

## NATURE OR NURTURE? JUDICIAL LAW-MAKING IN THE EUROPEAN COURT OF JUSTICE AND ANDEAN TRIBUNAL OF JUSTICE\*

Karen J. Alter  
Northwestern University

Laurence Helfer  
Vanderbilt Law School

### I. INTRODUCTION:

One often hears concerns that international judges may run amok, actively finding international law that is not based in explicit state consent. There is a lot more heat than reality to these concerns. In practice, all judges make law. Indeed a key reason states delegate authority to international courts is because governments know that contracts are incomplete, and thus legal rules will need to be filled in by legal actors (Bradley and Kelley 2008; Hawkins et al. 2006). Most studies of international court (IC) decision-making find that IC judges are more restrained in practice than the greatest critics of international judicial activism fear (Cogan 2008; Steinberg 2004; Helfer ; Ginsburg 2005; Danner 2006). Yet there is a real concern that international judges being interpretively expansionist may undermine national sovereignty. For people who are concerned about international judicial law-making, the European Court of Justice (ECJ) represents the problem in the extreme.

Observers credit the ECJ with using creative interpretations of the Treaty of Rome to transform the Treaty of Rome into a constitution for Europe (Stein 1981; Hartley 1996; Weiler 1991). Scholars have shown how the ECJ expanded the reach and scope of European law so that litigants could use the European legal system to help promote trade in Europe, and to promote key substantive and political objectives associated with European integration (Burley and Mattli 1993; Stone Sweet 2004; Alter 2009). Supporters of the effective international adjudication see the ECJ as a positive model, seeking to generalize from the ECJ's experience: if the ECJ's design could be replicated, and the judges could play their part well, we could find many more examples of effective supranational adjudication (Helfer and Slaughter 1997). For others, the ECJ experience is an outlier; it is too willing to compromise state sovereignty and its example is perhaps a reason to avoid creating highly independent international courts (Posner and Yoo 2005; Rasmussen 1986; Denning 1990).

This article reinvestigates the lessons from Europe to explore how political context shapes international judicial law-making. It does so by comparing the ECJ with its largely unknown cousin. In 1969 Andean countries imported the European Economic Community ideals

---

\* We are grateful for the financial support provided by the Center for the Americas at Vanderbilt and the Northwestern Dispute Resolution Research Center, which funded field research in Quito, Lima, and Bogota. For helpful comments on previous drafts, we thank David Boyd, Darren Hawkins, Tom Ginsburg, Cesare Romano, Osvaldo Saldias and Alexander Krastev Panayotov and the participants of the April 2009 Vanderbilt International Law Roundtable. Thanks also to Gilda Anahi Gutierrez, Elena Herrero-Beaumont, and Maria Florencia Guertzovich who provided superb research assistance for this project.

of building a common market through common institutions, creating an Andean Pact with similar institutions yet omitting the Court of Justice. Andean political leaders believed that the lack of a court was harming uniformity of interpretation and compliance with Andean law (Vargas-Hidalgo 1979: 224; Garcí'a Amador 1978). In 1984 Andean states created the Andean Tribunal of Justice, as part of a number of institutional changes aimed at reinvigorating Andean integration (Keener 1987; Padilla 1979). Member states modeled the ATJ explicitly on the European Union's Court of Justice. The ATJ has emerged under the radar screen as the third most active international court, having issued over 1400 decisions. It has fewer rulings than the European Court of Human Rights and the European Court of Justice (with its Court of First Instance) but far more the World Trade Organization's dispute resolution system, the International Court of Justice, or Latin America's other legal mechanisms—the Inter-American Court of Human Rights and the Central American Court of Justice.

The ATJ is extremely active, but it is not activist. The vast majority of ATJ preliminary ruling cases involve references where national judges ask the ATJ to repeat verbatim doctrine it developed in earlier cases. In the preliminary ruling cases where the ATJ has been asked to fill in the law so as to help enforce Andean rules, the ATJ has been surprisingly reluctant, eschewing opportunities to expand the reach of Andean law and its own authority.

The ECJ/ATJ's comparison reminds one of the nature versus nurture debate in child rearing. Is it the genes, or the environment that shapes how an actor develops? International relations and international law scholars tend to side with "nature," the notion that behavior comes from a combination of structure and the DNA of an institution. The DNA part of the equation comes by assumption-- analysts assume that bureaucracies, including courts, will use the discretion they have to expand the scope of their authority (Barnett and Finnemore 2004: 27). If you feed the court with cases, and do not punish the court in a way that will pervert its normal development, courts generally expand the reach and scope of law through their rulings (Stone Sweet 1999, 2004; Burley and Mattli 1993; Alter 2001: 45-52).

The reality that the ATJ has not been an expansionist law-maker lends credence to "nurture" based theories that stress that IC authority depends on the larger social and political context. But what about the context nurtures an IC to be expansionist in its rulings? The ATJ is a clone of the ECJ. Both the ECJ and the ATJ were asked in cases raised by legal entrepreneurs to expand the reach of their respective law, and to enforce the treaties governments had agreed to respect. This same essential condition holds for most ICs. Most ICs will be presented with opportunities to expand their authority and develop the law. What factors nurture ICs into supplying expansive legal interpretations?

We examine the tendency of the ATJ to be interpretively expansionist during the first twenty-five years of ATJ (1984 to 2007) compared to the ECJ's behavior during the first twenty-five years European Economic Community (1960 to 1985) when both communities had smaller

membership,<sup>1</sup> less developed trade relations, and when challenges and limitations of the new institutions were being discovered. The European story is well known, thus we focus more on the ATJ experience. We show that over time the Andean Tribunal has become more willing to find violations of clear Andean rules, but it remains unwilling to issue the types of expansionist interpretations that are the hallmark of its cousin, namely purposive legal interpretations that fill in the law in ways that promote Andean integration. We argue that the existence of sub-state actors who embrace a supra-national legal solution shapes the willingness of ICs to engage in expansionist law-making.

Section I defines expansionist judicial law making and embeds the analysis in existing scholarship on IC law-making. The section explains how the ECJ and ATJ are by design identical institutions, raising questions about “nature” based arguments of judicial activism. Section II documents the pattern of law-making in the ATJ. The ATJ has mimicked a number of the ECJ’s doctrinal developments, including declaring the direct effect and supremacy of Andean law. The ATJ has been more willing to engage in gap-filling law-making in issues related to intellectual property, and it has even boldly declared that Andean law is supreme to World Trade Organization law. But the ATJ remains remarkably reticent to follow the ECJ in building a constitutional authority for Andean law via teleological interpretations of the founding Andean treaties. Section III examines how environmental factors have influenced ATJ and ECJ law-making. Section IV concludes drawing out the implications of this comparison for our understanding of how international judicial law-making is shaped by its political context.

The broader implication of our analysis is that we should not assume that international courts will be expansionist, nor fear that designing courts to be politically independent will inherently lead to judicial activism that compromises state sovereignty. The analysis also suggests that international courts are more willing to be interpretively expansionist when they have the support of authoritative sub-state interlocutors, which could include some combination of national judiciaries, political actors within the state apparatus, or diffuse public support. This may mean that vibrant democracies face a greater risk of judicial activism, because sub-state interlocutors may be more willing to support IC rulings that challenge state policy. But it may also mean that judicial activism will vary by issue area and by legal issue, depending on whether groups of lawyers, judges and national administrators are mobilized in support of specific laws and interpretive developments.

---

<sup>1</sup> 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 10 members in 1981 (when Greece joined). Spain and Portugal joined the EEC in 1985. For most of the ATJ period we study the Andean Community had five members. The original Andean Pact included Colombia, Ecuador, Bolivia, Chile and Peru. Chile withdrew in 1976. Venezuela joined in 1973 and withdrew in 2006.

## THEORIES OF IC LAW MAKING

All courts make law, clarifying the meaning of vague legal clauses and filling in legal lacunae (Shapiro 1981: 29). But some judges mainly bridge small gaps in the law, while others expand the reach and scope of law, and thereby the legal and political authority of courts. Our definition of expansionist judicial law-making includes two dimensions—interpretations that aggrandize judicial power, and law-making that expands the substantive reach and scope of the law. The two dimensions of expansive law-making often go hand and hand. We do not include in our definition a requirement that judges rule against governments. Often ICs expand the law without ruling against governments, and often ICs rule against governments without expanding the law. We note, however, that both the ECJ and the ATJ have engaged in expansionist law-making *and* issued inconvenient decisions that have upset powerful governments.

When do judges engage in expansionist law-making? Most theories of how judges use their discretion have been constructed in a domestic context. These studies tend to focus on judicial decision-making in specific cases rather than on judicial law-making. Scholars have investigated how appointment politics shapes the ways judges decide cases (Schanzenbach 2004; Epstein and Knight 1998) and how judges strategize to influence decision-making where a panel of judges renders a decision (Murphy 1964). Scholars have also examined how the ideological and social background of judges shapes judicial decision-making (Voeten 2007; Epstein and Segal 2005: 115-141; Voeten 2008). These studies do not lend themselves to our task in part because there is so little systematic evidence regarding appointment politics of international court judges,<sup>2</sup> and no information regarding internal decision-making dynamics within the ECJ or the ATJ, both of which issue decisions unanimously. But also, the studies that exist focus on fairly fine grained distinctions regarding judicial behavior. We are comparing the ECJ's expansive lawmaking in constitutionalizing the Treaty of Rome and in extending the reach of European law to issues that are seemingly wholly domestic in scope,<sup>3</sup> to the dearth of demand for and supply of Andean Tribunal rulings that purposively interpret Andean statutes to expand the reach and scope of Andean law. Neither the available data nor the stark contrast we examine in this paper call for the types of analysis domestically focused judicial behavior literature undertakes.

International law and international relations theories that assume that ICs are by nature expansionist lawmakers have tended to focus on factors that facilitate or hinder the opportunity of judges to expand the law. One set of scholars focus on how a court's design shapes the opportunity to litigate, and thus the demand for expansionist legal rulings. Scholars expect courts

---

<sup>2</sup> There are a handful of studies focused on attributes of judges who serve on ICs, though not per se on the politics of judicial selection. See: (Voeten 2007, 2008; Terris, Romano, and Swigart 2008; Kenney 1998). Ruth Mackenzie has work underway on this topic.

<sup>3</sup> Miguel Maduro sees the ECJ's use of European law's Article 30 as even more muscular than the United State's Supreme Court's reliance on the commerce clause, because in his view the US market reached a point of no return while in Europe state level barriers to trade could limit the development of a single European market (Maduro 1998: 89-102).

with private access (what Keohane et al. call transnational courts (Keohane, Moravcsik, and Slaughter 2000), Helfer and Slaughter call supranational courts (1997), and Hawkins and Jacoby call permeable courts (Hawkins and Jacoby 2008)) to be busier and therefore more likely to expand the reach and scope of law compared to courts without private access (a.k.a. interstate courts) because

a steady flow of cases... allows a court to become an actor on the legal and political stage, raising its profile in the elementary sense that other litigants become aware of its existence and in the deeper sense that interpretation and application of a particular legal rule must be reckoned with as a part of what the law means in practice. Litigants who are likely to benefit from interpretation will have an incentive to bring additional cases to clarify and enforce it. Further, the interpretation or application is itself likely to raise additional questions that can only be answered through subsequent cases. Finally, a court gains political capital from a growing caseload by demonstrably performing a needed function...(Keohane, Moravcsik, and Slaughter 2000: 482)

Another set of scholars builds on insights of Principal-Agent (P-A) theory, which generally assumes that agents have interests that are different than the Principal. The task of P-A theory is to explain the conditions under which Agents have more or less slack they can exploit to pursue their interests. Scholars applying P-A theory to ICs tend to assume that judicial independence translates into judicial empowerment. Scholars have suggested that international judges will be less likely to develop the law in ways that states do not like where legal rules are easier to change, and where appointments for judges are shorter in length and/or subject to reappointment (Tsebelis and Garrett 2001; Vaubel 2006; Stephan 2002). In a somewhat different application of the insights of P-A theory, Eric Posner and John Yoo presume that compulsory jurisdiction and private access make ICs less dependent on states wanting to use the IC, and thus anything that increases demand for IC decisions inherently makes ICs more likely to supply expansionist law-making (Posner and Yoo 2005: 6-7).

Finally, a set of scholars has examined how domestic conditions facilitate or limit the ability of national judges to embrace international level legal developments. Scholars expect international law adherence to be more likely in liberal democracies (Slaughter 1995; Moravcsik 1997). Scholars expect the public to tolerate more controversial IC decision-making in contexts where national courts enjoy significant respect and authority (Gibson and Caldeira 1995, 1992). Scholars expect the specificity of the legal rules and the willingness of states to comply with IC rulings will cabin judicial discretion in interpreting legal rules (Steinberg 2004; Ginsburg 2005; Guzman 2008).

These theories share the assumption that judges *will* engage in expansionist law-making if the structural conditions to do so exist, so that it is structural conditions that determine the extent of expansionist law-making we find. The ECJ-ATJ comparison presents us with a natural experiment where we can hold constant a number of structural features to explore how a court's context shapes the extent of judicial law-making. The creators of the ATJ modeled the court on the ECJ, with the hope that the ATJ could replicate the ECJ's success in enhancing respect for common market rules (Keener 1987: 49). As ICs, the courts are structurally virtually identical,

presenting litigants with the same opportunities to litigate and politicians with the same opportunities to sanction judges, and thereby inhibit judicial law-making.

Both the ECJ and the ATJ are highly permeable, allowing state and non-state actors to challenge government behaviors that conflict with common legal rules. Even the mechanisms through which litigants can raise cases are the same. Both the European and Andean legal systems contain a preliminary ruling mechanism that allows private actors to raise suits in domestic courts, with national judges referring the case to the ECJ/ATJ which issues a binding interpretation regarding the meaning of the law at stake. Both legal systems contain a noncompliance mechanism that allows the private actors and member states to bring to the communities' Secretariat information regarding violations of common rules. The Commission/General Secretariat investigates the violation, and if necessary brings to ECJ/ATJ a noncompliance case against a government. In both systems, if a state fails to comply with an ECJ/ATJ ruling, a sanctioning procedure can be triggered which can lead to punitive sanctions against the state.<sup>4</sup> The Andean system has one additional feature. If the General Secretariat refuses to raise a noncompliance suit, a private actor can bring the suit directly to the ATJ.<sup>5</sup>

Both international courts face the same formal political constraints in that the tools of states to sanction ECJ/ATJ activism are basically identical. Judges are appointed to fixed terms that are renewable.<sup>6</sup> States can redefine each Court's jurisdiction by amending the founding documents, which requires unanimous support of all member states.<sup>7</sup> Both the Andean

---

<sup>4</sup> A sanctioning mechanism was added to the European legal system in 1989, thus after the period of time we are studying. By contrast, the Andean system has always allowed for retaliatory sanctions. This factor is less important in preliminary ruling cases where national courts will enforce supranational rulings, but in any event the distinction plays to the ATJ's advantage in that scholars usually expect ICs to be more ambitious when they expect state compliance with their rulings (Steinberg 2004); meanwhile scholars often expect compliance to be higher where there are sanctions attached to non-compliance (Downs 1998).

<sup>5</sup> Originally, the Andean *Junta* could only investigate state non-compliance when another member state asked it to do so. In the 1996 Cochabamba reforms, member states revised the ATJ's founding treaty. Revised Article 25 allows private actors to request the General Secretariat (which replaced the *Junta*) to request an investigation and to raise infringement cases directly in front of the ATJ. Revised Article 34 explicitly authorizes the ATJ to delve into the facts of the case "when essential for the requested interpretation." Section IV of the Revised Andean Court Treaty also allows private actors to challenge the General Secretariat's failure to act. These changes allows private actors to circumvent reluctant national judges so that the General Secretariat can credibly claim that one way or another, the state's non-compliance will be pursued in front of the ATJ. These changes are revealed by comparing the original court Treaty (18 Int'l Legal Materials 1203 1979) to the current Treaty Creating the Court of Justice of the Cartagena Agreement, as amended by the Protocol of Cochabamba (May 28, 1996), [www.comunidadandina.org/ingles/treaties/trea/ande\\_tre2.htm](http://www.comunidadandina.org/ingles/treaties/trea/ande_tre2.htm) [hereinafter Revised ATJ Court Treaty].

<sup>6</sup> Andean judges serve six year terms, like their European equivalents. Where ECJ judges can be reappointed numerous times, Andean judges can only be reappointed once, which in theory means that Andean judges need to be less strategic about seeking reappointment compared to European judges. How to remove a judge is procedurally clearer for the ATJ compared to the ECJ (See: Andean Court Treaty Article 10), but in both cases judges can only be removed for "serious violations." No effort has been made to remove an ATJ or an ECJ judge.

<sup>7</sup> For the ECJ, states amend the Consolidated Treaty on a European Union. For the ATJ, states amend the Treaty Creating the Court of Justice of the Cartagena Agreement. In fact both treaties have been amended, but in each case the court's jurisdiction has been extended, not retrenched. On changes in the ATJ's jurisdiction, see note 5.

Community and the European Community have political bodies comprised of state representatives that can create secondary legislation that is directly applicable.<sup>8</sup>

The design-based theories discussed above generate fairly static expectations: the ECJ and ATJ should be equally expansionist in their law-making since they face similar opportunities and constraints. More dynamic “nature” type theories would expect the political constraints on judicial law-making to vary based on whether states are united in their aversion to a specific example of IC law-making. Unity in state preferences mainly makes it more likely that states will pass legislation to limit the effect an unwanted IC ruling, but it may also mean that ICs refuse to expand the law because a strong majority of actors opposes the expansion (Maduro 1998; Carrubba, Gabel, and Hankla 2008). Also, a more dynamic nature-based theory might expect variable structural conditions—rises in regional trade, whether or not the government in power was a democracy, and the level of popular diffuse support for national judges—to affect the court’s penchant for law-making (Stone Sweet and Brunell 1998; Moravcsik 2000; Slaughter 1995; Moravcsik 1997; Gibson and Caldeira 1995, 1992).

We incorporate these more dynamic nature based expectations by examining how changes in trade, domestic democratic stability, consensus in the Andean Community and legal activity have influenced the supply of expansionist ATJ law-making. In the end, we conclude that IC expansionist law-making requires nurturing by a set of sub-state actors—be they national judges, national administrators, advocacy movements, or governments in power. Structural conditions cannot determine whether such actors arise or coalesce behind the agenda of the supra-national body. Even where there are motivated litigants who invite ICs to expand the reach and scope of law, ICs are not by their very nature expansionist law-makers.

## II. DOES ACTIVE MEAN ACTIVIST? ECJ AND ATJ LAW-MAKING COMPARED

We are comparing ATJ to the ECJ law-making over a twenty-five year period when both courts had been delegated authority to help enforce founding treaties that required states to eschew new barriers to trade while lowering existing barriers, and when each court was establishing their legal and political authority. Both courts faced environments where governments were weakly committed to economic and legal integration, and where the collective secondary legislation intended to replace national legislation did not materialize as envisioned. Both courts were given opportunities to use legal interpretation as a tool to expand the court’s authority and to promote greater regional integration, including cases raised by repeat players and legal activists who were encouraging both legal bodies to interpret the law teleologically so as to promote the larger objectives of the treaty. And both courts were unusually active legal

---

<sup>8</sup> In the Andean context, support of all member states is required to change secondary legislation (Decisions and Resolutions); in the European context unanimity was required to change European secondary legislation (regulations and directives) during the period of time we are investigating, but as of 1989 some European rules can be changed by the support of a qualified majority.

bodies. Indeed in terms of level of activity, the ATJ and ECJ experiences track each other. Both courts have had a large number of cases to adjudicate; for both courts preliminary ruling references comprise the vast majority of the court's docket; both courts' dockets grew fairly steadily over time. In their first 25 years the ECJ issued 305 non-compliance rulings and 1808 preliminary rulings (an average of 86.1 cases per year), while the ATJ, with a geographically and demographically smaller region to oversee, issued 85 noncompliance rulings and 1338 preliminary rulings (an average of 71.5 per year).<sup>9</sup> Only the European Court of Human Rights (ECHR) rivals the ECJ and ATJ in terms of level of judicial activity, and the ECHR itself was quite inactive during its first twenty-five years in operation.<sup>10</sup>

Because so much is known about ECJ law-making, this section focuses more ATJ's law-making over time. There is a surprising dearth of scholarship on the ATJ and/or national court rulings involving Andean law, thus we must rely on our original analysis of ATJ law-making. We coded every ATJ preliminary ruling published on the Andean Community's website, from the court's founding to the end of 2007 (1338 rulings in all).<sup>11</sup> Where ATJ rulings broke new legal ground, or engaged novel legal issues, we examined the ruling in greater detail. We also conducted over forty interviews with lawyers, judges and practitioners in Peru, Ecuador and Colombia where we probed for important ATJ rulings. This search led us to a number of non-compliance rulings, but we did not analyze all non-compliance rulings. In this paper we are narrowly focused on ATJ law-making (See Appendix 1 for an explanation of our methodological choices). Elsewhere we report on litigation patterns in the ATJ, on why so much of the ATJ's docket involves intellectual property (IP) issues, and on why ATJ preliminary ruling litigation has not spilled much beyond the issue of intellectual property.

For the comparison to the ECJ, we rely heavily on Joseph Weiler's seminal account of ECJ law-making from 1960 to 1990 (1991), which provided the legal basis for Anne-Marie Burley and Walter's Mattli's political analysis in *International Organization* (1993). Others have supplemented Weiler's analysis by focusing on law-making in specific issue areas, but none have repudiated Weiler's broader legal or political claims about ECJ law-making.<sup>12</sup> Following Weiler's model, we group our study of ATJ rulings into periods of time that correspond to varying levels of political support for integration. This grouping allows us to capture the dynamic between legal and political law-making. Both Weiler and Burley and Mattli explained

---

<sup>9</sup> ECJ data from (Stone, 2004: p. 72-9). Elsewhere we have examined depth litigation patterns in the Andean Court of Justice, relying on the Stone Sweet data for the comparison. See: (Helfer and Alter 2009; Helfer, Alter, and Guertzovich 2009).

<sup>10</sup> On ECHR litigation during the ECHR's see: (Robertson and Merrills 1994). For a comparison of litigation across ICs see: (Alter 2006)

<sup>11</sup> The Andean Secretariat's website is generally more reliable than the ATJ's website. Indeed the statistics offered by the ATJ differ from what one can find from the Secretariat. We relied on the following cite:

[www.comunidadandina.org/canprocedimientosinternet/procedimientos.aspx](http://www.comunidadandina.org/canprocedimientosinternet/procedimientos.aspx)

<sup>12</sup> Weiler was himself building on (Stein 1981). On the ECJ's law-making regarding eliminating barriers to trade see: (Maduro 1998). On the ECJ's law-making regarding gender equality and environmental issues see: (Stone Sweet 2004; Cichowski 2007)

ECJ law-making by appealing to “nature” based arguments, namely the inherent desire of courts to aggrandize their power. In part III we reconsider the question of what explains the ECJ’s law-making drawing on more recent research involving ECJ law-making.

### **The Foundational Period: the ATJ During the Andean Pact (1984-1994)**

The ECJ’s judicial-lawmaking was most radical during what Joseph Weiler called the ECJ’s “foundational period” from 1962 to the mid 1970s. Although there was significant political turmoil in Europe during this period of time—this was when European states seemed to abandon their commitment to European integration (Hoffmann 1974) and when European states were rocked by the labor and student protests of 1968-- the ECJ nonetheless developed its core constitutional doctrines of direct effect, supremacy and implied powers, and its human rights discourse at this time (Weiler, 1991: 2413).

The ATJ also developed core constitutional doctrines in its founding period, incorporating the ECJ’s jurisprudence regarding the direct effect and supremacy of Andean law. While the ATJ at times suggests that ECJ doctrines apply in the Andean context, in key ways the ATJ has not followed the ECJ. Most fundamentally, the ATJ has refused to make the Cartagena agreement a constitution for Andean integration—a set of higher ordered legal rules that inherently limit what states can agree to at home or in the context of the Andean Community.

Since the ATJ was created after fifteen years of turmoil within the Andean Pact, we must begin by backing up in time to understand the fraught political context the ATJ faced as it sought to establish its authority. The Andean Pact, created in 1969, was modeled on the European Economic Community, replicating its supranational structure but excluding a court. While the Andean Pact looked like the European Community, its economic policy was profoundly different, inspired by the import substitution economic strategy of Raul Prebisch (Prebisch and Helen Kellogg Institute for International Studies. 1984; Prebisch and Inter-American Development Bank. 1971). The Andean Pact envisioned regional industrial programs with production capabilities distributed to lesson unequal growth and promote economic development (Avery and Cochraine 1973; French-Davis 1977). Andean elites were bitterly divided over whether important substitution or neo-liberal economic policy would better promote economic development (Dietz and James 1990: 1-11). Government economic policy tended to shift as the balance of power of contending sides within each country changed, which meant that government commitment to Andean integration changed depending on whether left leaning or right leaning governments were in power.

Andean law in the 1970s and early 1980s reflected the two economic approaches that were in contention. The heart of the Andean Pact was supposed to be its regional economic programs to build new industrial capabilities, but the industrial programs depended on foreign investment, which never materialized. The Andean Pact also envisioned creating a common market by removing internal barriers to trade. The lack of progress regarding Andean industrial development raised a conundrum. Should a country be held to market liberalization if it was not

getting the promised regional industrial development aid? Andean law dealt with this problem by having a Free Trade Program that allowed for national exceptions for politically sensitive products. The existence of the Free Trade Program complicated the legal scene. The Cartagena agreement prohibited creating new barriers to trade, and it required that states progressively remove existing barriers to trade. But it seemed that everything of importance was exempted from the legal requirements of Andean integration (Hojman 1981).

The ATJ came into existence in 1984. The controversial policies that divided Andean member states remained on the books, but by the time the ATJ was created supranational management of regional economic development had largely given way to national government control over how Andean policies were implemented (Hojman 1981). A handful of motivated litigants sought to use the Andean legal system to challenge national barriers to trade.

The ATJ's first preliminary ruling suit came in 1987, and it involved the registration of the Volvo trademark.<sup>13</sup> While the plaintiff implied that the Colombian authority was not implementing Andean law correctly, the case did not involve an actual or potential conflict between Andean and Colombian law.<sup>14</sup> The ATJ nonetheless used the case to incorporate the ECJ's key foundational legal doctrines and to explain the Andean legal system.

The ECJ had largely invented the notion that European law is supreme to national law—the European Economic Community's founding Treaty (the Treaty of Rome) was itself silent on the issue. The ECJ intentionally framed its legal discourse in constitutional terms.<sup>15</sup> Indeed the ECJ's constitutional language is itself seen as an important political move by the ECJ (Maduro 1998: 8; Vauchez 2007). The ATJ own language on these issues is less overtly constitutional. Like the Treaty of Rome, the Cartagena Agreement and the Andean Court Treaty do not explicitly mention Andean law supremacy over national law. But where the ECJ boldly asserted “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights,”<sup>16</sup> the ATJ notes “Firstly, it is deemed necessary to

---

<sup>13</sup> Andean court decisions are posted by number on the internet (see note: 11). The letters connote the type of procedure (IP= interpretaciones prejudiciales, N=nulidad, AI= Acciones de Incumplimiento). The last number (e.g. 87) corresponds to the year the case was filed (e.g. 1987). This system of notation means that rulings actually lack names. We refer to the rulings by number, as they are listed on the website. See 1-IP-87

<sup>14</sup> The suit challenged the refusal of the competent Colombian legal authority to hear Volvo's complaint against the registration of a trade-mark which Volvo saw as infringing on its own known mark. The litigant wanted the ATJ and the Colombian national court to rule in favor of the “reestablishment of the law so that applications and appeals are rejected in a process of registration of trademark before the Industrial Property Division of the Superintendence of Industry and Trade of Colombia” (1-IP-87: 7).

<sup>15</sup> The *Van Gend en Loos* decision established the direct effect of European law. The ECJ's *Costa* decision went further establishing the supremacy of European law. *Van Gend en Loos v. Nederlandse Administratie Belastingen*. ECJ 26/62 [1963] ECR 1. [1963] CMLR 105. *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, ECJ Case 6/64, [1964] ECR 585, [1964] CMLR 425. See Weiler, 1991 p. 2413-5. For more on the activism involved in these rulings, see: (Hartley 1996)

<sup>16</sup> *Ibid* *Van Gend en Loos v. Nederlandse Administratie Belastingen*. p. 12.

point out that the legal system of Andean integration prevails in its application over the internal or national norms, since it is the essential characteristic of the Community Law as the basic requirement for building integration.” The ATJ then goes out of its way to show that member state had intended Andean law to have primacy over national law:

It was acknowledged in this way by the Commission of the Cartagena Agreement integrated by the Plenipotentiaries of the Member Countries in the declaration approved during the Twenty Ninth Period of Ordinary Sessions (Lima May 29th – June 5th, 1980) when it declared the “full validity” of the following concepts: a) the legal system of the Cartagena Agreement has its own identity and autonomy, constitutes a common law and is part of the national legal systems, b) the legal system of the Agreement prevails within the framework of its competences, over the national norms, without unilateral acts or measures from the Member Countries being able to oppose this legal system, c) the Decisions implying obligations for the Member Countries come into effect on the date indicated... (1-IP-87 p. 3)

The ATJ’s second preliminary ruling request raised the question of what becomes of the national law that remains on the books yet conflicts with Andean law. When the ECJ declared the direct effect and supremacy of European law supremacy, it argued that member states had transferred sovereign power to the European level.<sup>17</sup> The ATJ, by contrast, “firstly settles for preferential application” of Andean law while seemingly absorbing the ECJ’s doctrine into Andean law:

Strictly speaking, the repeal of an internal norm, due to being contrary to a community norm, can be indispensable for practical purposes in certain cases. But since such repeal would have to be decided by internal law and not by community law, integrationist law firstly settles for preferential application... The Court of Justice of the European Communities... has affirmed the absolute preeminence of community law over internal law, an argument that is also applicable to the judicial system of the Andean integration... [The ATJ then quotes the ECJ’s *Simmenthal* decision<sup>18</sup>] “that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights of individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.” (2-IP-88: 3)

These rulings explicitly borrow from the ECJ the notion that Andean law is supreme to national law, and that national courts must disregard conflicting national law in favor of Andean law. In declaring that the ECJ’s jurisprudence “is also applicable to the judicial system of Andean integration,” the ATJ suggests that the ECJ’s legal doctrines apply completely. But the ATJ is not actually as demanding as the ECJ. The ATJ finds that conflicting domestic law is inapplicable, but only so long as there is a contrary Andean law that prevails (2-IP-88: 3). Instead of a radical doctrine of supremacy and preemption, the ATJ establishes the principle of *complemento indispensable*: in areas where Andean law governs, member states may only enact domestic laws that are necessary complements for the implementation of Andean law. This

---

<sup>17</sup> This language of “transferring sovereignty” appears in both the *Van Gend en Loos* and *Costa v. Enel* rulings. Ibid *Van Gend en Loos* p. 12. Op cit. *Costa v. Enel*.

<sup>18</sup> (*Simmenthal*) Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II), ECJ Case 106/77 (1978) ECR 629; [1978] CMLR 263

doctrine is far less demanding than the “implied powers” doctrine of the ECJ that suggested that states had actually transferred away legislating competence in certain issues.<sup>19</sup>

The ATJ’s decision 2-IP-88 also put into place the seeds to replicate the ECJ’s founding assertions of authority. The ATJ cited Article 5 of the Andean Court Treaty, which replicated Article 5 of the original Treaty of Rome, noting that member states are obliged to do whatever is necessary to ensure compliance with Andean norms (p. 2). The ECJ had used this rather vague provision of the Treaty of Rome to suggest that national judges had powers and obligations vis-à-vis European law that were not explicitly spelled out, namely the authority to set aside national law that conflicts with European law (Pescatore 1983). The ATJ went out of its way to insinuate the similarities between the Andean and European legal orders, but we will see that the ATJ did not later evolve these seeds into forceful legal doctrines.

Like the ECJ’s foundational rulings, the ATJ’s rulings were of greater doctrinal significance than they were of substantive impact.<sup>20</sup> The legal cases discussed above did not turn on the constitutional issues the ATJ was speaking to, nor did they require member states to do anything to comply with the decisions. Judged by the silence that followed, both the declarations of the direct effect and primacy of Andean law seem entirely unremarkable. Indeed it is hard to find any commentary on these rulings. The silence that followed left most national judges ignorant regarding ATJ doctrine.

The rest of the ATJ’s law-making in this period is far less expansive. Instead, the ATJ is notably deferential in that the ATJ allows wide state autonomy in implementing Andean rules. The ATJ is also decidedly unhelpful to litigants that are trying to use the Andean legal system to push integration on their governments.

In 1987, Reynolds Aluminum raised a noncompliance suit challenging the Colombian imposition of a duty on imports from Venezuela. The ATJ rejected the suit because at the time private actors were not authorized to raise noncompliance suits.<sup>21</sup> In 1989 a legal entrepreneur from Colombia asked the ATJ to weigh into the controversy surrounding the Andean investment code,<sup>22</sup> which had by this time been relaxed to allow foreign countries to develop their own strategies regarding when and where foreign actors could invest in their countries (O’Keefe 1996:

---

<sup>19</sup> On the ECJ’s doctrine of implied powers, see: Weiler, 1991: 2415-7.

<sup>20</sup> The European Court has a policy style where it develops doctrines in less substantively significant cases, building support for them after which the ECJ applies the doctrine more fully (Alter 1998: 131-2).

<sup>21</sup> 1-INCULP-1987. This early ruling had a different numbering system than subsequent infringement cases. States explicitly authorized private litigants to raise non-compliance suits in the 1996 Cochabamba reforms. Today this legal appeal would be admissible. See note 5.

<sup>22</sup> The Andean Investment code was one of the most controversial policies of the Andean Pact because it limited the terms under which foreign firms could own local companies, and the extent to which profits could be extracted from Andean countries. The code was passed as secondary legislation during the early Andean Pact days. Venezuela demanded changes in the code as part of its accession agreement, and before Chile withdrew from the Andean Pact, it also secured changes in the Investment Code. The code was also revised a number of times in an effort to reinvigorate the Andean Pact project, by encouraging more foreign investment.

818). The ATJ defended its authority to hear the suit, affirmed its precedent and made it clear that governments cannot make unilateral reservations or use domestic law as an excuse to avoid following Andean law. The ATJ's bold declarations of authority, however, did not extend to the substance of the dispute. While the ATJ underscored that member states could not renationalize industries that had been nationalized as part of Andean industrial programs, it gave to Andean governments "full authority" to decide whether certain economic sectors are only for domestic ownership.<sup>23</sup>

The 1987 Reynolds Aluminum non-compliance suit reappeared in 1990 as a preliminary ruling suit. The case resembled in substance the ECJ's *Van Gend en Loos* suit in that the plaintiff asserted that the Cartagena Treaty created an immediate barrier to states raising tariffs on goods from other member states. Unlike Europe, however, the Andean Community had a Free Trade Program that granted exceptions to Andean rules. The plaintiff argued that the Cartagena Treaty prohibited raising any tariffs, and thus that it froze in place existing tariffs even for products that were exempt under the Free Trade Area. The Colombian government argued that the Cartagena Treaty must be interpreted in conjunction with Andean *Decisions* that in essence amended the agreement (Saldias 2007: 12). The ATJ sided with the Colombian government's interpretation in the substance of the case, finding that the Free Trade Program gave member states free reign with respect to items that were excepted from the program:

Member States are independent to decide on burdens and restrictions in relation to reserved or excepted products; the Agreement of Cartagena in no case prohibits them from imposing new burdens or granting these products a more favorable treatment since it would result, anyway, to the benefit of integration. (1-IP-90: 8)<sup>24</sup>

In refusing to find any absolute constraint on states by virtue of the Cartagena Treaty, the ATJ suggested that the Cartagena agreement is not a constitutional contract so much as a starting point for integration; the obligations defined by the Cartagena Treaty get changed and amended through every Andean legislative act.

In 1993 the ATJ was asked again by Reynolds Aluminum, thus for the third time, to rule against the same Colombian duty on aluminum products. Since its 1-IP-90 ruling, Andean laws had been amended. Andean Presidents had finally agreed to establish an intraregional free trade area and they set a four-tiered common external tariff to come in effect January 1, 1992. They

---

<sup>23</sup> 5- IP-89

<sup>24</sup> "La prohibición del Artículo 54 -de otra parte- se refiere a "modificar niveles. . . de modo que signifiquen una situación menos favorable" para la integración, lo cual equivale, en materia de gravámenes, a la prohibición de aumentarlos. No impide esta disposición, en sana lógica, que los gravámenes sean disminuidos o eliminados. No es cierto, en consecuencia -como lo afirma la parte demandada en los Procesos en referencia- que el efecto de la norma, en relación con los productos incluidos en las nóminas de reserva o en las listas de excepciones, sea que "el producto o su importador de ninguna manera puede ser excepcionado del pago de impuesto aduanero." Los Países Miembros son autónomos para decidir sobre gravámenes y restricciones en relación con productos reservados o exceptuados, pero el Acuerdo de Cartagena en ningún caso les prohíbe imponer nuevos gravámenes o conceder a dichos productos un tratamiento más favorable ya que ello redundaría, de todos modos, en beneficio de la integración." (1-IP-90: 8)

had also noted that any special list of goods exempted from the common external tariff was to be eliminated by January 1, 1993 (O'Keefe 1996: 818-19). These legal changes presented an opportunity for the ATJ to decide the case differently.

The legal question of 3-IP-93 was the same as 1-IP-90, and the ATJ reached the same conclusion—governments retained the right to raise tariffs regarding the list of exceptions. Again, the ATJ left the key substantive issues for national courts to decide, essentially punting on the job of using Andean law to promote the common market. The ATJ discussed the various regimes that governed Andean Trade, including the Cartagena Agreement's prohibition on countries imposing new barriers to trade, Cartagena Agreement's Free Trade provisions which envisioned the automatic lowering of barriers over time, the Quito Protocol which "substantially modified" the Cartagena agreement by creating a separate regime for products regulated under Andean Industrial Programs, and various Andean *Decisions* passed to implement the Free Trade Program which allowed for a list of exceptions to be regulated by national governments. The heart of the issue, however, was what regime governed what products? Was Colombia obligated not to raise tariffs on aluminum because of the Cartagena agreement? Was aluminum covered by the Andean Industrial Programs, which seemingly transferred regulatory authority to the Andean level? Or, did aluminum fall under the list of exceptions where national governments retain complete autonomy? This crucial issue, the ATJ left national courts to decide saying

For the specific case that gave rise to the preliminary ruling reference, it is for the national court to determine whether the product in question is part of the "universe" of tariffs which are to be automatically decreased over time, on the list of exceptions for which each member country retains rights, or part of the products affected by [Andean] industrial development programs. (3-IP-93: 13) (check translation)

It is hard to imagine that the ECJ would have refrained from asserting its authority to determine the extent of national exceptions. Indeed ECJ Justices have been quite explicit about the extent of their involvement in determining *how* national actors should apply European rules. ECJ Justice Federico Mancini once wrote:

It bears repeating that under Article 177 [the preliminary ruling procedure] national judges can only request the Court of Justice to interpret a Community measure. The Court never told them they were entitled to overstep that bound: in fact, whenever they did so—for example, whenever they asked if national rule A is in violation of Community Regulation B or Directive C—, the Court answered that its only power is to explain what B or C actually mean. But having paid this lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the court usually went on to indicate to what extent a certain type of national legislation can be regarded as compatible with that measure. The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play. (Mancini 1989: 606).

The ECJ, while doctrinally activist, was also substantively cautious during its foundational period. Karen Alter has argued that the ECJ was playing off the shorter time horizons of politicians, building the legal foundations of its political authority while making sure that its rulings did not rouse political concerns (Alter 1998: 130-33). But the ATJ was more than

substantively cautious. It also refused to assert its authority in the bold terms the ECJ had demanded.

There were a number of ways that the ATJ could have used the aluminum cases to expand its authority. The ATJ could have mimicked the ECJ, implying for itself the powers necessary to ensure that the Cartagena's prohibition on raising tariff levels were respected. Or, the ATJ could have developed a general doctrine limiting the types of trade restrictions while more clearly suggesting that the specific Colombian policy fell under one of the allowed exceptions. Why would the ATJ remove itself from deciding on a case-by-case basis whether specific goods remain at the discretion of member states? The ATJ suggested that countries could always remove something from their list of exceptions, doing so unilaterally, which was perhaps the reason why national judges had to determine which products remained on the list of exceptions. But in turning this issue over to national courts, the ATJ effectively removed any role for itself in determining whether states were in effective compliance with Andean free trade rules.

Something was inhibiting the ATJ from making the bolder claims the ECJ had made. Would the ATJ become a more purposive law-maker if there were greater consensus within the Andean Community? The next period we examine represents the height of political consensus within the Andean integration system.

#### **ATJ law-making during a period of relative political harmony - 1996-2004**

In response to the demands of international financial institutions and growing domestic dissatisfaction with the slow pace of regional economic growth, national governments re-launched Andean integration in the mid 1990s. By this time, the dependency economic theory that had underpinned the Andean Pact had come into disrepute, and the neo-liberal Washington Consensus was being embraced throughout the region (Dezalay and Garth 2002; Williamson 1990). The Andean Community decisively shed its import substitution policies, embracing the goal of building a common market (O'Keefe 1996). Member States also reformed Andean institutions, replacing the ineffectual Junta with a General Secretariat (GS), increasing the size of the Secretariat's budget, and appointing a new cadre of young lawyers eager to use the Secretariat's enhanced resources to promote regional integration.<sup>25</sup>

Starting in 1996 the ATJ faced a very different context. Compared to the Andean Pact period, there was relative agreement among member states regarding the economic approach of Andean integration. There were still challenges; Peru immediately withdrew from the Common External Tariff citing economic difficulties,<sup>26</sup> and Andean states continued to disagree on specific policy issues. But in the 1996 Treaty of Cochabamba reforms increased the Andean legal tools

---

<sup>25</sup> Interviews with Monica Rosell, former Legal Secretary of the ATJ and Attorney in the Legal Advisor's Office of the Secretariat General, Quito, Ecuador, Mar. 17, 2005 & Chicago, IL Apr. 1, 2007 [hereafter Interviews with Monica Rosell].

<sup>26</sup> [http://www.comunidadandina.org/INGLES/comercio/customs\\_union.htm](http://www.comunidadandina.org/INGLES/comercio/customs_union.htm)

private actors have to seek member state compliance with Andean rules, and sent the message that member states wanted the ATJ to more actively enforce Andean rules (See Note 5). And the *Sucre Protocol* of 1997 envisioned the phasing out all exceptions to the common market system.

We can see a divergence in ATJ law making around this time. With respect to intellectual property (IP) law, the ATJ became a more active law-maker and enforcer of Andean law. As we discuss elsewhere, in the 1990s the ATJ demanded procedural improvements in how IP administrative decisions are made, and it developed substantive IP doctrine regarding notorious trademarks, and co-existence agreements, doctrines that were wholly judge-made. These developments count as law-making, but they mainly help clarify unspecified elements of Andean IP law. The ATJ was also willing to apply its doctrines in more politically charged cases. In one noteworthy exchange, the ATJ ruled that Peruvian, Bolivian and Venezuelan decisions to grant second use patents violated Andean law. In the Bolivian and Venezuelan case, the plaintiff argued that second use patents were permissible under World Trade Organization rules, which is a dubious claim. The ATJ found that Andean law is even supreme to international treaties (01-AI-2001), a position that the ECJ has also adopted [need citation]. The ATJ's language is unequivocal, invoking the tone of ECJ rulings: "The principle of autonomy of the Andean Laws establishes that regional law has as its source not the laws from member states but the Treaty of Creation of the Andean Community and therefore it does not rely on nor is it subordinated by any international laws which are part of the domestic laws. International treaties signed by member states do not bind the Andean Community nor will they have any effect even though these might have binding force for member states. (p. 16)" These rulings help ensure that Andean and European law cannot be undermined by countries signing international agreements, and thus that Andean and European integration cannot be subsumed by the World Trade Organization or by bi-lateral agreements.

Outside of the issue of IP, the ATJ became bolder, though not per se any more expansionist in its law-making. For example, in 19-IP-98 the ATJ did delve into the facts of the case, going beyond the briefs provided by others to augment its fact finding. The case involved Venezuela's refusal to grant preferential aid to mercantile ships from the Andean region. The ATJ noted a number of examples of violations where Venezuela seemed to help ships from its other trade partners- the United States, Canada and Brazil—and where the plaintiff's efforts to assert their legal rights under Andean law were rejected by national regulators and national courts. The ATJ's decision leaves no doubt that Venezuela failed in its obligations to the plaintiff.

The ATJ's decision regarding Colombia's alcohol policy, discussed below, is unequivocal in stating that the Cartagena agreement requires the elimination of duties and restrictions on regional imports, and that the government must find a way to keep municipalities from discriminating as they set their own tax rates. In 103-IP-2000 the ATJ finds that countries cannot on their own determine if imports from other Andean countries have led to temporary

market disruptions, rather the Andean GS must approve any safeguard that an Andean country wants to implement.

These rulings make strong legal demands of states. But they don't exploit the seeds of Andean law supremacy laid in the foundational period. The Venezuelan ruling is hard to track. With Hugo Chavez's political assent, the Venezuelan judiciary became politically penetrated by Chavez appointees. The Venezuelan reference noted above is the only case referred to the ATJ by national judges to the ATJ. Though we did interview current and former Venezuelan officials in Ecuador and the United States, we chose not to conduct fieldwork in Venezuela which in 2006 withdrew from the Andean Community. In the end, we were unable to find any information about what happened to the ruling. More interesting is the Colombian alcohol case.

The Colombian alcohol dispute has a fairly long lineage. In May 1991, Ecuador complained to the Andean *Junta*, arguing that certain municipal rules in Colombia related to the distribution and floor prices for alcohol products impeded competition and discriminated against alcohol products exported from Ecuador. At the time, the Junta was avoiding raising suits in front of the ATJ. It arbitrated the dispute without resolving the underlying problem.<sup>27</sup> The compliant appeared again after the reforms of the Andean legal system in 1996. This time Venezuela brought a complaint against Colombia's alcohol policy, leading the *Junta* to pass a binding *Resolución 453* which found that the legal problem was not the monopoly per se, but the policies of certain Colombian municipalities. The Junta asserted that the Colombian government had admitted that some municipalities discriminated against imports in their distribution and pricing policies.<sup>28</sup> It ordered Colombia to fix the problem. The *resolución* was legally binding once published in the official "Gaceta" on February 13, 1997. When Colombia ignored the *resolución*, what was by now the General Secretariat raised a noncompliance suit in front of the Andean Tribunal.<sup>29</sup>

Meanwhile, on November 7 1997, a private citizen (Maria Carolina Rodriguez Ruiz) asked the Colombian Constitutional Court to review the constitutionality of the base law that allowed for a state monopoly on alcohol sold. Rodriguez Ruiz suggested a number of legal problems with the alcohol monopoly, one of which was its incompatibility with the Andean Cartagena agreement. With this case pending, the ATJ stalled for time.

The Colombian Constitutional Court issued its ruling on May 27 1998.<sup>30</sup> The Colombian Court was well aware of *Resolución 453*. Still, it found that enforcing this *resolución* was not its responsibility. According to the Colombian Constitutional Court, certain international treaties (namely human rights treaties) are part of a "bloque de constitucionalidad" (defined in Article 93

---

<sup>27</sup> This background is referred to in *Resolución 453* in the *Gaceta Oficial del Acuerdo del Cartagena*, Año XIII - Número 249 p. 3.

<sup>28</sup> *Ibid.*

<sup>29</sup> For a number of years the Junta insisted that its *resoluciones* had the same legal affect as an ATJ decision. The case was raised October 20, 1997. See the ATJ ruling 3-AI-97.

<sup>30</sup> Constitutional Court (CC) of Colombian Decision c-256/98 of 27 May 1998.

of the Colombian Constitution),<sup>31</sup> which gives them a higher authority than national law. But Andean law is not part of this “bloque;” instead its status is equal to domestic legislation. Regular international treaties do not need to be considered when the constitutional court determines whether or not domestic law contravenes or not the constitution. Because ‘international treaties and the constitution do not share the same hierarchy, nor are [international treaties] an intermediate legal source between the Constitution and regular domestic laws... contradictions between a domestic law and Andean Laws will not have as a consequence the non-execution of the law’ thus a constitutional challenge is not the correct means to determine a contravention between domestic and Andean laws.’<sup>32</sup> The Constitutional Court refused to nullify the alcohol monopoly legislation, leaving it for the government to find a way to make the implementation of the alcohol monopoly policy compatible with Andean law.

The ATJ issued its non-compliance ruling about six months after the Constitutional Court ruling (December 8, 1998.) The ATJ went out of its way to agree with the Colombian Constitutional Court, quoting from the ruling and concurring there was no inherent conflict between the Colombian Constitution’s authorization of an alcohol monopoly and Andean law. It was the implementation of this monopoly that was a problem. Each municipality set the terms for selling alcohol, forcing exporters to apply for a license in each municipality. The Colombian government had tried to introduce a common system of taxation for alcohol products (la Ley 223 de 1995 sobre Racionalización Tributaria), but municipal licensing and price floor policies persisted. The ATJ found that municipal practices did create restrictions on the circulation of alcohol products, and that Colombia was obliged under Andean law to correct the problem.

The private litigant of the Constitutional appeal went on to raise an Andean preliminary ruling case, asking the Colombian Consejo de Estado to nullify the Colombian law authorizing the alcohol monopoly. This case was referred to the ATJ which on 22 January 1999 reiterated that the Colombian government was legally bound to change the practices that conflicted with Andean law.<sup>33</sup> For the Consejo de Estado, however, the problem was that the law authorizing alcohol monopolies stemmed from 1905. The legal source was thus a law, and not an

---

<sup>31</sup> Article 93 of the Colombia’s 1993 constitution states that. “International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically.”

<sup>32</sup> [needs a pincite—the clause is: “Ni los tratados de integración ni el derecho comunitario se acomodan a los supuestos normados por el artículo 93 constitucional, ya que sin perjuicio del respeto a los principios superiores del ordenamiento constitucional, su finalidad no es el reconocimiento de los derechos humanos sino la regulación de aspectos económicos, fiscales, aduaneros, monetarios, técnicos, etc. No existe la superioridad del derecho comunitario sobre la Constitución, y que no es cierto que comparta con ella idéntica jerarquía. Adicionalmente, el derecho comunitario tampoco conforma un cuerpo normativo intermedio entre la Carta Fundamental y la ley ordinaria, ya que la aprobación de los tratados por el Congreso se lleva a cabo mediante una ley ordinaria, de modo que, analizadas las cosas desde la perspectiva del juicio de constitucionalidad, las presuntas contradicciones entre la ley y el derecho comunitario andino no generan la declaración de inexecutable, cuyo presupuesto es la inconformidad de una norma inferior con otra superior y no con otra de la misma jerarquía o proveniente de algún órgano comunitario.”]

<sup>33</sup> ATJ decision 29-IP-98. 22 January 1999

administrative decision. The Consejo de Estado, in its view, lacked the authority to invalidate laws, indeed to do so would infringe on the separation of powers in violation of the Colombian Constitution. Moreover, there were a number of legal precedents affirming the validity of the law in question.

This interchange is remarkably similar to what the ECJ faced in its *Costa v. Enel* ruling, with one important exception. The *Costa v. Enel* case had been sent simultaneously to the Italian Constitutional Court and the ECJ. The Italian Constitutional Court ruled first, finding that European law was inapplicable to the case at hand and *not* supreme to national law [check this].<sup>34</sup> The ECJ nonetheless went on to review the case, finding that European law was supreme to national law, that national courts were obliged to apply European law instead of conflicting national law. But on the merits the ECJ found that the Italian law in question did not violate the Treaty of Rome.<sup>35</sup> Perhaps the key difference between the ECJ and ATJ's situation was that in the *Costa v. Enel* case it was far from evident that nationalizing the Italian energy industry in any way violated European law. In the Colombian case, however, Colombian policy had already been found to violate Andean law.

In its alcohol ruling, the ATJ seems to step back from its early invocation of the ECJ's *Simmenthal* doctrine in its 2-IP-88 ruling. If the ATJ had followed the ECJ, it would have instructed the Colombian Court to do what was necessary to give effect to Andean law. Instead, the ATJ stuck to its doctrinal declaration of what Andean law requires, without demanding that national courts help to enforce Andean law.

There are other signs of ATJ caution in this period. In 1999, the administrative tribunal of the Peruvian IP agency INDECOPI attempted to refer a case to the ATJ. At the time, the ATJ was not receiving any references from Peruvian courts. If the ATJ had allowed the INDECOPI tribunal to send cases, it would expand its influence within Peru. Yet Andean judges rejected the INDECOPI referral, adopting the formalist position that the INDECOPI tribunal was part of an administrative agency, and thus not a "judicial body" qualified to refer cases.<sup>36</sup>

In 87-IP-2002 TELECEL asked the ATJ to review a Bolivian telecommunications regulation that created a different tax rate for long distance calls from land lines compared to calls from cell phones. The plaintiff argued that the Bolivian tax system was discriminatory in that two identical products (long-distance calls) were being taxed differently—with the result that the state owned firm (ENTEL) was advantaged over the privately owned TELECEL. The

---

<sup>34</sup> *Costa v. E.n.e.l. & Soc. Edisonvolta*, Italian Constitutional Court Decision 14 of 7 March 1964, [1964] CMLR 425, [1964] I II Foro It. 87 I 465.

<sup>35</sup> See note 15.

<sup>36</sup> We found no written record of this decision, but its existence was confirmed by several Peruvian attorneys, judges, and government officials. The ATJ reversed course in 2007, ruling that IP agencies could refer cases following a final administrative decision. 14-IP-2007 (interpreting the term "domestic judge" in the Revised ATJ Treaty to include an administrative agency that carries out judicial functions). This change is likely to expedite ATJ review of agency registration decisions by obviating the need for appeals to national courts.

ATJ found that Andean rules (Article 2 of *Resolución* 285) excludes practices carried out by enterprises in a single member state that do not generate regional externalities. Thus the ATJ found that the Bolivian regulation was not governed by Andean law.

A former member of the Andean legal secretariat sought to encourage the ATJ to fill in details regarding Andean regulation regarding the safe use of pesticides. The ATJ found that there was an obligation under Andean law to improve the quality of life in rural and agricultural industries, and it called for a better administrative procedure to achieve this goal, including a registration of pesticide products that would apply to both imported and regional pesticides. But it left it up to the competent national authority to determine how to best achieve these goals. Indeed the ATJ found that there was no Andean law that required any different procedure than whatever national registrars require.<sup>37</sup>

Thus we see that in intellectual property issues, the ATJ will build and enforce Andean law. But outside of IP, the ATJ remains the reticent law-maker.

### **The ATJ in times of crisis: 2005-to the present**

The Andean Community has entered a new period of political crisis, triggered in large part by Hugo Chavez's challenges to the liberal economic philosophy underpinning Andean integration. Buoyed by higher oil prices, Chavez began intervening in the internal affairs of his neighbors, providing funds to left leaning pro-Chavez political candidates, and reputedly aiding the revolutionary forces fighting Colombia's government (the FARC). With the ascendancy of Evo Morales as President of Bolivia in 2006, Chavez gained an ally in the Andean Community. Together with Morales, Chavez began blocking new initiatives that had a market orientation. In 2006 Venezuela withdrew from the Andean Community, taking with it a significant portion of the Andean Community's budget.

This political crisis has slowed down General Secretariat enforcement of Andean law through noncompliance suits. It has not, however, noticeably affected ATJ litigation in preliminary ruling cases. Ecuadorian, Colombian and Peruvian courts continue to refer IP cases to the ATJ, and the ATJ continues to enforce clear Andean rules where it is asked to do so. Moreover, the ATJ has hung strongly to its established precedent, and in some areas been even bolder. The ATJ upheld the supremacy of a resolution of the General Secretariat over domestic regulations that had been adopted later in time.<sup>38</sup> In an Ecuadorian case arising from a contract dispute between two private companies, the Andean Tribunal reiterated its view that Andean law is supreme to WTO rules (in this case the General Agreement on Trade in Services) (158-IP-

---

<sup>37</sup> Interview with Marcel Tangerife Torres, former member of the General Secretariat's legal division 10 September 2007, Bogota Colombia. The case was 137-IP-2003.

<sup>38</sup> The ATJ upheld a General Secretariat resolution that refused a Colombian request to defer a tariff. The ATJ found that Colombia had violated Andean law when it ignored the Secretariat and unilaterally altered a tariff. The ATJ clearly states that the specific General Secretariat resolutions are supreme to domestic regulations, even if the General Secretariat resolution came earlier in time than the domestic regulation (115-IP-2005).

2006). The ATJ also reversed its earlier ruling, agreeing to accept referrals from the internal adjudicative bodies of IP administrative agencies (14-IP-2007; see note 36).

### **Comparing 25 Years of Expansionist Judicial Law-Making by the ATJ and ECJ**

The above analysis covers the universe of law-making in ATJ preliminary ruling cases. To summarize where we stand: the ATJ has on the one hand emulated ECJ doctrine. Andean law is directly effective and supreme to national law, preempting and even barring Andean countries from passing domestic legislation in areas covered by Andean law, except to implement Andean laws. The ATJ has also tried to harness national courts as enforcers of Andean law, making it clear that national courts are obligated to refer all cases involving Andean law to the ATJ, and give priority to Andean law. But the ATJ has fallen short of requiring national courts to do whatever is necessary to see that Andean law is respected. While the ATJ notes that these doctrines are based on state consent, the ATJ has developed these doctrines beyond what was formally agreed to. For example, the ATJ has found that Andean law is even supreme to international agreements states may sign with non-Andean countries.

The ATJ is increasingly willing to enforce clear Andean rules, and it has engaged in gap-filling law-making with respect to IP issues. But Andean rules themselves grant significant discretion to states as they implement Andean secondary legislation. The ATJ respects state discretion, and eschews opportunities to imply powers or expand the reach and scope of Andean law beyond its very limited terrain. Moreover, the ATJ does not treat the Cartagena agreement as higher order law, relying instead on secondary legislation to determine the reach and scope of Andean rules. Said differently, member states are able to cabin in ATJ law-making so that the ATJ does not regularly develop the law in ways that member states do not desire or intend.

Both the ECJ and the ATJ experienced the conditions which scholars expect to contribute to law-making. Both courts have mechanisms that allow them to work with national courts to enforce Andean and European law. Both courts experience a rise of litigation—an opportunity to show the court’s benefit to litigants. The ATJ has arguably showed its utility in IP cases where it has developed gap-filling law, and backed up the authority of domestic IP agencies. Meanwhile the ATJ has avoided other opportunities litigants have presented to issue purposive rulings that both help litigants and aggrandize the power of the ATJ. The refusal of the ATJ to be boldly helpful arguably hinders spillover. Not only does the reach and scope of Andean law *not* expand, litigants stop searching out cases that could contribute to legal expansion. Of the ATJ’s 1338 preliminary ruling references, only 35 involve issues other than IP.<sup>39</sup>

In contrast to the ATJ, the ECJ is often expansionist in its doctrine. Examining ECJ doctrinal development involving three separate substantive areas of European law (the

---

<sup>39</sup> Many of these non-IP cases were discussed above. There are an additional 17 cases that involve a special tax program for firms exporting products to other Andean states. A single firm is a repeat player in most of these cases, but the legal issues remain narrow and the ATJ’s jurisprudence in these cases is not particularly noteworthy. For an analysis of preliminary ruling reference patters, see: (Helfer and Alter 2009)

environment, sex discrimination and free movement of goods), Alec Stone Sweet concluded that “through its rulings [the ECJ] has acted—relatively systematically—to reduce the domain of national autonomy, to expand supranational modes of governance to the detriment of intergovernmental modes, and to create the conditions for the gradual Europeanization of national administration and judging (Stone Sweet 2004: 232).

Breaking down ATJ law-making historically revealed another difference. In terms of constitutional doctrine, the ECJ is most expansionist in its foundational period, when European legal integration was stalled. The Andean Tribunal also developed its most important doctrine during its foundational period, but overall the Andean system does not reveal the dynamic of judges stepping in when political process is blocked.

How can we understand this contrast in ECJ/ATJ judicial law-making?

### **III. WHY ISN'T THE ATJ MORE OF AN EXPANSIONIST LAW-MAKER? WHY IS THE ECJ JUST AN EXPANSIONIST LAW-MAKER?**

This section draws on the literature on IC law-making to consider whether they can account for the pattern documented in Section II. We reject a number of possible explanations for the variation we find, before developing our own explanation.

All of the theories discussed in Part I assume that judges have choices, and that factors like legal culture are insufficient to explain the proclivity of judges to make law. But many lawyers trained in the civil law tradition would simply say that the ECJ adopted a common law approach to the law, while the ATJ reflected the civil law tradition of its member states. We reject legal culture based arguments for a number of reasons. First, it is ahistorical to think that European legal traditions of the 1960s were fundamentally different from Latin America traditions in the 1990s. All of the EEC's founding states had civil law traditions that inhibited national judges from embracing European law supremacy.<sup>40</sup> Second, as John Merryman himself notes, the civil law tradition is often more of folklore than reality; the “tradition” is constantly evolving, and increasingly courts in Europe and Latin America are moving in the direction of decodification of the law and constitutionalism (Merryman and Pérez-Perdomo 2007: 156-9). Indeed the ATJ is quite up front in its reliance on its own precedent, which the ATJ and national actors clearly consider to be an authoritative legal source—something one would expect of common law not civil law courts. Third, reverting to cultural arguments ignores a central finding related the Andean legal system. For IP, legal integration worked pretty much as the advocates of neo-functional theory expect (Burley and Mattli 1993; Stone Sweet 1999). New Andean IP rules (adopted in 1992) increased the incentive to apply for and defend intellectual property rights, and thereby increased the number of appeals of national IP decisions. Appeals of IP

---

<sup>40</sup> One should not forget the full title of John Merryman's classic book: *The Civil Law Tradition an introduction to the legal systems of Europe and Latin America*. For more on the challenges of European national judges in embracing the ECJ's doctrine, see: (Alter 2001)

application decisions created more opportunities to fill in details of Andean IP doctrine, which led the ATJ to “construct governance.” (See: Helfer, Alter, and Guerzovich 2009) The success within the IP “island of law” makes all the more interesting the finding that legal integration has not really spilled outside of the issue of IP, nor has the ATJ become significantly more expansionist in its law-making. We also reject any formalist legal analysis that looks to the different mandates of the two courts.<sup>41</sup> The essential difference is that the ECJ chose to assume that member states intended the legal rights to be meaningful, and the legal system to be effective (Pescatore 1983); something the ATJ could also have chosen as well.

Do the structural factors identified in the more dynamic “nature” based theories explain the patterns we see? One possible argument is that ATJ judges face a greater risk of sanction compared to ECJ judges. But this claim is hard to sustain. The ECJ’s doctrine of the 1960s advanced radical legal and political ideas such as supranationality, which Charles De Gaulle vehemently rejected, and the notion that sovereignty had been transferred. The ECJ’s doctrines were controversial at the time, and they did give rise to numerous political and legal challenges.<sup>42</sup> Since the ECJ was avoiding issuing rulings that required states to change their policies, however, the only way to legislatively reverse the ECJ’s doctrinal assertions would be to redraft the Treaty of Rome, making it clear that European law *was not* supreme to national law. The ATJ also did not require governments to change their policy, but unlike the ECJ it was careful to note that states retained the discretion in key policy areas. Moreover, the ATJ itself created a greater likelihood of being legislatively reversed by treating the Cartagena agreement as a simple statute, as opposed to a constitutional document.<sup>43</sup> So we can say that both courts avoided legislative reversal by not requiring governments to change their policy, but not that a fear of sanction in itself explains the different law-making experiences.

Another central difference is the level of importance of inter-community trade in the two regions. Alec Stone-Sweet and Thomas Brunell have suggested that there is a linear relationship where more trade translates into greater supranational litigation rates, which in turn contributes to the construction of more supra-national law (Stone Sweet and Brunell 1998). While the total level of inter-Andean trade remains very low, we should not forget that at the launching of the European Economic Community, inter-European trade was also relatively small, constituting less

---

<sup>41</sup> Where the Treaty of Rome simply gives the ECJ the authority to offer preliminary rulings, the Andean Court Treaty (Article 34) specifies that “The Court’s interpretation must be limited to specifying the contents and scope of the provisions comprising the legal system of the Andean Community, which refer to the specific case. The Court may neither interpret the contents and scope of national law, nor judge the facts in dispute.” To encourage the ATJ to be a bit bolder in considering the facts of the case, member states added to Article 34 in Cochabamba reforms. States added the sentence 34 “Even so, it may refer to those facts when essential for the requested interpretation.” See note 5 for a discussion of the Cochabamba reforms.

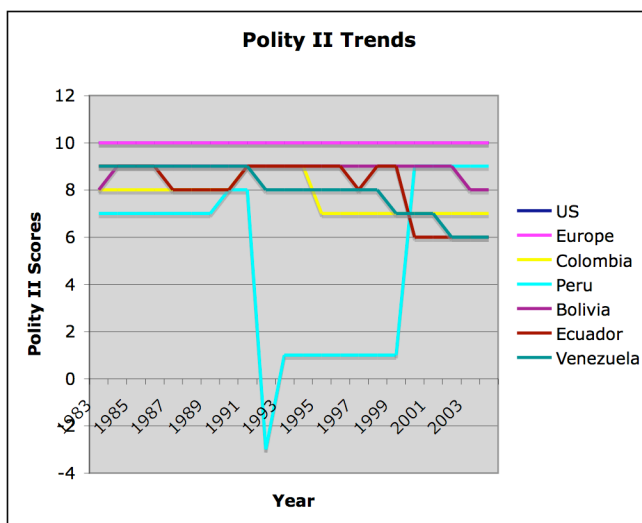
<sup>42</sup> Legal and political opposition to the ECJ’s doctrine of supremacy is discussed in (Alter 2001)

<sup>43</sup> Why would the ATJ hesitate? By the time the ATJ existed, there was both the Cartagena Agreement and the Free Trade Agreement which seemingly contradicted the Cartagena agreement. The ATJ lacked the political support to elevate the Cartagena agreement above the Free Trade Agreement, and it may well have also lacked the legal authority to do so. Recall that these early rulings occurred in the 1980s, before the advent of constitutionalism in the region which came with the 1991 establishment of the Colombian Constitutional Court.

than 3 percent of the GDP of European countries (Stone Sweet 2004: 57). Trade among Andean states did increase over the period we study, from a low point of Andean 3% to 5% of total trade during the Andean Pact period (Avery and Cochraine 1973: 183; Hojman 1981),<sup>44</sup> rising in the last decade to 13% in 1998 but declining to less than 10% a few years later (Kuwayama 2005: 14; Rodríguez Mendoza, Low, and Kotschwar 1999: 96). There is no evidence that increases in trade have led to increases in private actor use of the Andean legal system, perhaps because litigating ones way towards economic openness seems like a fairly fruitless endeavor for Andean firms. A greater political commitment to economic integration in the Andes would likely manifest itself in more binding collective rules and in greater firm-based investment in regional trade, which may generate more litigation and more ATJ rulings enforcing Andean rules. We do not dispute that the virtuous circle envisioned in Stone-Sweet's neo-functionalist theory can emerge. At the same time, it is hard to sustain that trade was the engine of ECJ law-making in the 1960s, nor does the absence of trade explain the lack of ATJ law-making in the period of time we study.

Might political instability and the relative fragility of democracy in Andean countries explain the ATJ's unwillingness to engage in expansionist law-making? Table 1 below identifies the POLITY II scores of Andean states, which measure the quality of the democracy within Andean States. During the period of time we studied, Peru, Ecuador and Venezuela experienced significant turns toward authoritarianism, which usually involved political threats to national judges. They also experienced returns to democracy, which could have ushered in a significantly different approach to Andean law.

**Table 1. Polity Scores --Andean Countries and Europe Compared**



<sup>44</sup> Evolucion del Proceso de Integracion 1969-1999, CAN document SG/di 219/Rev.1 at 28 (Apr. 26, 2000) (on file with authors).

The fluctuations in POLITY scores suggest answer to some questions involving the Andean legal system, but not to our main question. Elsewhere we document the relative lateness of Peruvian courts' willingness to referring IP cases, and dearth of references from Bolivian and Venezuelan courts (the ATJ has only one reference from each court). These trends are arguably explained in part by the factors that give rise to lower POLITY scores. But the human rights revolution has spread to Colombia and Peru, contributing to greater judicial willingness to enforce human rights obligations against government officials [add citations]. Andean legal integration, however, does not seem to be affected by these trends. Unsurprisingly, the simple equation wherein more democracy means greater respect for international law and more law-making across the board does not hold.

We are not saying that trade levels, political threats, or political instability are irrelevant factors when it comes to Andean law or ATJ decision-making. The real question is how do contextual factors interact to explain the outcome we find? There is too little evidence that sanctioning concerns either drove or hindered law-making in the two courts during the period of time we studied. We can see how virtuous circles of trade, litigation and law-making may be self-reinforcing. We can also see how the failure of courts to reward legal entrepreneurs can undercut the incentive to litigate, and thereby the demand for law-making (Alter 2000). But to see these dynamics is not to explain the role of ICs within them. These factors do not account for the stark divergence in expansionist law-making we observe.

Perhaps the real problem is that we have started from the European case, and with it "nature" based theories, assuming that the European experience presents the baseline expectation. Perhaps the question is not why the ATJ was not more active in using law to promote Andean integration, but rather why the ECJ was so unusually willing to engage in the risky endeavor of expansionist law-making in the 1960s? After all, the ATJ has mostly been cautious. Taking risks is far hard to explain that acting with caution.

New sociological accounts of early European legal integration focus on the political background of key actors—litigants, ECJ judges, and national judges—revealing that the ECJ's activist revolution in the 1960s and 1970s was not really about the spontaneous pursuit of mutual self-interest as Burley and Mattli suggested. Rather, it appears that the legally trained politicians who favored European integration converted the political defeat of the European Political Community and European Constitution projects into to a legal strategy, seeking to build through litigation and legal interpretation what they had been unable to create through high level political negotiations (Cohen 2007). Committed integrationists created a network of legal activists, which included a number of people who held important legal and political positions in national universities, judiciaries, and governmental bodies. These activists used their offices, as lawyers, legal scholars, and judges, to aid the process of European legal integration.

Pro-integration jurists helped create test cases so that the ECJ could develop doctrine. During meetings of legal associations dedicated to the study of European law, members of the

ECJ and the Commission's legal secretariat let lawyers and national judges know what types of cases would be helpful. Sometimes the Commission even leaked to lawyers cases that it had settled with governments, so that lawyers could find a similar case to raise in a national court. Meetings of scholarly associations served as de facto "kitchen cabinet" sessions where scholars debated legal doctrines that the ECJ could embrace. Often ECJ judges sat in on debates where lawyers and scholars discussed the rulings of ECJ's Advocate General, which served as a sort of trial balloon public argument that the ECJ could consider.<sup>45</sup> There is some evidence that these debates encouraged the ECJ to be bolder in its legal discourse (Alter 2009: 76-8). Once the ECJ had ruled, pro-integration legal scholars ran a decentralized public relations campaign on behalf of the ECJ doctrines. They wrote articles about the rulings, and used their positions as national judges, government officials and law professors to make it appear that there was growing societal support that favored ECJ legal integration (Vauchez 2007; Sacriste and Vauchez 2007; Alter 2009).

The largely one-sided activities of pro-integration European lawyers are well known. Eric Stein, Joseph Weiler, Anne-Marie Slaughter, Walter Mattli, and Hjalte Rasmussen all noted that legal scholars and national judges were helpful intermediaries for the ECJ (Weiler 1994; Rasmussen 1986; Mattli and Slaughter 1998). But scholars then built theories that either assumed the support of these actors, or that wrote out the importance of ICs having the support of sub-state interlocutors. In terms of our puzzle, the existence of supportive sub-state interlocutors explains when both the ECJ and ATJ are more eager and assertive law-makers.

This paper compares the ECJ of the 1960s and 1970s to the ATJ because most scholars focus on the ECJ in the context of the EEC and because the EEC context is more directly comparable to the Andean integration context. But the ECJ was created in 1952, as part of the European Coal and Steel Community (ECSC). Stuart Scheingold analyzed every ECJ decision from 1952 to 1964 issued as part of the ECSC. Scheingold concluded that the ECJ's flexible approach to enforcing ECSC rules often "watered down" supranationalism and made ECSC rules quite "plastic." (Scheingold 1965: 300) Scheingold's assessment of the ECJ in this period is quite similar to what we observe of the ATJ: "Where the jurisdiction of the Community is clear the Court has generally been willing to indulge in extensive and illuminating explorations of the Treaty. On the other hand, the judges have had major difficulties with suits raising issues bearing on the partial character of the Community. The other problem area for the Court has been, of course, suits growing out of the Community's rather awkward efforts to adapt the treaty to changing conditions." (p. 278). According to Scheingold, what limited the ECJ was the fundamental weakness of the High Authority and the partial nature of European Coal and Steel

---

<sup>45</sup> The Avocates General (AG) are ECJ employees, with a status equal to an ECJ judge, who offer public reasoned opinions for ECJ judges to consider. Avocates Generals can question parties involved, and they issue their rulings before the ECJ has deliberated or ruled. The ATJ is a poorer institution. It lacks a system of AGs or of legal secretaries who could provide continuity and legal expertise for ATJ judges to consider.

integration. Scheingold's assessment suggests that even the ECJ is at times unwilling to be an expansionist law-maker.

Meanwhile, we find that the ATJ is more of a law-maker in the area of IP law. Why would the ATJ be more willing to make law in the area of IP? For the area of IP, the ATJ has a set of interlocutors—the national IP agencies. One cannot observe the support of these agencies from coding ATJ rulings—indeed IP agencies are almost always the defendant in preliminary ruling cases. But our interviews revealed that national IP agencies are perhaps the most enthusiastic of the ATJ's interlocutors. National IP agencies actually *prefer* that national judges refer cases to the ATJ, as they fear that national judges have no expertise in IP issues. National IP agencies have worked with the GS to help refine Andean IP laws, giving them a stake in the IP rules the ATJ oversees. National IP administrators stay on top of ATJ jurisprudence, immediately incorporating ATJ interpretations into their legal practice. Our analysis of the ATJ's influence over Andean IP law revealed that ATJ oversight actually protects national IP agencies, helping them to resist political pressure from the United States and Western firms even where their own governments have conceded ground (Helfer, Alter, and Guertzovich 2009: 22-34).

The behind the scenes support of IP agencies is important in the Andean context because national judges remain both confused and ambivalent about their obligations under Andean law. In Ecuador and Peru national courts had to be threatened and pressured before they would begin referring cases to the ATJ (Helfer and Alter 2009). In Colombia national judges have been more willing to refer cases, but the Colombian judges we spoke to were clearly happy that the ATJ remained rather abstract in its rulings, leaving key aspects of legal discretion to them.<sup>46</sup> The national judges we interviewed also did not see the direct effect and supremacy of Andean law as suggesting that a broad range of national legal domains, such as taxes and customs, likely fell under the ATJ's authority. Indeed it seems that judges both accept the primacy of Andean law, and see few legal obligations flowing from the primacy of Andean law. There seems to be a regional distinction between the “primacy” of Andean law, and what lawyers in the United States and Europe would call higher order legal “supremacy.” Primacy seems to be closer to priority—when rules conflict, Andean rules should prevail even over national laws passed subsequent to the Andean law. But primacy does not per se connote that Andean rules are higher order legal obligations. Indeed the Colombian Constitutional Court is quite clear: international human rights treaties *do* create higher order legal obligations, but Andean law has primacy yet remains at the same legal level as secondary national law.

---

<sup>46</sup> Interview with Marco Antonio Velilla Moreno, Martha Sofía Sanz Tobón, Rafael E. Ostau De Lafont Pianeta, Camilo Arciniegas Andrade, Council of State of Colombia, First Section, Bogota, Colombia, Sept. 12, 2007 [hereinafter Interview with Judges of the Council of State]; Interview with Elicira Vasquez Cortez, Vocal Supremo Jefe de la Oficina de Control de la Magistrature del Poder and Member of the Sala Constitucional y Social de Peru, 2003-2007, Lima, Peru, June 21, 2007 [hereinafter Interview with Judge Vasquez Cortez]; Interview with Judge Ernesto Muñoz Borrero and Eloy Torees Guzmán, Administrative Tribunal for District No. 1, Quito Ecuador, Mar. 15, 2005.

It is beyond the scope of this paper to consider *why* legal activists coalesced behind the European integration process, and why Andean integration lacks a similar set of legal supporters.<sup>47</sup> What is important is that IC judges are more likely to be expansionist law-makers when they can expect support from key sub-state actors. For the ECJ, the key interlocutors were national judges, whereas for the ATJ, the key interlocutors were national IP agencies. Once these actors were on board, the ICs could be reasonably sure that their rulings would be respected regardless of the government's position on the issue.

International relations scholars tend to prioritize in importance the support of national government officials. Governmental support may well be one pathway to eliciting compliance with IC rulings. But the many examples of ICs making decisions that national governments have neither sought nor desired suggests that governmental support is not the only pathway which will lead ICs to engage in expansionist law-making. We argue that ICs are more likely to be expansionist law-makers where they find support among a set of sub-state actors, be they the national judges who will enforce the rulings, the administrators who will implement the rulings, governments themselves, political activists who will agitate to see that their governments comply or the public at large. The next section considers the implication of this finding.

#### **IV. CONCLUSION- ARE IC JUDGES EXPANSIONIST LAW-MAKERS BY NATURE?**

This article focused on the law-making in the ATJ and ECJ during the first twenty five years each court was involved in applying their respective common market treaties. The different outcomes of two structurally identical courts allows us to reject the simplest version of the nature based arguments, arriving at a position that is more consistent with the latest scientific findings in the nature/nurture debate. Scientists today see individual development as affected both by underlying biological traits and by contextual factors. People with a cancer gene are more likely to develop cancer, yet not every person with cancer genes *will* develop cancer. The choices individuals make, in interaction with the context individuals live in, determine whether biological traits emerge or stay latent.

Courts have in their DNA the capacity, and perhaps even a proclivity, to be law-makers. But the path of least resistance is for judges not to act on this proclivity. Judges can best avoid personal risk by being legally formalist, by adhering to the letter if not the spirit of the law. In being legal formalists, however, judges may fail in their overall duty as a trustee of the law. We find many examples of judges taking the riskier route of becoming law-makers, even where it involves confronting powerful political actors. This paper has sought to illuminate the factors that lead ICs to be more or less active law-makers.

---

<sup>47</sup> We explore the relative lack of national judicial support for the ATJ in (Helfer and Alter 2009). We explore the failure of the ATJ to galvanize a larger movement of legal supporters in: (Alter 2009)

It was easier to rule out certain explanations than to conclusively support the alternative we suggest. Our structured comparison of the ECJ and ATJ allows us to hold constant the design of the IC. We can conclusively say that cloning the structure of the ECJ will not generate the politics of the ECJ. This finding is of general significance as there are now 10 international courts that replicate the structure of the ECJ.<sup>48</sup> We also controlled for a number of factors that others have suggested contribute to law-making. We cannot say that regional trade levels, political stability or the extent of democracy are irrelevant to whether or not judges engage in law-making, but clearly these factors do not explain the pattern of law-making we observe.

Our investigation led us to rethink both nature-based arguments and how these arguments have been used to explain ECJ law-making. We started our research and this paper by taking at face value the dominant explanations of ECJ activation and activism. Yet the ATJ experienced the same potent combination of wide access rules, self-interested litigants, repeat player legal entrepreneurs, and the supposedly tantalizing possibility of empowerment through law-making. The ATJ did not, however, respond to this situation by becoming an expansionist law-maker. We suggested that our nature-based assumptions about judicial proclivities may have obscured the important role jurist advocacy movements played in nurturing the ECJ to bold law-making.

In the end we conclude that international judges are more likely to become expansive law-makers when they have the support of a set of sub-state intermediaries. These intermediaries can include governmental actors, or they can be societal actors who identify for themselves a stake in having international legal rules respected. The implication of this insight are potentially far reaching.

This study affirms what many other studies have also found—ICs do not have to pander to governments in order to make a political difference. Eliciting government support *is* one pathway to engendering compliance with the law. But there are other pathways towards compliance—namely allying with actors within states who have a stake in having international law respected.

The reality that structural conditions are insufficient explanations—that not all democracies adhere to international law, and that increased trade does not automatically convert to an increased supply of liberal legal interpretations—suggests a greater role for politics than many scholars choose to admit. This reality means that we should expect that international law to develop unevenly based on where interlocutors are mobilized to be a constituency for ICs and international law more generally. This may mean that the political dynamics of international law will vary significantly across regions, and across legal issues within regions, depending on whether or not sub-state actors are mobilized supporters of international legal rules.

---

<sup>48</sup> The ATJ is arguably the most successful of the ECJ clones. ECJ clones include: Benelux court, Andean Tribunal of Justice, European Free Trade Area Court, West African Economic and Monetary Union Court, Common Market for East African States Court, Central African Monetary Community Court, East African Community Court, Caribbean Court of Justice, Southern African Development Community Court, and the proposed African Court of Justice.

The importance of sub-state interlocutors introduces a political dynamism in how international law influences international politics. Our argument may mean that international law will neither mostly work in democracies, nor mostly fail in autocracies. It may mean that only some international laws become politically salient, and thus that there will be uneven compliance with international rules in both the best and worst functioning international legal systems. It may mean that the dynamics shaping international human rights law will be fundamentally different than the dynamics shaping international economic law, because of the different ability of international legal rules to connect with the objectives of actors within affected states. It may mean that democracies are more vulnerable to IC interventions, precisely because interlocutors are more able to mobilize and act independently of government preferences in democratic systems. At the same time, the comparison may mean that one can reinforce democratic developments by providing international legal means for actors within to pressure their governments.

While our analysis hardly provides definitive support for such far reaching conclusions, it does redirect our attention to the question of where, when, and to what effect sub-state actors build connections to international law. A related question is where and when ICs are able to be tools of sub-state actors to further their objectives? We expect that the ATJ is a more likely model for ICs than is the ECJ. As a model, the world could do far worse. The ATJ may not be a builder of creative legal doctrines, but it has contributed to anchoring in an Andean rule of law in an unstable region of the world.

### ***Appendix 1: Methodological Choices***

Because there is so little literature on the ATJ, we had to make blind choices when we began our investigation. We focused on ATJ preliminary ruling decisions because preliminary ruling decisions have been the most important venue for ECJ law-making, and because the largest source of ATJ cases comes from preliminary ruling references. Our coding revealed that ninety-seven percent of ATJ preliminary ruling decisions concern intellectual property issues. Our coding also revealed significant cross-national variation in reference rates to the ATJ. But, our interviews suggest that cross-national variation primarily reflects differences in the rate of applications for IP rights. Because of the substantive concentration of preliminary ruling references, and because we believe that cross-national variation in references is highly affected by variations in IP applications, we do not believe that regression analysis of reference patterns would yield useful insights for our dependant variable.

Governments rarely offer observations in Andean preliminary ruling cases, and ATJ preliminary ruling decisions provide scant clues to the outcome of legal cases. Instead, ATJ preliminary rulings for the most part contain abstract pronouncements regarding Andean legal texts. For all of these reasons, one cannot conduct the type of analysis undertaken by Carrubba et. al as they probed for state influence over ECJ decision-making in preliminary ruling cases (Carrubba, Gabel, and Hankla 2008).

ATJ non-compliance rulings are different in that the ATJ speaks directly to the facts of the case, and government positions are usually more clearly discussed. One could investigate the political dynamics of ATJ decision-making by focusing on non-compliance case. We do not, however, believe that such an investigation would change the main findings of this paper. We probed for salient rulings in interviews and found no evidence that the ATJ was an active law-

maker in non-compliance cases. Nor has our select analysis of noncompliance decisions, or a study that analyzes a sample of nullification decisions (Rodriguez Lemmo 2002) provided evidence that would suggest that the ATJ employs a fundamentally different law-making approach in noncompliance cases. We thus suspect that noncompliance data would help one investigate litigation of non-IP issues, and enforcement of Andean rules, but not the penchant for the ATJ to expand the reach and scope of Andean law.

- Alter, Karen J. 1998. Who are the Masters of the Treaty?: European Governments and the European Court of Justice. *International Organization* 52 (1):125-152.
- . 2000. The European Legal System and Domestic Policy: Spillover or Backlash. *International Organization* 54 (3):489-518.
- . 2001. *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press.
- . 2006. Private Litigants and the New International Courts. *Comparative Political Studies* 39 (1):22-49.
- . 2009. Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975). In *The European Court's Political Power*. Oxford: Oxford University Press.
- . 2009. *The European Court's Political Power: Selected Essays*. Oxford: Oxford University Press.
- Avery, William P., and James D. Cochraine. 1973. Innovation in Latin American Regionalism: The Andean Common Market. *International Organization* 27 (2):181-223.
- Barnett, Michael N., and Martha Finnemore. 2004. *Rules for the world : international organizations in global politics*. Ithaca, N.Y. ; London: Cornell University Press.
- Bradley, Curtis A., and Judith G. Kelley. 2008. The Concept of Delegation. *Law and Contemporary Problems*.
- Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court. *International Organization* 47 (1):41-76.
- Carrubba, Clifford J., Matthew Gabel, and Charles Hankla. 2008. Judicial Behavior under Political Constraints: Evidence from the European Court of Justice. *American Political Science Review* 104 (4):435-452.
- Cichowski, Rachel. 2007. *The European Court and Civil Society: Litigation, Mobilization and Governance*. Cambridge: Cambridge University Press.
- Cogan, Jacob Katz. 2008. Competition and Control in International Adjudication. *Virginia Journal of International Law* 48 (2):411-449.
- Cohen, Antonin. 2007. Constitutionalism without Constitution. Transnational Elites between Political Mobilization and Legal Expertise (1940s-1960s). *Law & Social Inquiry* 23 (1):109-136.
- Danner, Allison. 2006. When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War. *Vanderbilt Law Review* 59:1-63.
- Denning, Lord. 1990. Introduction to article "The European Court of Justice: Judges or Policy Makers?": The Bruge Group Publication, Suite 102 Whitehall Court, Westminster, London SW1A 2EL.
- Dezalay, Yves, and Bryant G. Garth. 2002. *The internationalization of palace wars : lawyers, economists, and the contest to transform Latin American states*. Chicago: University of Chicago Press.
- Dietz, James L., and Dilmus D. James, eds. 1990. *Progress towards Development in Latin America*. Boulder: Lynne Rienner.
- Downs, George. 1998. Enforcement and the Evolution of Cooperation. *Michigan Journal of International Law* 19 (Winter):319-344.
- Epstein, Lee, and Jack Knight. 1998. *The choices justices make*. Washington, D.C.: CQ Press.
- Epstein, Lee, and Jeffrey Segal. 2005. *Advice and Consent*. Oxford: Oxford University Press.

- French-Davis, Ricardo. 1977. The Andean Pact: A Model for Economic Development. *World Development* 5 (1/2):137-153.
- García Amador, F. V. 1978. *The Andean legal order: a new community law*. Dobbs Ferry, NY: Oceana Publications.
- Gibson, James, and Gregory Caldeira. 1992. Legitimacy, Judicial Power, and the Emergence of Transnational Legal Institutions: The Court of Justice in the European Community. Paper read at Interim Meeting of the Research Committee on Comparative Judicial Studies, International Political Science Association, at University of Bologna, Forli June 14-17, 1992.
- . 1995. The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice. *American Journal of Political Science* 39 (2):459-89.
- Ginsburg, Tom. 2005. Bounded Discretion in International Judicial Lawmaking. *Virginia Journal of International Law* 43 (3):631-673.
- . 2005. Bounded Discretion in International Judicial Lawmaking. *Virginia Journal of International Law* 45 (3):631-673.
- Guzman, Andrew T. 2008. International Tribunals: A Rational Choice Analysis. *University of Pennsylvania Law Review*.
- Hartley, Trevor. 1996. The European Court, Judicial Objectivity and the Constitution of the European Union. *Law Quarterly Review* 112:95-109.
- Hawkins, Darren, and Wade Jacoby. 2008. Agent permeability, principal delegation and the European Court of Human Rights. *The Review of International Organizations* 3 (1):1-28.
- Hawkins, Darren, David Lake, Daniel Nielson, and Mike Tierney. 2006. Delegation under Anarchy: States, International Organizations and Principal-Agent Theory. In *Delegation and Agency in International Organizations*. Cambridge: Cambridge University Press.
- Helfer, Laurence. 2006. Why State Create International Tribunals: A Theory of Constrained Independence. In *International Conflict Resolution*, edited by S. Voigt, M. Albert and D. Schmidtchen. Tübingen: Mohr Seibeck.
- Helfer, Laurence, and Karen Alter. 2009. The Andean Tribunal of Justice and its Interlocutors: Understanding the Preliminary Reference Patterns in the Andean Community. *Journal of International Law and Politics* 42.
- Helfer, Laurence, Karen Alter, and Maria Florencia Guerzovich. 2009. Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community. *American Journal of International Law* 103:1- 47.
- Helfer, Laurence, and Anne-Marie Slaughter. 1997. Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal* 107 (2):273-391.
- Hoffmann, Stanley. 1974. Obstinate or Obsolete? France, European Integration, and the Fate of the Nation-State. *Decline or Renewal*.
- Hojman, David E. 1981. The Andean Pact: Failure of a Model of Integration? *Journal of Common Market Studies* 20 (2):139-159.
- Keener, E. Barlow. 1987. The Andean Common Market Court of Justice: Its Purpose, Structure, and Future. *Emory Journal of International Dispute Resolution* 2 (1):37-72.
- Kenney, Sally. 1998. The Judges of the European Communities. In *Constitutional Dialogues in Comparative Perspective*, edited by S. Kenney, W. Reisinger and J. Reitz. London: Macmillan.
- Keohane, Robert, Andrew Moravcsik, and Anne-Marie Slaughter. 2000. Legalized Dispute Resolution: Interstate and Transnational. *International Organization* 54 (3):457-488.

- Kuwayama, Mikio. 2005. Latin American South-South Integration and Cooperation: From a Regional Public Goods Perspective. In *Comercio Internacional Series*, edited by E. C. f. L. A. a. t. C. (ECLAC).
- Maduro, Miguel Poiars. 1998. *We the court : the European Court of Justice and the European Economic Constitution : a critical reading of Article 30 of the EC Treaty*. Oxford Evanston, Ill.: Hart Pub. ;  
Distributed in the United States by Northwestern University Press.
- Mancini, Federico. 1989. The Making of a Constitution for Europe. *Common Market Law Review* 24:595-614.
- Mattli, Walter, and Anne-Marie Slaughter. 1998. Revisiting the European Court of Justice. *International Organization* 52 (1):177-209.
- Merryman, John Henry, and Rogelio Pérez-Perdomo. 2007. *The Civil Law Tradition*. Stanford: Stanford University Press.
- Moravcsik, Andrew. 1997. Explaining International Human Rights Regimes: Liberal Theory and Western Europe. *European Journal of International Relations* 1 (2):157-189.
- . 2000. The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe. *International Organization* 54 (2):217-252.
- Murphy, Walter. 1964. *Elements of Judicial Strategy*. Chicago: Chicago University Press.
- O'Keefe, Thomas Andrew. 1996. How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise. *International Lawyer* 30 (Winter):811-824.
- Padilla, David. 1979. The Judicial Resolution of Legal Disputes in the Integration Movements of the Hemisphere. *Lawyers of the Americas* 11 (1):75-95.
- Pescatore, Pierre. 1983. La clarence du législateur communautaire et le devoir du juge. In *Gedächtnisschrift für L.-J. Constantinesco*. Cologne: Carl Heymanns Verlag.
- . 1983. The Doctrine of "Direct Effect": an Infant Disease of Community Law. *European Law Review* 8 (3):155-177.
- Posner, Eric A., and John C. Yoo. 2005. A Theory of International Adjudication. *California Law Review* 93 (1):1-72.
- Prebisch, Raúl, and Helen Kellogg Institute for International Studies. 1984. *Power relations and market laws*. Notre Dame, IN: The Helen Kellogg Institute for International Studies, University of Notre Dame.
- Prebisch, Raúl, and Inter-American Development Bank. 1971. *Change and development--Latin America's great task; report submitted to the Inter-American Development Bank, Praeger special studies in international economics and development*. New York,: Praeger.
- Rasmussen, Hjalte. 1986. *On Law and Policy in the European Court of Justice*. Dordrecht: Martinus Nijhoff Publishers.
- Robertson, A.H., and J. G. Merrills. 1994. *Human Rights in Europe*. Manchester: Manchester University Press.
- Rodriguez Lemmo, Maria Alejandra. 2002. Study of Selected International Dispute Resolution Regimes, with an Analysis of the Decisions of the Court of the Andean Community. *Arizona Journal of International and Comparative Law* 19:863-929.
- Rodríguez Mendoza, Miguel, Patrick Low, and Barbara Kotschwar. 1999. *Trade rules in the making : challenges in regional and multilateral negotiations*. Washington, D.C.: Organization of American States : Brookings Institution Press.
- Sacriste, Guillaume, and Antoine Vauchez. 2007. The Force of International Law: Lawyer's Diplomacy on the International Scene in the 1920s. *Law & Social Inquiry* 32 (1):83-107.

- Saldias, Osvaldo. *Supranational Courts as Engines of Disintegration*. Frei Universität Berlin 2007 [cited December 2 2007. Available from [www.fu-berlin.de/polsoz/polwiss/europa/arbeitspapiere/2007-5\\_Saldias.pdf](http://www.fu-berlin.de/polsoz/polwiss/europa/arbeitspapiere/2007-5_Saldias.pdf)]
- Schanzenbach, Max. 2004. Racial and Gender Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics. *Northwestern Law & Econ Research Paper No. 04-03*.
- Scheingold, Stuart. 1965. *The Rule of Law in European Integration*. New Haven: Yale University Press.
- Shapiro, Martin. 1981. *Courts: A comparative political analysis*. Chicago: University of Chicago Press.
- Slaughter, Anne-Marie. 1995. International Law in a World of Liberal States. *European Journal of International Law* (6):503-538.
- Stein, Eric. 1981. Lawyers, Judges and the Making of a Transnational Constitution. *American Journal of International Law* 75 (1):1-27.
- Steinberg, Richard H. 2004. Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints. *American Journal of International Law* 98 (2):247-275.
- Stephan, Paul B. 2002. Courts, Tribunals and Legal Unification-- The Agency Problem. *Chicago Journal of International Law* 2002 (3):333-352.
- Stone Sweet, Alec. 1999. Judicialization and the Construction of Governance. *Comparative Political Studies* 32 (2):147-184.
- . 2004. *The Judicial Construction of Europe*. Oxford: Oxford University Press.
- Stone Sweet, Alec, and Thomas Brunell. 1998. Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community. *American Political Science Review* 92 (1):63-80.
- Terris, Daniel, Cesare Romano, and Leigh Swigart. 2008. *The International Judge: An Introduction to the Men and Women to Decide the World's Cases*.
- Tsebelis, George, and Geoffrey Garrett. 2001. The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union. *International Organization* 55 (2):357-390.
- Vargas-Hidalgo, Rafael. 1979. The Crisis of the Andean Pact: Lessons for Integration Among Developing Countries. *Journal of Common Market Studies* 27 (3):213-226.
- Vaubel, Roland. 2006. Principal-agent problems in international organizations. *Review of International Organizations* 1:125-138.
- Vaucher, Antoine. 2007. Europe's first Trustees: Lawyers' politics at the outset of the European Communities (1950-1970).
- . 2007. « Judge-made Law. Aux origines du modèle politique communautaire (retour sur Van Gend en Loos et Costa c. ENEL). In *Une Europe des élites ? Réflexions sur la fracture démocratique de l'Union européenne*, edited by O. Costa and P. Magnette. Brussels: Presses de l'Université libre de Bruxelles.
- Voeten, Erik. 2007. The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights. *International Organization* 61 (4):669-701.
- . 2008. The Impartiality of International Judges: Evidence from the European Court of Human Rights. *American Political Science Review*.
- Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-2483.
- . 1994. A Quiet Revolution- The European Court of Justice and its Interlocutors. *Comparative Political Studies* 26 (4):510-534.

Williamson, John. 1990. What Washington Means by Policy Reform. In *Latin American Adjustment: How Much Has Happened*, edited by J. Williamson. Washington, D.C.: Institute for International Economics,.