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Laurence R. Helfer

Duke University School of Law, helper@law.duke.edu

Karen J. Alter

Northwestern University Dept of Political Science, kalter@northwestern.edu

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NATURE OR NURTURE? JUDICIAL LAWMAKING IN THE EUROPEAN COURT OF JUSTICE AND THE ANDEAN TRIBUNAL OF JUSTICE*

Karen J. Alter
Northwestern University

Laurence R. Helfer
Duke University School of Law

Abstract: Are international courts (ICs) by nature expansionist lawmakers, expanding the reach and scope of their authority at the expense of state sovereignty when permissive conditions allow? Or are they naturally conservative, applying international law in straightforward and circumscribed ways unless environmental factors encourage them to be more expansive? We investigate expansionist lawmaking patterns in the European Court of Justice (ECJ) and the Andean Tribunal of Justice (ATJ), the ECJ's jurisdictional twin and the third most active IC. We argue that international judges are more likely to become expansive lawmakers when they are supported by influential sub-state interlocutors and compliance constituencies. These intermediaries include national judges, administrative agency officials, and private actors who have a personal, professional or ideological stake in promoting respect for international rules. Our study investigates lawmaking across all ATJ preliminary rulings through 2007 and analyzes the political effects of cloning the ECJ in region outside of Europe.

INTRODUCTION

One often hears concerns that international judges may run amok, actively finding and expanding international law 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 that legal commitments will need to be filled in by judges.¹ In addition, studies of international court (IC) decision-making find that ICs are more restrained in practice than many critics of international judicial activism fear.² Yet this concern is not entirely unfounded: some ICs do interpret international rules in ways that constrain national sovereignty. For governments and commentators concerned about such expansive judicial lawmaking, the European Court of Justice (ECJ) represents the problem in the extreme.

Decades of ECJ rulings transformed the Treaty of Rome into a de facto constitution for the European Community (EC).³ The ECJ achieved this remarkable result by expanding the reach and scope of EC law and enabling litigants to use the European legal system to promote

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¹ Bradley and Kelley, 2008, Hawkins, Lake, Nielson and Tierney, 2006

² Cogan, 2008, Danner, 2006, Ginsburg, 2005, Steinberg, 2004, Helfer, 2006

³ Stein, 1981, Hartley, 1996, Weiler, 1991

key substantive and political objectives associated with regional integration.⁴ Proponents of effective international adjudication see the ECJ as an exemplar for other ICs.⁵ Sovereignists, by contrast, criticize the ECJ as riding roughshod over state consent and suggest that the ECJ's experience is a reason to avoid creating independent ICs.⁶

This article reinvestigates the lessons of the ECJ to explore how political context shapes international judicial lawmaking. It does so by comparing the ECJ with its largely unknown cousin—the Andean Tribunal of Justice (ATJ). In 1969, five countries in the Andean region of South America imported from Europe the idea of building a common market through supranational institutions—minus an IC. Andean governments later concluded that the absence of a court undermined the uniform interpretation of and compliance with Andean law.⁷ In 1984 they established the ATJ, explicitly modeling its design on its European predecessor.

Today, the ATJ is the third most active IC, having issued more than 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 than the World Trade Organization's dispute settlement system, the International Court of Justice, or Latin America's other ICs—the Inter-American Court of Human Rights and the Central American Court of Justice.⁸

The ATJ is active, but it is not activist. In the vast majority of cases, national judges ask the ATJ to repeat verbatim doctrines developed in earlier rulings. When provided with opportunities to make broader interpretations, the ATJ is surprisingly reluctant to expand the reach of Andean rules or 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." They assume that judges are "hardwired" to use their discretion to increase their power wherever possible.⁹ It is only a fear of being sanctioned that inhibits the natural tendency of judges to expand the reach and scope of their authority.¹⁰ By contrast, nurture-based explanations assume that judges are conservative by nature. Judges typically apply the law to the case in fairly straightforward and circumscribed ways. Expansionist lawmaking—that is, broadening the reach or scope of the law and of judicial authority at the cost of national political discretion—is unusual. Special nurturing and encouragement is needed for judges to become expansionist lawmakers.

⁴ Burley and Mattli, 1993, Stone Sweet, 2004, Alter, 2009.

⁵ Helfer and Slaughter, 1997.

⁶ Posner and Yoo, 2005, Rasmussen, 1986, Denning, 1990.

⁷ Vargas-Hidalgo, 1979: 224, García Amador, 1978.

⁸ Alter, 2008: 57-60.

⁹ Barnett and Finnemore, 2004: 27.

¹⁰ Stone Sweet, 1999, Stone Sweet, 2004, Burley and Mattli, 1993, Alter, 2001: 45-52, Weiler, 1991..

We investigate the relative influences of nature versus nurture by comparing the first 25 years of ATJ and ECJ decision making, periods when the regional organizations that created both courts had smaller memberships,¹¹ nascent supranational institutions, and lower trade volumes. Because the European story is well known, we focus on the Andean experience. We show that the ATJ has generally refrained from the sort of expansionist lawmaking designed to promote integration through law that is the hallmark of its European cousin.

Our analysis has three wider implications beyond this regional comparison. First, most theories of IC lawmaking assume that ICs are by nature expansionist, and that specific design features of ICs facilitate or hinder this innate tendency to engage in judicial lawmaking. Our analysis of two identically designed ICs suggests that too much emphasis has been placed on these formal institutional rules. Second, in contrast to the predominant focus of international relations theories on government preferences, we argue that ICs are more likely to be expansionist where domestic interlocutors—such as national judiciaries, jurist advocacy networks, administrative agencies within the state, or the public generally—support such expansions. A third broad policy implication of our analysis is that politically independent ICs can complete international contracts without engaging in expansive judicial lawmaking that compromises state sovereignty.

Section I defines expansionist judicial lawmaking and situates our analysis in existing scholarship on ICs. The section shows that the ECJ and ATJ are identically designed institutions, creating a natural experiment to test “nature” versus “nurture” theories of judicial decision making. Section II documents the key trends in ATJ lawmaking. Andean judges have mimicked several ECJ doctrines, including direct effect and supremacy. But outside of intellectual property disputes—an area in which, as we explain below, the ATJ enjoys the support of national administrative actors—Andean judges have declined to follow the ECJ by expansively interpreting Andean law. Section III compares the ways in which environmental factors have influenced ATJ and ECJ decision making. Section IV analyzes the implications of this comparison for understanding how political context shapes IC lawmaking. Inasmuch as our data on the ATJ is new and largely unknown, an appendix explains our methodological choices and provides a guide for scholars who wish to investigate the ATJ further.

¹¹ 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 Bolivia, Chile, Colombia, Ecuador, and Peru. Chile withdrew in 1976. Venezuela joined in 1973 and withdrew in 2006.

I. THEORIES OF EXPANSIONIST JUDICIAL LAWMAKING BY INTERNATIONAL COURTS

All courts are presented with cases in which the law is indeterminate; thus all courts clarify vague clauses and fill in lacunae, making law as they resolve specific disputes.¹² But in contrast to gap filling, expansionist lawmaking significantly widens the domain of the court's authority at the expense of national discretion. We define expansionist judicial lawmaking as interpretations that expand the substantive reach and scope of the law and/or aggrandizes a court's power. We do not include in our definition a requirement that judges rule against governments. ICs can expand the law without ruling against governments; conversely, they can rule against governments without expanding the law.

International law and international relations theories usually assume that ICs are by nature expansionist lawmakers. Building from the implicit premise that judges want to expand their own authority, theorists focus on factors that facilitate or hinder the ability of judges to expand the law. One group of scholars examines how access rules shape the opportunity to litigate, and thus the demand for expansionist rulings. Scholars expect courts where private litigants can initiate disputes¹³ to be busier and therefore more likely to expand the reach and scope of international law compared to courts that hear only interstate disputes 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....¹⁴

Another set of scholars builds on the insights of Principal-Agent (P-A) theory, which posits that agents have interests different than principals. P-A studies focused on ICs assume that judges are expansionist by nature; thus, judicial independence translates into judicial empowerment at the expense of governments. Scholars have asserted that ICs will be less expansionist where states can easily change legal rules and where judicial terms are short or subject to reappointment.¹⁵ Tom Ginsburg adds that judicial lawmaking increases with the number of parties to an agreement and the difficulty of amending the treaty or overruling judges and decreases with the ease of exit from the regime.¹⁶ Eric Posner and John Yoo claim that

¹² Shapiro, 1981: 29.

¹³ Keohane, Moravcsik and Slaughter, 2000, Helfer and Slaughter, 1997, Hawkins and Jacoby, 2008.

¹⁴ Keohane, Moravcsik, and Slaughter 2000: 482.

¹⁵ Tsebelis and Garrett, 2001, Vaubel, 2006, Stephan, 2002.

¹⁶ Ginsburg 2005.

compulsory jurisdiction and private access make ICs less dependent on states and thus inherently more likely to issue expansionist rulings.¹⁷

These theories assume that ICs will engage in expansionist lawmaking, and that permissive institutional design features facilitate the extent of such lawmaking. The ECJ-ATJ comparison presents us with a natural experiment that holds constant these design features to explore how context shapes judicial behavior.

Andean governments replicated the ECJ's design, hoping to copy its success in enhancing respect for common market rules.¹⁸ Both the ECJ and the ATJ provide multiple avenues for challenging government behavior that conflicts with international rules. Both systems contain a preliminary ruling mechanism in which private actors file suits in domestic courts and national judges refer questions to the ECJ/ATJ for a binding interpretation of the applicable law. Both systems also contain a noncompliance procedure that enables private actors and member states to inform the communities' secretariats about rule violations. The secretariat investigates the alleged violation, and, if necessary, files a noncompliance complaint with ECJ/ATJ. In both systems, sanctions can be imposed if a state fails to comply with the court's ruling.¹⁹ The Andean system has one additional feature. If the secretariat refuses to raise a noncompliance suit, a private actor can bring the suit directly to the ATJ.

Both courts also interpret similar legal rules. The Andean Community's Cartagena Agreement copies many elements of the Treaty of Rome. Both documents prohibit member states from creating new barriers to trade, require national treatment for products from other member states, and allow supranational bodies to adopt directly applicable secondary legislation.²⁰ In both systems, member states set ambitious but politically unrealistic dates for completing a common market. But whereas the ECJ crafted its rulings to overcome political obstacles to integration, the ATJ has not done likewise, even after Andean governments modestly expanded its authority and permeability to private actors.²¹

¹⁷ Posner and Yoo, 2005: 6-7.

¹⁸ Keener, 1987: 49.

¹⁹ A sanctioning mechanism was added to the European legal system in 1989, after the period of our study. By contrast, the Andean system has always allowed for retaliatory sanctions.

²⁰ In the Andean context, changing secondary legislation requires the support of all member states; in Europe, unanimity was required during the period we investigate. As of 1989, some secondary European legislation can be changed by a qualified majority vote.

²¹ Originally, the Andean *Junta* could only investigate state noncompliance when another member state asked it to do so. In the 1996 Cochabamba Protocol 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 file infringement cases directly with the ATJ. Revised Article 34 explicitly authorizes the ATJ to delve into the facts of preliminary references "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 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/andetrie2.htm.

Additionally, both regional systems provide governments with the same formal opportunities to sanction overreaching and thereby inhibit judicial lawmaking. Judges are appointed to fixed, renewable terms.²² States can redefine each court's jurisdiction by unanimously amending its founding charter.²³ Member states may in theory withdraw from both the EC and Andean Community.²⁴ As a practical matter, exit is unlikely in Europe, whereas states have exited from the Andean regime (for reasons unrelated to the ATJ).

Nature-based theories that emphasize institutional design would expect the ECJ and ATJ to be equally expansionist because the two ICs face similar opportunities and constraints. More dynamic "nature" type theories would expect judicial lawmaking to vary based on whether states are opposed to a specific expansionist ruling. Concordant preferences make it more likely that states will adopt legislation to limit the effect an unwanted IC ruling. But they also cast a shadow over future expansionist rulings by signaling to an IC that states strongly oppose such behavior.²⁵

Dynamic nurture-based theories might expect variations in economic and political structural conditions—such as trade levels, whether governments in power are democracies, and the level of diffuse popular support for judges and integration—to affect a court's penchant for lawmaking.²⁶ We incorporate these dynamic expectations by examining whether a greater political consensus in support of integration, or changes in trade levels and democratic stability explain our finding that the ATJ is far more hesitant than the ECJ to engage in expansionist lawmaking. We conclude that ICs expand the reach and scope of the law not as a result of structural conditions but rather in response to the encouragement and support of sub-state actors who possess the domestic authority or influence to support compliance with expansionist IC rulings.

II. DOES ACTIVE MEAN ACTIVIST? ECJ AND ATJ LAWMAKING COMPARED

We compare ATJ and ECJ lawmaking over twenty-five-year periods when each court was beginning to establish its legal and political authority. Both courts were similarly active during these periods, with a steadily increasing diet of preliminary references. The ECJ issued 305 noncompliance decisions and 1808 preliminary rulings between 1960 and 1985 (an average of 86.1 cases per year), whereas the ATJ, with a geographically and demographically smaller

²² Andean judges serve six year terms, like their European equivalents. Whereas ECJ judges can be reappointed numerous times, ATJ judges can only be reappointed once. Judges on both courts can only be removed for serious misconduct. No effort has been made to remove an ATJ or an ECJ judge.

²³ 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. Both treaties have been amended, but only to expand, not limit, each court's jurisdiction. On changes to the ATJ's jurisdiction, see note 21.

²⁴ Hartley, 1999: 164-5.

²⁵ Maduro, 1998, Carrubba, Gabel and Hankla, 2008.

²⁶ Stone Sweet and Brunell, 1998, Moravcsik, 2000, Slaughter, 1995, Moravcsik, 1997, Gibson and Caldeira, 1995, Carrubba and Murrh, 2005.

region to oversee, issued 85 noncompliance decisions and 1338 preliminary rulings between 1984 to 2007 (an average of 71.5 per year).²⁷

Notwithstanding the large number of cases, European and Andean governments were only weakly committed to economic and legal integration during these periods. Repeat players and activists urged the courts to overcome this impediment with teleological interpretations that furthered the treaties' integrationist goals. As we explain below, the ECJ responded eagerly to these entreaties whereas the ATJ was more circumspect.

Because so much is known about the ECJ, this section focuses on the ATJ, an IC whose activities have generated surprisingly little scholarship. To fill this vacuum, we coded all 1338 ATJ preliminary rulings available on the Andean Community website from the court's founding through 2007.²⁸ Where the ATJ broke new legal ground, we analyzed its rulings in depth. We also conducted over forty interviews with lawyers, judges, and government officials in Peru, Ecuador, and Colombia.²⁹ Our account of ECJ lawmaking relies heavily on Joseph Weiler's seminal legal analysis (1991), and on Anne-Marie Burley and Walter's Mattli's political analysis (1993), both of which use "nature"-based arguments to explain ECJ expansionist jurisprudence. Following Weiler, we group our study into time periods that correspond to varying levels of support for regional integration to capture dynamics between political and legal integration.

The Foundational Period: the ATJ During the Andean Pact (1984-1995)

ECJ lawmaking was most expansive during what Weiler labels as the court's "foundational period" from 1962 to the mid-1970s. There was significant political turmoil in Europe during these years. European member states, consumed by internal problems and divergent objectives, seemingly turned away from both supranationalism and the goal of building a common market.³⁰ Weiler argues that the ECJ responded to this political impasse by being remarkably activist, building through law what supporters of integration could not achieve through politics. The ECJ established the core doctrines of regional integration—the direct effect, supremacy and preemption of Community law over national law, and the implied powers of supranational institutions.³¹

The ATJ's genesis shares some of these characteristics but not others. Like the ECJ before it, the ATJ announced the supremacy and preemptive power of Andean law during its foundational period (the direct effect of Andean law was presumed).³² The ECJ developed these

²⁷ ECJ data from (Stone, 2004: p. 72-9). For ATJ litigation patterns, see Helfer and Alter, 2009, Helfer, Alter and Guertzovich, 2009.

²⁸ The Andean Secretariat website is generally more reliable than the ATJ's website. We accessed ATJ decisions and resolutions here: www.comunidadandina.org/canprocedimientosinternet/procedimientos.aspx

²⁹ This search led us to a number of noncompliance rulings, several of which we analyze below. We did not, however, code all noncompliance rulings. (See Appendix 1).

³⁰ Hoffmann, 1966: 881-95.

³¹ Weiler, 1991: 2445-2450.

³² The ATJ's first preliminary ruling in 1987 involved a Colombian administrative agency's refusal to consider an opposition filed by the car company Volvo to the registration of an allegedly infringing trademark. The complaint

doctrines without applying them to the case at hand; the ATJ behaved similarly, finding reasons to accept the validity of the state practices in question.³³ But whereas the ECJ later expanded these core legal doctrines, the ATJ has circumscribed them.

To understand the development of ATJ doctrine, we must first explain the fraught political context that preceded the creation of the ATJ. Although Andean Pact institutions resembled their European counterparts, Andean economic policies were profoundly different. Inspired by the import substitution strategy of Raul Prebisch, the Pact envisioned regional industrial programs with production capabilities distributed to lesson unequal growth and promote economic development.³⁴ But the foreign investment needed to fund these programs never materialized.³⁵

The Andean Pact also envisioned creating a common market by removing internal trade barriers. But the lack of progress on import substitution policies raised a conundrum. Should a country be required to open its markets if it did not receive the benefits of industrial development? Andean law responded by adopting a Janus-faced Free Trade Program that outlawed new barriers to trade and required the progressive removal of existing barriers but also exempted nearly all economically or politically important products.³⁶ The ATJ thus came into existence facing a political compromise that blunted the legal aspirations of the Cartagena Agreement.

The ATJ was established in 1984 as part of a series of reforms seeking to reinvigorate the faltering Andean integration project.³⁷ Soon after its creation, a handful of motivated litigants turned to the court to promote the objectives of the Cartagena Agreement. The first preliminary reference was raised by a strong supporter of the Andean legal system.³⁸ The ATJ used the case to explain how the preliminary ruling process worked and to adopt the ECJ's *Costa v. Enel* and *Simmmenthal* rulings, which declared the supremacy of European law and the obligation of

did not raise an actual or potential conflict between Andean and Colombian law. But the ATJ nevertheless used the case to declare the preeminence of Andean law. See ATJ ruling 1-IP-87 (points 2 and 3.5). ATJ decisions are referenced by their case number not by the litigants' names. 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).

³³ The ECJ developed key legal doctrines in cases of minor substantive importance, laying the groundwork for future expansions of European law in more consequential rulings. Alter, 1998: 131-2.

³⁴ Prebisch and Helen Kellogg Institute for International Studies. 1984; Prebisch and Inter-American Development Bank. 1971 Avery and Cochrane, 1973, French-Davis, 1977.

³⁵ Dietz and James, 1990: 1-11.

³⁶ Hojman, 1981.

³⁷ Padilla, 1979, Keener, 1987, Ferris, 1979.

³⁸ Germán Cavelier had served as Secretary General of Colombia's Ministry of Foreign Affairs in 1968 and 1969 when the Andean Pact was negotiated. Cavelier was an internationalist, writing his doctoral thesis and numerous treatises on international law. According to attorneys in the law firm he founded, Cavelier viewed Andean integration and the ATJ as mechanisms to strengthen international law. Interview with German Marin & Emilio Ferraro, Cavelier Abogados 11 Sept. 2007 Bogota, Colombia.

national courts to enforce this law.³⁹ But whereas the ECJ had framed its analysis in constitutional terms,⁴⁰ boldly asserting that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights,”⁴¹ the ATJ stressed the functional necessity and implicit state support for the supremacy doctrine.⁴²

The ATJ’s second preliminary ruling raised the question of what becomes of national laws that conflict with Andean rules yet remain on the books. In the *Simmenthal* case, the ECJ had resolved this conflict with an unyielding rule: “[E]very national court must . . . apply Community law in its entirety and . . . must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”⁴³ The ATJ, although citing to the *Simmenthal* decision, ultimately interpreted Andean law more modestly as “firstly settl[ing] for [a rule of] preferential application.” National law remains valid and on the books, but is not applied unless Community law is later modified so that the latent national law becomes compatible with Community law.⁴⁴

The ATJ’s first two preliminary rulings seemingly incorporated the ECJ’s foundational doctrines of direct effect, supremacy, and preemption. As ATJ jurisprudence evolved, however, the court declined to follow later ECJ rulings that expanded them. In the Colombian alcohol case discussed below, for example, the ATJ did not assert that supremacy implies an obligation for national judges to set aside conflicting domestic law.

A comparison of the two courts’ preemption doctrines reveals a similar trend. Without any textual support in the Treaty of Rome, the ECJ asserted that in a number of fields (e.g. the common commercial policy) Community powers were exclusive so that member states were precluded from acting regardless of whether their actions conflicted with Community law. In other areas regulated by European law, the ECJ concluded that member states are barred from legislating even where there is no Community rule directly on point. These rulings are expansionist because it is the that ECJ determines whether a particular EC rule or policy space is

³⁹ *Costa v. Ente Nazionale per L’Energia Elettrica (ENEL)*, ECJ Case 6/64, [1964] ECR 585, [1964] CMLR 425; *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)*, ECJ Case 106/77 (1978) ECR 629; [1978] CMLR 263.

⁴⁰ The *Van Gend en Loos* decision established the direct effect of European law. The *Costa* decision later established the supremacy of European law. *Van Gend en Loos v. Nederlandse Administratie Belastingen*. ECJ 26/62 [1963] ECR 1. [1963] CMLR 105. *Op cit Costa v. Enel (note 39)*. See Weiler, 1991 pp. 2413-5. For more on the activism involved in these rulings, see: Hartley, 1996. Commentators have stressed that the ECJ’s constitutional framing was an important political move. Maduro, 1998: 8, Vauchez, 2007.

⁴¹ *Van Gend en Loos* p. 12.

⁴² The court stated that supremacy “is the essential characteristic of Community Law and a basic requirement for building integration.” The ATJ cited 1980 declaration in which member states had agreed that “the legal system of the [Cartagena] Agreement prevails within the framework of its competences over national norms.” 1-IP-87 point 2.

⁴³ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)*, ECJ Case 106/77 (1978) ECR 629; [1978] CMLR 263.

⁴⁴ 2-IP-88: point 2

exclusive and preeminent.⁴⁵ In striking contrast, the preemptive force of Andean law is far more modest. In an early ruling, the ATJ announced the principle of *complemento indispensable*: even in areas where Andean law clearly governs, member states may enact domestic laws necessary to implement a Community rule provided that the laws do not obstruct or nullify it.⁴⁶ Stated differently, whereas the ECJ both implied powers not explicitly delegated to the Community and asserted preemptive authority even where Community law is silent, the ATJ has not implied powers for the community, and it has concluded that states retain the power to legislate with the sole exception of national laws that directly conflict with extant Community rules.

In a 1990 ruling, the ATJ further cabined the preemption doctrine. Although citing ECJ case law to reaffirm that Andean laws can displace national rules, the ATJ also stressed that integration is gradual, incremental process that limits the extent to which Community rules preempt national authority: “Especially, when dealing with complex and vast issues, such as intellectual property, . . . it seems logical that many of these diverse issues, even if they have to be a matter of common regulation in the beginning, are still the competence of the national legislator for an indefinite time until they are effectively covered by the Community norms.”⁴⁷

Other ATJ rulings during the foundational period exhibited even greater deference. The ATJ allowed states wide autonomy in implementing Andean rules, and it was decidedly unhelpful to litigants that turned to the Andean legal system to accelerate the integration process. In 1987, for example, Reynolds Aluminum challenged a Colombian duty on aluminum imports from Venezuela. The ATJ dismissed the complaint because at the time private actors were not expressly authorized to raise noncompliance suits.⁴⁸ In 1989 an attorney from Colombia asked the ATJ to interpret the controversial Andean investment code,⁴⁹ which by then had been revised to allow member states considerable leeway to regulate foreign investment.⁵⁰ The ATJ defended its authority to hear the suit and made clear that states could not use domestic law to avoid Andean obligations. Yet the ruling also recognized the authority of governments to employ their own criteria to decide whether certain economic sectors could be limited to domestic ownership, either because domestic producers have “adequately taken care of” providing the good or because the government has reserved investment for domestic corporations.⁵¹

The Reynolds Aluminum dispute reappeared in 1990 as a preliminary ruling with facts strikingly similar to the ECJ’s *Van Gend en Loos* decision. As in that case, the plaintiff claimed that the common market treaty created an immediate bar to increasing tariffs on goods from

⁴⁵ On the ECJ’s doctrine of implied powers, see: Weiler, 1991: 2415-17.

⁴⁶ 2-IP-88: point 3.

⁴⁷ 2-IP-90: see point 1.

⁴⁸ 1-INCULP-1987. This early ruling had a different numbering system than subsequent infringement cases. States explicitly authorized private litigants to raise noncompliance suits in 1996 reforms. Today this legal appeal would be admissible. See note 21

⁴⁹ Horton, 1982: 46 & 49.

⁵⁰ O’Keefe, 1996: 818.

⁵¹ 5- IP-89: conclusions points a & c.

other member states. As explained above, the Andean Free Trade Program, unlike its European counterpart, contained broad exemptions from regional free trade rules. The plaintiff nevertheless argued that the Cartagena Agreement should be read as freezing existing tariffs even for exempt products. The Colombian government countered that the treaty must be interpreted in light of Andean secondary legislation that permitted the exemptions and that had effectively amended the treaty.⁵² The ATJ sided with the Colombian government, ruling that member states had free reign with respect to products exempted from the Free Trade Program's purview.⁵³

By refusing to interpret the Cartagena Agreement as an independent source of free trade commitments, the ATJ parted company with *Van Gend en Loos*. The ECJ made the Treaty of Rome a constitutional document that created immediately enforceable rights for private actors and higher order legal obligations for governments. For Andean judges, by contrast, the Cartagena Agreement was not a constitutional charter but only a starting point for integration that member states were free to amend by enacting Andean secondary legislation.⁵⁴

The implications of this conclusion became clear in 1993 when Reynolds Aluminum asked the ATJ to review—for a third time—the same Colombian duty on aluminum products. In the years since the court's earlier ruling, member states had moved Andean law a few steps further toward a common market. A series of dates had been set to eliminate the exceptions lists for different countries. There were now three distinct regimes governing Andean trade, each with a different mix of requirements and exemptions.⁵⁵ The ATJ defined the obligations under each regime, and noted that the exceptions for the free trade program apply “as long as exception and reserve lists exist.”⁵⁶ But the heart of the issue was which legal regime governed which products. Rather than selecting the relevant rules from among the three options, the ATJ left this key question for national courts to answer.⁵⁷

The ECJ has a long tradition of reserving to itself the authority to determine the extent of national exceptions to free trade rules.⁵⁸ Moreover, ECJ has given significant direction to national judges regarding how to apply Community rules to the facts. Judge Federico Mancini acknowledged that the ECJ formally refrains from “overstepping” its authority to rule on whether a national law violates European law. But “having clarified the meaning of the relevant

⁵² Saldias, 2007: 12

⁵³ “Member States are independent to decide on burdens and restrictions in relation to reserved or excepted products; the Cartagena Agreement in no case prohibits them from imposing new burdens or granting these products more favorable treatment . . .” 1-IP-90: conclusion point 1.

⁵⁴ In a later nullification ruling the ATJ required that changes to the Cartagena agreement be adopted during a “reunion de plenipotenciarios” and not via ordinary secondary legislation. See: 1-AN-1996 Points 2.4 & 2.5

⁵⁵ O’Keefe 1996: 818-19.

⁵⁶ 3-IP-93: point 2 (p. 7).

⁵⁷ 3-IP-93: conclusions point 2: “It is for the [national court] to determine whether the product in question is part of the Free Trade program of the Cartagena agreement, the *Nómina de Reserva* [which forms part of Andean industrial programs] or the list of exceptions of the member country.”

⁵⁸ See Maduro (1998) and Stone-Sweet (2004).

Community measure, the court usually indicated the extent to which 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."⁵⁹ Andean states sought to limit the ATJ from guiding the application of national law by at first suggesting that the ATJ could not consider the facts of referred cases, and later providing that the ATJ can only consider the facts "when essential for the requested interpretation."⁶⁰ Although one can thus find some textual support for the ATJ's reticence, the court has nevertheless been remarkably reluctant to give prescriptive guidance to national judges.

There were a number of ways that the ATJ could have used the aluminum cases to expand its authority and to promote the Andean common market. The court could have taken the planned end of the Free Trade Program's exceptions as a hard date. It could have found the Andean industrial programs preempted national autonomy. It could have declared the exemption list a part of Andean law and itself determined which goods were included on the list. Or it could have allowed national judges the discretion to decide individual cases subject to very clearly defined Andean guidelines for determining the validity of government exemptions claims. Instead, the ATJ turned the issue over to national courts entirely and thereby removed itself from determining whether member states were complying with Andean free trade rules.

Would the ATJ become more expansionist if there were greater political consensus among Andean member states over building a common market?

ATJ lawmaking during a period of relative political harmony: 1996-2004

In the mid-1990s, the member states re-launched Andean integration in response to the demands of international financial institutions and growing domestic dissatisfaction with the slow pace of economic growth. By this time, the import substitution theory had come into disrepute and the region's governments had decisively embraced the neoliberal Washington Consensus⁶¹ and the goal of building a common market.⁶² In recognition of this sea change, member states reformed Andean institutions, replacing the ineffectual Junta with a General Secretariat (GS), increasing the size of the Secretariat's budget, and appointing a cadre of young lawyers eager to use those enhanced resources to promote regional integration.⁶³

By 1996, the ATJ faced a very different political environment. Contrary to the Andean Pact period, there was relative agreement among member states regarding the region's economic philosophy. To be sure, there were still challenges, such as Peru's withdrawal from the Common

⁵⁹ Mancini, 1989: 606.

⁶⁰ See note 21.

⁶¹ Dezalay and Garth, 2002, Williamson, 1990.

⁶² O'Keefe 1996. For example, the 1997 Sucre Protocol—a document similar to the European Single European Act—envisioned the phase out of all exceptions to the common market.

⁶³ 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.

External Tariff.⁶⁴ But using the Andean legal system to promote compliance with Andean rules was not among them. The 1996 Cochabamba Protocol for the first time authorized private actors to file noncompliance complaints with the GS, and gave the ATJ greater authority to apply Andean rules to the facts of preliminary reference cases. These changes suggested that member states wanted the ATJ to be more assertive in interpreting and enforcing Andean rules.⁶⁵

We see a marked change in the ATJ around this time, especially in its rulings concerning intellectual property. For reasons we explain elsewhere, the vast majority of ATJ's docket concerns this subject, which has long occupied a central place in Andean integration.⁶⁶ Andean law seeks to balance intellectual property protection against other social policies such as public health and consumer protection. The ATJ has purposively interpreted Andean law to protect this balanced approach against external pressures to raise intellectual property protection standards.

In the ATJ's first noncompliance case, a 1996 ruling involving "pipeline" patents, the court reviewed a challenge to a bilateral agreement between Ecuador and the United States that granted additional patent rights to foreign pharmaceutical firms.⁶⁷ Ecuador defended the agreement by citing to an Andean rule that expressly authorized member states, "in their own domestic legislation or under international treaties, [to] strengthen the [intellectual] property rights provided for in this Decision."⁶⁸ The ATJ rejected Ecuador's reliance on this seemingly unambiguous text. It reasoned that common intellectual property rules were "one of the fundamental pillars for economic harmonization" and "an essential instrument" to "promote well-balanced, harmonious, and equal development" in the region. The court then interpreted the word "strengthen" in a teleological fashion, allowing member states to enhance but not contradict these common rules and precluding them from invoking treaties "as a reason to validate noncompliance with a prior Community obligation."⁶⁹ In so doing, to the ATJ cast itself as the defender of Andean values at the expense of national discretion.

The ATJ extended this approach in a subsequent decision involving second use patents, another intellectual property right sought by foreign pharmaceutical companies.⁷⁰ The plaintiff argued that second use patents were required under the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights. Adopting a position arguably bolder than analogous European rulings, the ATJ concluded that Andean law is supreme even over multilateral treaties such as those adopted in the WTO:

⁶⁴ http://www.comunidadandina.org/INGLES/comercio/customs_union.htm

⁶⁵ See discussion of changes adopted in Cochabamba Protocol, note 21

⁶⁶ Helfer, Alter, and Guertzovich 2009. Article 27 (now Article 55) of the Cartagena Agreement proclaims the need for "a common system for the treatment of . . . trademarks, patents, licenses, and royalties."

⁶⁷ 1-AI-96.

⁶⁸ Article 143 of Decision 344.

⁶⁹ 1-AI-96.

⁷⁰ 01-AI-2001.

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.⁷¹

In addition to its patent rulings, the ATJ developed a large body of judge-made doctrine involving trademarks and the procedures of domestic intellectual property administrative agencies. Its rulings filled in gaps in Andean rules and balanced the rights of intellectual property owners against the interests of consumers and those opposing intellectual property registrations.⁷²

In litigation unrelated to intellectual property issues, by contrast, the shift in ATJ decision making was less pronounced. The court became more scrupulous in finding violations of clear Andean rules, in enforcing Andean procedures, and in reviewing the facts of preliminary references.⁷³ But it did not issue expansionist rulings that pushed member states toward deeper levels of legal integration.

The Colombian alcohol monopoly cases illustrate the ATJ's approach during this period. In May 1991, Ecuador complained to the Andean Junta, arguing that municipal laws in Colombia concerning the distribution and floor prices for alcohol products impeded competition and discriminated against alcohol products exported from Ecuador.⁷⁴ Consistent with past practice, the Junta settled the dispute without resolving the underlying problem and without referring the case to the ATJ. The dispute reappeared after the 1996 reforms of the Andean legal system. This time Venezuela challenged the Colombian alcohol policy. The Junta adopted *Resolución 453*, a legally binding decision that found fault with Colombian municipalities that discriminated against imports in their distribution and pricing policies.⁷⁵ The Junta ordered Colombia to fix the problem. When Colombia ignored the Resolution, the General Secretariat (which by then had replaced the Junta) filed a noncompliance suit with the ATJ.⁷⁶

Meanwhile, in November 1997, a private citizen asked the Colombian Constitutional Court to review the state's alcohol monopoly. One of the plaintiff's arguments was that the monopoly was incompatible with the Cartagena Agreement as applied in *Resolución 453*. In its May 1998 judgment, the Colombian court declined to enforce the resolution. It reasoned that,

⁷¹ 01-AI-2001, at p.16. For a review of ECJ rulings regarding WTO law, see Peers, 2001.

⁷² Helfer & Alter 2009: 24-25

⁷³ In 19-IP-98, for example, the ATJ delved into the facts of the case, going beyond the information provided by the parties and leaving no doubt that Venezuela had violated Andean law. Similarly, in 103-IP-2000, the ATJ concluded that only the GS, not national governments, can determine if imports from other member countries create temporary market disruptions that warrant the imposition of safeguards.

⁷⁴ This background is referred to in *Resolución 453*. GS resolutions are available on the same web portal as ATJ decisions.

⁷⁵ Ibid.

⁷⁶ The case was referred on October 20, 1997. See 3-AI-97.

unlike human rights treaties that have quasi-constitutional status,⁷⁷ Andean laws were equivalent to domestic legislation. Because such laws “and the Constitution do not share the same hierarchy, nor are [they] an intermediate legal source between the Constitution and ordinary domestic laws, . . . contradictions between a domestic law and Andean community law will not have as a consequence the non-execution of the [domestic] law.” The court also noted that Community law has “primacy” over conflicting national law—a concept that the Constitutional Court equated with preemption and interpreted to mean that Community law “displaces but does not abrogate or render inexecutable” conflicting national legislation.⁷⁸

The ATJ issued its noncompliance judgment six months later. The situation facing the ATJ was remarkably similar to the ECJ’s landmark *Costa v. Enel* decision—with a key difference. The *Costa v. Enel* case was simultaneously referred to the Italian Constitutional Court and to the ECJ. The Italian Constitutional Court ruled first, finding that European law was inapplicable to the case at hand and not supreme over national law.⁷⁹ The ECJ, by contrast, found that European law was supreme and that national courts were obliged to apply it instead of conflicting national law, but that the Italian law at issue did not conflict with Community law.⁸⁰ The ATJ was ruling on a noncompliance suit, although it later received a preliminary ruling reference concerning this issue. The more salient contrast is that the Colombian practice had been challenged by two member states and condemned by a GS Resolution.

In the noncompliance ruling, the ATJ went out of its way to agree with the Constitutional Court. It quoted from the court’s decision and concurred that there was no inherent conflict between the alcohol monopoly and Andean law. The implementation of the monopoly was a different matter, however. Each municipality had set its own rules for selling alcohol, forcing exporters to apply for multiple licenses to distribute alcohol throughout the country. The national government had tried to introduce a common system alcohol taxation, but the local policies persisted. The ATJ found that the municipal practices illegally restricted the sale of alcohol products and that Colombia was therefore in violation of Andean law.

The same litigant who had filed the Constitutional Court challenge later asked another Colombian court—the *Consejo de Estado*—to nullify the municipal policies. This case was one of many attacks on the alcohol monopoly that this court had reviewed. To nullify the law this time, especially after the Constitutional Court ruling, would have been a radical step. National

⁷⁷ International human rights agreements ratified by Colombia are part of a “bloque de constitucionalidad” which gives them a status superior to than national law. Article 93 of Colombia’s 1993 Constitution states: “International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically.” Colombian Constitutional Court Sentencia C-256/98 of 27 May 1998, Section 3.1

⁷⁸ Ibid Section 3.1 on p. 35. Section 3.2 explains how monopolies are part of the Estado Social de Derecho

⁷⁹ Indeed initially the Italian Constitutional Court suggested that Italian statutes take precedence over the EEC Treaty. *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.

⁸⁰ On the facts presented, however, the ECJ found that the Italian law nationalizing the state’s energy industry did not violate the Treaty of Rome. *Costa v. Enel* supra note 39.

courts in Europe had taken just such a step when they embraced the supremacy of European law. But as of 1999 no national court in the Andean Community had shown much willingness to overturn domestic statutes or doctrines to help enforce Andean law. Before ruling on the complaint, the *Consejo* referred the case to the ATJ as required under Andean law.

The ATJ issued its preliminary ruling in 1999, reiterating that Colombia was obligated to modify practices that conflicted with Andean law.⁸¹ Yet the ATJ refused to extend its earlier reliance on the European supremacy doctrine. If the ATJ had followed the ECJ's supremacy analysis in *Costa v. Enel*, it would have instructed the Colombian courts to do whatever was necessary to give effect to Andean law. Instead, the ATJ simply declared what Andean law required without asking national judges to help it to enforce that law. Although the ATJ did not explain its reluctance to extend supremacy, its conclusion is difficult to divorce from the very real concern that Andean national judges might find that they lacked the legal authority or the political will to heed the ATJ's request.⁸²

Two other cases further illustrate the ATJ's unwillingness to expand its authority or the reach of Andean law during this period. In 1999, the administrative tribunal of the Peruvian intellectual property agency INDECOPI attempted to refer a case to the ATJ. At the time, Peruvian courts refused to refer cases, although agency officials were eager for guidance as to the meaning of Andean IP rules. If the ATJ had allowed the INDECOPI tribunal to refer cases, it would have greatly expanded its influence in Peru. But the Andean judges rejected the referral, adopting the highly formalist position that the tribunal was part of an administrative agency and thus not a "domestic judge" authorized by the ATJ Treaty to refer cases.⁸³

In the second case, from 2003, a former staff attorney of the General Secretariat asked the ATJ to fill in Andean rules regulating the use of pesticides. The ATJ found that Andean rules required states to improve the quality of health in rural and agricultural industries, and it called for a better administrative procedure, including a registration of both imported and domestic pesticides. But the court left it to the national authorities to determine how to best achieve these goals. And, somewhat inconsistently, it found that Andean law did not require national agencies to follow any particular pesticide registration procedure.⁸⁴

In sum, during the period of relative political harmony between 1996 and 2004, the ATJ issued expansionist rulings concerning intellectual property but was far less willing to exert its authority outside of that area.

⁸¹ 29-IP-98.

⁸² The *Consejo de Estado* found against the plaintiff in the case, and Colombia has remained in breach of Andean law. Decision of Nov. 11, 1999 regarding Decreto 244 de 1906.

⁸³ We found no written record of this decision, but its existence was confirmed by several Peruvian attorneys, judges, and government officials. Interview with Teresa Mera Gomez, Member of INDECOPI Tribunal, Lima, Peru, June 21, 2007.

⁸⁴ 137-IP-2003; Interview with Marcel Tangerife Torres, former member of the GS legal division, 10 September 2007, Bogota Colombia.

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

In the mid-2000s, the Andean Community entered a new period of crisis triggered by political and economic schisms between the member states. Colombia and Peru remained true to the market liberalization ideals that animated Andean-level policies and institutional reforms of the 1990s. But the other three states challenged that philosophy. The shift began with the election of Hugo Chavez as President of Venezuela in 2001 and accelerated with the ascension of Evo Morales and Rafael Correa as the leaders of Bolivia and Ecuador in 2006. The three countries blocked new market-oriented initiatives and Venezuela ultimately withdrew from the Andean Community in 2006, taking with it a significant portion of the organization's budget.

The political crisis has slowed the filing of noncompliance suits by the GS. It has not, however, noticeably affected ATJ preliminary rulings. The bulk of those rulings are referrals from Ecuadorian, Colombian, and Peruvian courts that concern narrow, technical issues of Andean intellectual property law. In a few cases outside of intellectual property, the ATJ has enforced clear Andean rules and reaffirmed its established precedents. For example, in a 2006 Ecuadorian contract dispute between two private firms, the court reiterated its view that Andean law is superior to WTO rules (in this case the General Agreement on Trade in Services).⁸⁵ Occasionally, the ATJ has been bolder. In a 2005 ruling from Colombia, for example, the court upheld the supremacy of a GS resolution over domestic regulations adopted later in time.⁸⁶ And in 2007, the court overturned its earlier refusal to accept referrals from administrative bodies of intellectual property agencies.⁸⁷

Comparing 25 Years of Expansionist Judicial Lawmaking by the ATJ and ECJ

The above analysis encompasses ATJ lawmaking across the universe of ATJ preliminary rulings as well as important noncompliance decisions. To summarize our findings: Early ATJ rulings mostly emulated key ECJ doctrines, making Andean law directly effective and supreme to national law and preempting national governments from enacting conflicting domestic legislation. The ATJ has stressed that governments had agreed to these developments, which by all appearances is true. The ATJ has also been willing to enforce clear Andean laws and has required national judges give priority to those laws. Perhaps most strikingly, the court has purposively interpreted Andean intellectual property rules to protect the region's balanced approach to intellectual property protection against external challenges. In these ways, the ATJ has generally followed in the footsteps of the ECJ as an expansionist lawmaker.

In numerous other ways, however, the ATJ has behaved far more circumspectly than its regional cousin and contrary to the expectations of nature-based theories. The court has stressed that Andean legal commitments are a product of the member states' consent. As a result, where

⁸⁵ 158-IP-2006

⁸⁶ The ATJ upheld a GS resolution that refused Colombia's request to defer a tariff. The ATJ found that Colombia violated Andean law when it later ignored the resolution and unilaterally altered the tariff. The ATJ held that the resolution was superior to domestic law, even if it was adopted earlier in time. (115-IP-2005).

⁸⁷ 14-IP-2007; see note 83

Andean law contains gaps that protect national rules or national discretion, the ATJ has scrupulously respected that discretion and has eschewed opportunities to expand the reach and scope of Andean law. Moreover, the ATJ does not treat the Cartagena Agreement as higher order law; indeed its rulings apply Andean secondary legislation instead of seemingly contradictory Cartagena provisions. This position gives free reign to member states to amend Andean legislation to reflect the waxing and waning of their collective commitment to integration.

Both courts possessed the same potent combination of wide access rules, self-interested litigants, repeat player legal entrepreneurs, and the tantalizing possibility of judicial empowerment. Moreover both courts experienced an increase in case filings, providing opportunities to reveal their potential to private litigants. The ATJ has demonstrated its utility in intellectual property cases. But when litigants have presented opportunities to issue purposive rulings in other issue areas, the court has declined to help them or to aggrandize its own authority. The ATJ's refusal to be bold hinders spillovers—not only does the court's reticence cabin the reach and scope of Andean law, it also inhibits litigants from filing cases that might contribute to such expansions. It is a striking fact that of the 1338 ATJ preliminary rulings between 1984 and 2007, only 35 involve subjects other than intellectual property.⁸⁸

In contrast to the ATJ, the ECJ is often expansionist. Alec Stone Sweet has examined ECJ case law involving three substantive areas of European law—the environment, sex discrimination, and free movement of goods. He concludes 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.”⁸⁹

Breaking down ATJ lawmaking historically revealed another important difference between the two ICs. The ECJ was most expansionist in its foundational period, when the political demand for European integration had stalled. The ATJ also developed its key doctrines during its foundational period. But the Andean system overall exhibits little evidence of international judges stepping in when political processes are blocked. What explains these striking differences in ECJ/ATJ lawmaking?

III. EXPLAINING THE DIVERGENT LAWMAKING TRAJECTORIES OF THE ECJ AND THE ATJ

This section draws upon the literature on ECJ and international adjudication more generally to assess whether existing theories plausibly explain the differences analyzed above. We reject several possible explanations for these patterns, and then develop our own explanation.

⁸⁸ Many of these non-IP cases are discussed above. There are 17 additional cases that involve a special tax program for exports to other Andean states that mostly involve a single firm as a repeat player. The legal issues in these cases are narrow and the ATJ's analysis is not particularly noteworthy. See: Helfer and Alter, 2009

⁸⁹ Stone Sweet 2004: 232

Attorneys trained in the civil law tradition might offer legal culture as an explanation, arguing that the ECJ adopted a common law method of decision making, while ATJ rulings reflect the civil law tradition of its member states. We reject this explanation for several reasons. European legal traditions of the 1960s were not fundamentally different from Latin American traditions of the 1990s. All of the EEC's founding members had civil law systems that inhibited national judges from embracing the supremacy of European law. In addition, as John Merryman 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 de-codification of the law and constitutionalism.⁹⁰ Finally, cultural arguments ignore the fact that the ATJ was quite expansive in intellectual property cases, interpreting Andean rules teleologically and filling in gaps in ways that furthered regional values.

A second possibility is that Andean judges faced a greater risk of legislative reversal or an attack on their jurisdiction as compared to European judges. History does not support this claim. ECJ rulings of the 1960s advanced radical legal and political ideas such as European law supremacy and the transfer of sovereignty to supranational institutions—ideas that European leaders of the period vehemently rejected and that engendered numerous political and legal challenges. But since the ECJ announced its key doctrines in cases in which it ruled for governments on the facts presented, the only way to reverse the court's doctrinal assertions would have been to revise the Treaty of Rome—a complex and politically fraught endeavor.⁹¹ Early ATJ rulings also did not compel governments to change their policies. But unlike their European colleagues, Andean judges stressed that member state consent was paramount and that governments retained discretion in key policy areas. The ATJ also increased the likelihood of being legislatively overruled by refusing to find that the Cartagena Agreement created higher order legal obligations. In sum, both courts avoided rebukes by not requiring governments to change their policy. But we find no evidence that Andean judges' fear of sanction explains the differences in expansive judicial lawmaking.

A third claim we reject concerns differences in the levels of intra-Community trade in the two regions. Alec Stone-Sweet and Thomas Brunell have argued that there is a linear relationship between trade volumes and supranational litigation rates that contributes to the expansion of European law.⁹² Although levels of intra-Andean trade have remained very low, intra-European trade was also relatively small at the EEC's founding, constituting less than 3% of the member states' GDP.⁹³ Trade among Andean states increased over the period we study,

⁹⁰ Merryman and Pérez-Perdomo, 2007: 156-9. One should not forget the 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 national court resistance to ECJ doctrine, see Alter, 2001

⁹¹ See Alter, 2001

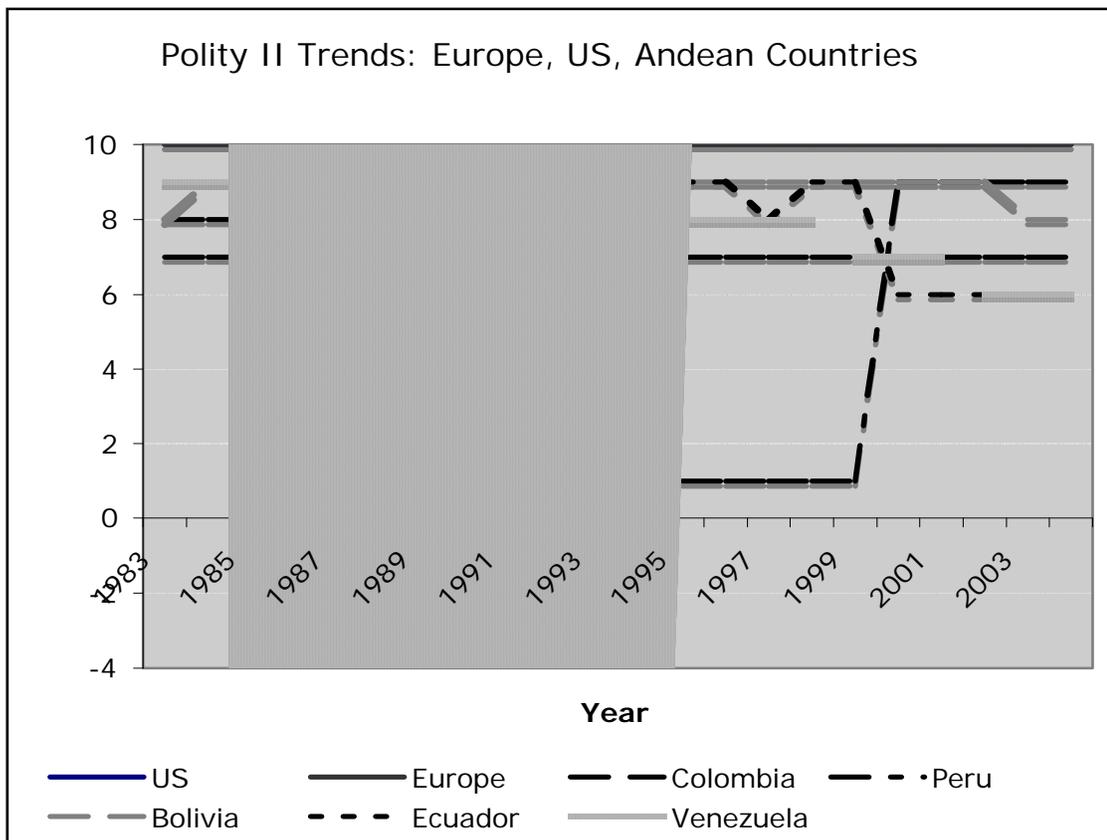
⁹² Stone Sweet and Brunell, 1998.

⁹³ Stone Sweet 2004: 57. As Stone Sweet developed his argument, he put more emphasis on the importance of secondary EEC legislation contributing to ECJ litigation (2004). He was also focused on more recent ECJ doctrinal developments; he never claimed his argument explained the lawmaking we discuss.

beginning from a low point of 3% to 5% of total trade during the Andean Pact,⁹⁴ rising to 13% in 1998, but declining to less than 10% a few years later.⁹⁵ These rising trade volumes do not, however, correlate with the patterns of ATJ lawmaking described in Section II. It remains an open question whether a region more united by economic interdependence would have pursued economic integration more vigorously, creating a deeper commitment to integration that might have affected ATJ law-making. But it is equally implausible to claim that economic conditions explain the ECJ's enthusiasm for expansive lawmaking in the 1960s and 1970s, and that low Andean trade levels explain the ATJ's divergent evolution.

Political instability and the relative fragility of democracy in Andean countries suggests a fourth potential explanation for the ATJ's unwillingness to engage in expansionist lawmaking. Table 1 below reports POLITY II scores for Andean and European countries. POLITY scores seek to capture the quality of democracy. Andean scores are lower than the US and Europe, but compared to many countries in the world, Andean countries score fairly well.⁹⁶

Table 1. POLITY II Scores --Andean Countries and Europe Compared



⁹⁴ Evolucion del Proceso de Integracion 1969-1999, CAN document SG/di 219/Rev.1 at 28 (Apr. 26, 2000) (on file with authors); Avery and Cochraine, 1973: 183, Hojman, 1981.

⁹⁵ Kuwayama, 2005: 14, Rodríguez Mendoza, Low and Kotschwar, 1999: 96.

⁹⁶ Out of possible 10, Andean countries often scored 9, and, aside from Peru's dip, mostly remained between 7 and 9 during the period of time we studied. Negative scores reflect a low democracy and a high authoritarianism score.

The factors reflected in the POLITY scores explain some cross-national variation within the Andean legal system.⁹⁷ But overall the quality of democracy indicators cannot explain why the Andean legal system works quite well with respect to intellectual property issues, but not in other issue areas. Unsurprisingly, a simple equation wherein higher levels of democracy equals greater respect for international law and more expansive international lawmaking does not hold. Nor is it true that international law is doomed to fail in contexts of domestic political instability.

To be clear, we do not assert that a fear of sanctions, economic conditions or political instability are irrelevant to our findings. The key question is how contextual factors interact to explain the outcomes we find. We began our research by taking at face value the dominant explanation of ECJ expansionism. If we remove the assumption that ICs by their nature seek to aggrandize their power, what remains are patterns that can be explained by a single logic: both courts engage in expansionist lawmaking where they are actively supported by a set sub-state interlocutors with the power to facilitate state compliance.

A first common pattern is that both the ECJ and the ATJ built key legal doctrines in their founding periods, but blunted the impact of those doctrines by ruling for national governments on the facts. This was a prudent move for both nascent courts, neither of which could count on the domestic political support needed to ensure compliance with rulings that directly clashed with extant government policies.

A second pattern is that the ATJ engages in expansionist lawmaking in intellectual property cases, whereas the ECJ is an expansionist lawmaker in multiple issue areas. What explains this distinction? Only for intellectual property is the ATJ actively supported by sub-state interlocutors—domestic intellectual property agencies. One cannot observe this support from coding ATJ rulings because the agencies are almost always defendants in preliminary rulings involving agency patent and trademark decisions. But our interviews revealed that the agencies are the ATJ's most enthusiastic interlocutors and compliance constituencies. The agencies prefer that cases be referred to the ATJ given the very limited intellectual property expertise of national judges. And national administrators have followed ATJ rulings over contrary national laws that remained on the books.⁹⁸

These two patterns led us to revisit understandings of the ECJ's legal revolution. Weiler, Burley and Mattli offer the canonical nature-based explanation of the ECJ's remarkable transformation. They explained ECJ lawmaking by arguing that the ECJ quite naturally sought

⁹⁷ Democratic instability perhaps explain why Bolivia and Venezuelan courts tend to refer very few cases to the ATJ, and why Peru did not become a more active legal participant until much later, though not why Ecuadorian courts have been among the strongest participants in the Andean legal system. See Helfer and Alter, 2009b.

⁹⁸ We analyze this relationship between the ATJ and national IP agencies in greater depth elsewhere, finding that the ATJ has catered to preferences of national IP agencies in its substantive development of the law. We also show that ATJ oversight has helped the agencies to rebuff pressures from the United States and multinational firms for stronger intellectual property protection rules even where national governments yielded to such pressures. Helfer, Alter, and Guertzovich 2009: 22-34.

empowerment, and they observe that the lawyers, law professors, and national judges who coalesced around the ECJ's doctrinal advances were also self-serving, since they too were empowered by these developments.⁹⁹ But this empowerment narrative conveniently elides the fact that most lawyers, national judges and law professors did not quickly coalesce behind ECJ doctrines. Recent scholarship on the court's early years suggests that self-empowerment may not have been the main driver of these actors. New accounts focus on the individuals involved in early legal integration. These studies reveal that many of lawyers, judges, and scholars who rallied around the ECJ had long supported the political project of regional integration, embedded in a rule of law, as an antidote to recent European wars and human rights abuses.¹⁰⁰

The support of this small but highly organized jurist advocacy movement nurtured the ECJ's early expansive lawmaking. At national meetings of European law scholarly associations, lawyers, government officials, legal academics, and European Community officials discussed contemporary European legal issues. EC officials told participants what types of cases would help to develop European law, sometimes leading to private lawyers complaints that the Commission had investigated but chose not to pursue. Pro-integration jurists then fashioned test cases so that the ECJ could develop its jurisprudence. The regular meetings served as *de facto* "kitchen cabinet" sessions where ECJ judges could hear lawyers and scholars debate open doctrinal issues.¹⁰¹ After the court issued its rulings, pro-integration legal scholars ran a decentralized public relations campaign on behalf of ECJ doctrines. They wrote articles about the rulings and used their influence as national judges, government officials, and law professors to make it appear that there was growing societal support for the ECJ's version of legal integration.¹⁰² The largely one-sided activities of these pro-integration lawyers are well known.¹⁰³ But scholars later built theories that assumed that self-interest would generate the support of these actors.¹⁰⁴

The jurist advocacy movement described above emboldened the ECJ to declare the direct effect, supremacy, and preemptive powers of Community law. The support of national courts added the next key ingredient. In the 1960s and 1970s national judges in Europe came to endorse the ECJ's supremacy doctrine. Once the ECJ had national court support, the ECJ could further develop its legal doctrines without fear of noncompliance, and ruling against governments on the merits of the cases. ECJ Judge Federico Mancini aptly captured how, in Europe, national courts were critical supporters for the ECJ:

⁹⁹ Weiler, 1991: 2426; Burley and Mattli, 1993: 60-5.

¹⁰⁰ Cohen and Madsen, 2007, Madsen and Vauchez, 2005.

¹⁰¹ Indeed, there is some evidence that ECJ discourse became bolder after these meetings. Alter, 2009: 76-8.

¹⁰² Vauchez, 2007, Sacriste and Vauchez, 2007, Alter, 2009.

¹⁰³ 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. See: Weiler, 1994, Rasmussen, 1986, Mattli and Slaughter, 1998.

¹⁰⁴ Rachel Cichowski expands this argument further by noting the importance of social mobilization in shaping the ECJ's jurisprudence on gender equality and environmental protection: Cichowski, 2007.

[t]he [European] Court would have been far less successful had it not been assisted by two mighty allies: the national courts and the Commission. . . . [B]y referring to Luxembourg sensitive questions of interpretation of Community law, the national courts have been indirectly responsible for the boldest judgments the Court has made. Moreover, by adhering to these judgments in deciding the cases before them, and therefore by lending them the credibility national judges usually enjoy in their own countries, they have rendered the case law of the Court both effective and respected throughout the Community.¹⁰⁵

The ATJ, by contrast, cannot count on domestic judicial support. The Colombian Constitutional Court, arguably the region's most powerful and authoritative national court, follows a narrow view of Andean law's supremacy. Ecuadorian, Peruvian and Colombian judges we interviewed remain ambivalent and confused about their obligations under Andean law. National judicial reticence is not a categorical barrier to ATJ lawmaking. As of 1996, private litigants can circumvent national courts that refuse to refer cases by filing noncompliance suits directly with the GS and then the ATJ. As a practical matter, however, the reticence of national judges denies the ATJ a key source of legal and political leverage.

It is beyond the scope of this paper to consider why legal activists and national judges coalesced behind the European integration process whereas Andean integration lacks a similar set of supporters.¹⁰⁶ What is important is our finding that ICs are more likely to be expansionist judicial lawmakers when they expect support from key sub-state actors. For the ECJ, the key interlocutors were the lawyers, judges, academics, and sympathetic government officials who participated in European law legal associations. For the ATJ, the key interlocutors were national IP agencies. Once these actors were on board, the two courts could be reasonably sure that their rulings would be respected regardless of the position of the executive or legislative branches.

In sum, we argue that ICs are more likely to be expansionist lawmakers where they are supported by a set of powerful sub-state actors, be they national judges who enforce international rulings, agencies who implement the rulings in their administrative practices, or political activists who will work to promote legislative compliance. We stress the support of sub-state actors over concerns about compliance. Of course ICs weigh seriously the arguments of governments. Moreover, voluntary government support is preferable because governments have the power to translate IC rulings into binding national law. But ICs can brook government disapproval and intermittent noncompliance, especially if doing so energizes a political movement to begin to change conflicting national policy. IC lawmaking can thus promote the spirit of international rules while sub-state actors mobilize. The next section considers the implication of this finding.

¹⁰⁵ Mancini, 1989: 376. Nyikos quantitatively shows how national court support shapes implementation politics: Nyikos, 2003

¹⁰⁶ 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: 82-9.

IV. CONCLUSION: THE DOMESTIC POLITICS OF IC LAWMAKING

This article has analyzed judicial lawmaking by the ATJ and ECJ during the first twenty-five years that each court was interpreting and applying its respective common market legal rules. The different trajectories of two structurally identical courts allows us to reject the simplest version of the nature-based arguments and arrive at a position that is more consistent with the latest scientific findings in the nature/nurture debate.¹⁰⁷ Many scholars have argued that ICs have in their DNA the capacity to be expansionist lawmakers. But such lawmaking—which we define as judicial decisions that expand international rules or IC authority at the expense of national discretion—creates political and professional risks. International judges can avoid these risks by adhering closely to the letter of the law. We find examples both of judges taking the riskier route of becoming lawmakers and examples of judges respecting state discretion. This article has sought to illuminate the factors that lead ICs to choose one of these paths over the other.

We can definitively say that the design of an IC is underdetermining of whether or not the IC will be an expansionist lawmaker. We demonstrate that cloning the ECJ does not guarantee a replication of its expansive lawmaking. We explain this finding by suggesting that context-specific factors nurture IC lawmaking, including lawmaking by the ECJ. The reality that nature-based theories and national structural conditions are insufficient to explain the differences in IC lawmaking suggests a greater role for domestic and regional politics in international adjudication and in the enforcement of international rules. Although the Cartagena Agreement included liberalizing trade rules similar to those in the Treaty of Rome, the Andean legal system has retained its sensitivity to the developing country context of its member states, especially in the area of intellectual property. The ATJ balanced consumer interests against the rights of foreign trademark holders and upheld the Andean ban on second use patents when Andean governments had caved into pressure by foreign pharmaceutical firms.

This finding has wider consequences for international law and politics, since many recently created ICs were modeled on the ECJ.¹⁰⁸ This study of the ATJ, the third most active IC whose decisions are largely unknown, helps us to understand the consequences of copying the ECJ's design in other regions of the world. The ATJ mimicked the ECJ's foundational doctrines, and interviews revealed that Andean officials regularly consult ECJ cases when confronted with new legal issues. This suggests that copying the ECJ brings with it a source of legal expertise. But it does not explain why ICs modeled on the ECJ would limit the scope of ECJ doctrines.¹⁰⁹

¹⁰⁷ Scientists today see individual development as affected both by underlying biological traits and by contextual factors.

¹⁰⁸ Ten ICs are modeled on the ECJ: The 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 and Human Rights (Alter 2006).

¹⁰⁹ A recent study of another ECJ-inspired court, the East African Community Court, indicates that the EAC has copied but also limited the reach of key ECJ doctrines. van der Mei, 2009.

Our broadest claim is that international judges are more likely to become expansive lawmakers when they are supported by influential sub-state interlocutors and compliance constituencies. These intermediaries include national judges, administrative agency officials, and groups who have a personal, professional or ideological stake in promoting respect for international rules. The implication of these insights are potentially far reaching. This comparison between the ATJ and ECJ suggests that ICs need not pander to executive or legislative officials but can promote compliance with international rules by allying with key public or private constituencies within states.

The finding that lawmaking responds to the interests of supportive sub-state actors suggests several broader implications. First, we should expect uneven expansions of international rules in both the best and worst functioning legal systems. Second, democracies may be more vulnerable to IC interventions precisely because domestic interlocutors have a greater ability to mobilize and act independently of governments in democratic regimes. In countries in transition, by contrast, domestic interlocutors can reinforce democratic developments by drawing on international legal mechanisms to pressure their governments. Third, in rejecting nature-based assumptions about IC expansion, we open the door for aspirations to drive the development of international law. We may well find that international lawmaking is expansive in the domains of human rights and war crimes precisely because there are mobilized advocacy networks who work to find test cases, develop legal doctrines, and find and encourage the sympathetic sub-state actors who can serve as IC compliance constituencies. Conversely, the fact that the ECJ's early advocates were motivated by the larger political goal of European integration, combined with the failure of self-interested actors to coalesce behind Andean legal integration should give pause to those who expect self-interest to be a sufficient engine of international law's expansion.

Our analysis hardly provides definitive support for such far reaching conclusions. But it does redirect our attention to where, when, why, and to what effect sub-state actors build connections to international legal systems. A specific application of this broader question is where and when sub-state actors turn to ICs to further their objectives. We suspect that more ICs will resemble the ATJ than the ECJ. As a model, the world could do far worse. The ATJ may not be an active builder of expansionist legal doctrines, but it has helped to anchor an Andean rule of law, albeit mostly within a confined policy space, 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 rulings because those rulings have been the most important venue for ECJ lawmaking, and because the largest source of ATJ cases comes from preliminary references. Our coding revealed that 97% percent of ATJ preliminary rulings 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 intellectual property rights. Because of the substantive concentration of preliminary references, and because cross-national variation in references is highly affected by variations in intellectual property applications, we do not believe that regression analysis of reference patterns would yield useful insights for our dependant variable.

Unlike in Europe, Andean governments rarely offer observations in preliminary references, and ATJ rulings provide scant clues as to how national judges should apply the law to the facts. Instead, preliminary rulings contain mainly abstract interpretations of specific provisions of Andean law. For all of these reasons, one cannot conduct the type of analysis undertaken by Carrubba et. al (2008) as they probed for state influence over ECJ decision making in preliminary rulings.

ATJ noncompliance rulings are different in that the ATJ speaks directly to the facts of the case, and the government's positions are more clearly developed. We analyzed several noncompliance decisions that our interviews and coding of preliminary rulings suggested were politically salient. Although one could further investigate these cases, we not believe such an investigation would not change the main findings of this paper. We probed multiple interviewees and found no evidence that, outside of intellectual property disputes, the ATJ was an active lawmaker in noncompliance cases.

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