATJ is one of eleven tribunals modeled on the European Court of Justice (ECJ), and arguably the most successful of these. The ATJ is the third most active international court, having issued over 2000 rulings since its founding. It is less active than the European Court of Human Rights and the European Court of Justice, but busier than the more intensively studied International Court of Justice, the World Trade Organization dispute settlement system, and other international tribunals. Although activity is not the same thing as effectiveness, the ATJ's large caseload suggests that governments and private actors use litigation before the Tribunal to protect their rights and interests. This is especially true for disputes relating to intellectual property (IP)—a subject that dominates the ATJ's docket.

The ATJ's contribution to building the Andean legal system—albeit within limited policy domains—is especially surprising given the political turmoil and relative weakness of national legal and judicial systems in the states subject to the Tribunal's jurisdiction. The fact that the ATJ is effective—if only in a small number of issue-areas—broadens the theoretical interest of the Andean experience. How did a region with weak legal institutions develop an effective international rule of law? Why has the Tribunal been able to induce widespread respect for Andean intellectual property rules but not in other issue areas governed by regional integration rules? And what does the ATJ's experience portend for other international courts that exercise authority over developing countries whose legal, political, and economic conditions are roughly comparable to those prevailing in the Andean countries?

This book includes three new chapters as well as six articles or book chapters originally published between 2009 and 2012. Co-authored by two leading interdisciplinary scholars of international law and politics, the book examines the origins, contributions, influence, and theoretical significance of the Andean Community legal system and the Andean Tribunal of Justice. It also uses the Andean experience to reconsider the European Community system, exploring why law and politics of integration in Europe and the Andes followed different trajectories. The book will expand upon works published in disparate scholarly venues and provide a coherent overarching framework to these articles by adding an introduction, a new chapter, and a conclusion. Collected in a single volume, the authors' analysis bring together common themes and highlight the theoretical and practical importance of the Andean experience for other international courts and for the interdisciplinary study of international institutions more generally.

The theoretical and empirical richness of this book enhances its appeal to multiple audiences. The chapters use the ATJ's experience for theory building and to reconsider the conventional wisdom on the ECJ's legal and political history. We expect this book to find a market in Latin America, home of the ATJ, but also in Europe because of the comparisons with the ECJ, and because Karen Alter is well known in Europe. Translating the book into Spanish would greatly increase this market. We also expect the book to find an audience among international law and international relations scholars in the United States and elsewhere, because there are very few examples of effective international courts outside of the European context.

Production costs for the English version of the book will be relatively low, since approximately 70% of the manuscript has already been copy-edited by peer-reviewed journals. We will edit these contributions to minimize repetition. As previously noted, we will also add a new introduction and conclusion and one original chapter that draws from four case studies that published in two monographs on comparative international courts.

The remainder of this proposal provides an overview the book and information on those chapters that have previously been published. We also append brief biographical information about the authors.

## **Part I: Supranational Legal Transplants**

**Chapter 1: “What We Can Learn From the Andean Tribunal of Justice”** will be a new original introduction that explains the theoretical richness of studying the Andean Tribunal of Justice. The Andean Tribunal is one of 11 copies of the ECJ. It is one of the oldest and arguably the most successful of the copies and perhaps the most successful international court to operate in a politically and economically turbulent developing country context. The Andean experience provides a lesson in the reasons why regional integration systems are copying from Europe, and in how transplanted supranational institutions operate differently because of their different context. The Andean case provides an excellent opportunity to reconsider theories developed in light of the ECJ's experience and to inductively build theories that scholars can use to analyze the next generation of international courts and tribunals. After comparing the ATJ with other international tribunals, Chapter 1 concludes with an overview the key findings in the book.

**Chapter 2: “Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice”** explains why Andean leaders came to believe that adding a supranational court would help with the uniform interpretation and enforcement of Andean rules. After considering a variety of options, Andean officials decided to copy the European Community's Court of Justice. But the drafters of the treaty that created the ATJ did not slavishly copy the ECJ model. Rather, they selectively adapted those elements that were useful for the Andean context, in the process preserving greater control over the Tribunal and regional lawmaking processes more generally. Over time, the adaptations were seen as undermining the effectiveness of the Andean legal system. Thus in 1996 Andean leaders adopted institutional changes that brought the ATJ even closer to the model of the ECJ. We draw on literatures on neofunctionalism, legal transplants, and the spread of European ideas and institutions to assess what the Andean experience tells us about supranational legal transplants.

**Possible additional chapter: *The Global Spread of European Style International Courts*** would help readers see how the ATJ compares to other copies of the ECJ. This chapter identifies the eleven ECJ

copies, and how their creators made adaptations to the ECJ's model. It also includes comparative litigation data that shows that ECJ style ICs are significantly more active than ICs that copy the WTO model, and that the ACJ is by far the most active of all ECJ transplants.<sup>1</sup> We did not originally include this article in the proposal as it takes readers away from the focus on the ATJ. But it does help one locate the ATJ among the ECJ's copies. We are open to editorial input on this decision, but are concerned that this may not be a good transition to Part II.

## **Part II: Law and Politics in the Andean Tribunal of Justice**

**Chapter 3: “*Legal Integration in the Andes: Law-Making by the Andean Tribunal of Justice*”** reviews key doctrines that the ECJ developed to promote regional integration, and it identifies where and why the ATJ followed these doctrines or instead developed its own distinctive jurisprudence.

**Chapter 4: “*The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*”** presents and analyzes data on national court interactions with the Andean Tribunal. The ATJ contains design features that are remarkably similar to the ECJ. Most notably, both courts contain similar preliminary reference mechanisms that enable national courts to refer unsettled questions of community law for interpretation. But these mechanisms operate very differently in the two legal systems. In Europe, the symbiotic relationship between the ECJ and national courts helped to build integration through law. The ATJ, in contrast, has developed very different interactions with legal actors within the Andean member states. This chapter makes the case that national judges are mostly passive intermediaries, referring cases to the ATJ. We also discuss the 2.5% of ‘outlier’ cases that are not about intellectual property.

**Chapter 5: “*Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*”** analyzes in detail an area in which the ATJ has been highly effective—its contribution to constructing an intellectual property rule of law in the Andean Community. The previous chapter explained that in the Andean community national judges are mostly passive intermediaries, which is quite different than the situation in Europe. This chapter explains how national administrative actors—namely intellectual property agencies—are the ATJ's main compliance partners. We explain why the ATJ was able to coopt domestic intellectual property agencies as key compliance partners, demonstrate the legal effectiveness of the Andean legal system within this policy domain, and explains why the ATJ's success has not spilled over into other issue areas governed by Andean law.

**Chapter 6: “*Navigating Fraught Political Terrains: Four Case Studies*”** will be a new co-authored chapter based on four case studies from the Andean Tribunal of Justice. The case studies were researched as parts of other projects, but we will be bringing them together and focusing on these cases as examples of the ATJ grappling with the conflicting interests of member states. The first case—which appeared in short form in the previous chapter but will be removed there to avoid repetition—considers why ATJ intervention led Peruvian intellectual property leaders to repudiate a Peruvian law allowing second use patents. This case was politically fraught because national actors had to ignore a legally valid government act, which had been created so as to circumvent Andean rules. The second case explores the ATJ's contribution to balancing conflicting legal provisions regarding trademark use. This case was politically fraught because Andean governments took significantly different positions on the contested legal issues. The ATJ corrected an initial legal misstep, and deftly crafted a compromise that clarified

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<sup>1</sup> The article version then discussed the reasons for 2 transplants in Africa. We would likely eliminate this discussion so as to improve the flow to the next chapter, which explains *why* Andean leaders copied the ECJ model.

Andean law while allowing governments to apply divergent use criteria in their home markets. The third case considers the ATJ's effort to address procedural irregularities by member states when they authorized legal exceptions for Peru, intended to help deal with severe economic policy change in Peru. This case was politically fraught because member states wanted to allow Peru exceptions to deal with economic turbulence, and even the Junta asked for the ATJ to dismiss the suit instead of ruling. This case study helps us think about how regional economic systems can weather economic and political turbulence. The fourth case considers why the ATJ was able to change Ecuador's illegal alcohol policies, yet unable to change Colombia's illegal alcohol policy. The case-study reveals the inability of the ATJ to coopt Colombian courts as co-enforcers of Andean rules in a case concerning non-tariff trade barriers inhibiting alcohol imports, and the problems with the sanctioning system intended to induce compliance with Andean law. This case was politically fraught because the suit was simultaneously adjudicated via two noncompliance cases, and all along it has been abundantly clear that the Colombian government would not comply with the ATJ ruling. This case study identifies how Colombian courts have a different approach for international human rights law than they do for Andean law. Different versions of these case studies have appeared elsewhere,<sup>2</sup> but we will use them differently in this chapter. In specific, we will put the cases side-by-side and both Karen Alter and Larry Helfer will consider what these four extensive cases tell us about how the ATJ navigates politically fraught contexts. It is also worth noting that these cases move well beyond the previous chapter's focus on preliminary ruling cases.

### **Part III: The ECJ reconsidered in light of the Andean experience**

The final three chapters consider in more detail what the different ATJ legal and political trajectory tells us about theories that were developed based on studies of the European Court of Justice.

**Chapter 7: "Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice"** compares the ATJ and ECJ experience to explore a broader issue—when international courts engage in expansive judicial lawmaking. Although many scholars assert that international judges naturally seek to aggrandize their own power, our comparative study of the ATJ and the ECJ reveals that the political context in which international courts are embedded are critical to how expansively they interpret their authority. This article briefly draws on the analysis in the next chapter. We will edit to avoid repetition, and thus omit the reexamination of the ECJ's early years.

**Chapter 8: "Transnational Jurist Advocacy Networks: A comparison between the ECJ and the Andean Tribunal of Justice"** provides a much deeper comparison of the role of jurist advocacy movements in building the European Community's legal order. A new introduction to this chapter will explain how studying the ATJ forced Karen Alter to return to material she had collected but not used in her research on the early experience of the ECJ. Whereas the previous chapter asked why the ATJ was *not* an expansionist law-maker, this chapter will ask why was the ECJ such an extraordinarily ambitious young international court? The chapter is mostly focused on the ECJ, but it then uses the absence of a jurist advocacy movement in the Andean context to theorize how advocacy movement are important for international legal innovation.

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<sup>2</sup> Three of case studies will have first appeared in Karen Alter's forthcoming book *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2013), but they will be scattered in the book and never discussed as a set. The alcohol case study will appear in a book about comparative dispute settlement systems, where the Andean case will be compared to the WTO and EU systems handling of alcohol related disputes.

**Chapter 9: “Reconsidering What Makes International Courts Effective”** Having compared the ATJ to the ECJ, we will conclude the book by returning to Laurence Helfer and Anne-Marie Slaughter’s seminal 1997 article in the Yale Law Journal that conceptualized the factors associated with effective supranational adjudication. This chapter will be a new co-authored restatement of our current thinking on when international courts and tribunals are effective, based on what we have learned from the ATJ and the Andean legal system. The chapter will also identify what research questions remain open with respect to the ATJ, and international courts more generally.

**Karen J. Alter** is Professor of Political Science and Law at Northwestern University, and a permanent visiting professor at the iCourts Center for Excellence, University of Copenhagen Faculty of Law. Alter is author of *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2013), *The European Court's Political Power* (Oxford University Press, 2009), *Establishing the Supremacy of European Law* (Oxford University Press, 2001) and numerous articles and book chapters on the politics of international courts and international law. She is co-editor of the *Oxford Handbook on International Adjudication* (Oxford University Press, 2013) and has published in the *American Journal of International Law*, *International Organization*, *Comparative Political Studies*, *Perspectives on Politics*, *European Journal of International Relations*, *European Law Journal*, *Law and Contemporary Problems*, *Annual Review of Law and Social Science*, *Journal of International Law and Politics*, and *European Union Politics*. Fluent in Italian, French and German, Alter's research has been supported by the John Simon Guggenheim Foundation, the American Academy of Berlin, the Howard Foundation, the German Marshall Fund, the DAAD, and the Bourse Chateaubriand Scientifique. Alter is member of the New York Council on Foreign Relations, serves on the editorial board of *International Organization*, and (previously) *Law and Social Inquiry* and *European Union Politics*. She has been a visiting scholar at the Northwestern Law School, the American Academy in Berlin, the Institute d'Etudes Politiques, the Deutsche Gesellschaft fur Auswartiges Politik, Harvard University's Center for European Studies, Harvard Law School, Seikei University, the Sonderforschungsbereich of Universitat Bremen, and the American Bar Foundation. Alter holds a Phd in Political Science from Massachusetts Institute of Technology, has some legal training as a visitor to Harvard Law School, and has taught courses at Northwestern University Law School.

**Laurence R. Helfer** is the Harry R. Chadwick, Sr. Professor of Law an expert in international law whose scholarly interests include interdisciplinary analysis of international law and institutions, international litigation, human rights, and international intellectual property law and policy. He is co-director of Duke Law School's Center for International and Comparative Law and a member of the Board of Editors of the *American Journal of International Law* and the *Journal of World Intellectual Property*. Helfer has authored more than 60 publications and has lectured widely on his diverse research interests. He is the coauthor of *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) and *Human Rights* (2d ed., Foundation Press, 2009); and the author of *Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments* (UN Food and Agriculture Organization, 2004). His scholarly articles have appeared in leading American law reviews and in numerous peer-reviewed and international law journals. Helfer has been a visiting professor at the University of Chicago Law School, Harvard Law School, and Princeton University's Woodrow Wilson School of Public and International Affairs. He holds a JD from New York University, where he graduated Order of the Coif and was articles editor of the *New York University Law Review*. He also holds a master's degree in public administration from Princeton University, where he was a Woodrow Wilson Fellow, and a bachelor's degree from Yale University.