TRANSPLANTING INTERNATIONAL COURTS:  
THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE  
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Note to Duke Law faculty workshop participants: Attached are the table of contents, introduction, and conclusion to my forthcoming book, coauthored with Karen Alter of Northwestern University. The first chapter provides an overview of the book’s theoretical framework, mix method research design, and overarching findings. The conclusion revisits my 1997 Yale Law Journal article with Anne-Marie Slaughter in light of a decade of research on international courts around the world. Readers pressed for time should read Chapter 1 and the discussion of backlash on pp. 31-34.

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

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

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

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

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

Our interest in the ATJ began as a sort of natural experiment. The Andean Tribunal and Andean Pact’s founding charter, the Cartagena Agreement, are very similar to the ECJ and the European Community’s Treaty of Rome. Both tribunals also have very active dockets. Comparing the two courts side-by-side allows us to explore judicial institutions with similar structures and doctrines that operate in very different legal and political contexts.

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

2 The ATJ issued 2853 rulings from its founding through 2014. In comparison, as of that same date the ICJ had issued 85 judgments in contentious cases and 26 advisory opinions and had denied jurisdiction or admissibility in 26 cases; the WTO dispute settlement system had adopted 201 panel reports and 134 AB rulings; the ITLOS court had issued 18 decisions and 2 advisory opinions. In 2015 the ICC had at different stages of investigation and prosecution 22 cases involving 26 individuals and 9 “situations.”
As we learned more about the ATJ, we became interested in a second issue—how the Tribunal has survived and even prospered in a relatively inhospitable climate. The Andean Community has endured numerous travails—years of economic and political instability, armed insurgencies and transborder military skirmishes, and deep ideological differences among its member states. In addition, all Andean countries share the reality that their relationships with non-Andean countries, such as United States, the European Union and China, are more politically and economically consequential than relations with their regional neighbors. The ATJ’s resilience despite this ongoing turbulence makes it an important topic for understanding whether and when international judges can shape international law and politics, especially when the going gets tough.

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

The second theoretical contribution is the use of detailed coding and analysis of ATJ rulings to revisit debates about the effectiveness of international courts. Early scholarship on his topic asked a simple question—do states comply with judgments against them?6 For the ATJ, compliance with its preliminary rulings is the norm, while states have mostly ignored the Tribunal’s judgments finding them in breach of Andean law. But these simple statistics mask a more complex and multifaceted reality, one that aligns with recent scholarship that distinguishes compliance from effectiveness and evaluates the latter by reference to a court’s mandate and goals7 and the extent to which its rulings lead to “observable, desired changes in behavior.”8

3 On the ECJ’s contributions to European integration, see Weiler, 1991; Stone Sweet, 2004; Burley and Mattli, 1993; Dehousse, 1998; Tallberg, 2003; Pollack, 2003.
4 See Alter, 2012.
5 Madsen and Huneeus, Currently Under Review.
6 Helfer and Slaughter, 1997 at 282-4.
8 Raustiala, 2000 at 393-4.
We had contrasting expectations about the ATJ’s effectiveness when we launched our study of the Andean legal system more than a decade ago. Because the Tribunal is modeled on its European cousin, we were not surprised that its docket is dominated by preliminary rulings. Our intuition was that private litigants would not file complaints and national judges would not send references to the Tribunal unless there were economic or other benefits from doing so. The large number of preliminary rulings thus suggested that the ATJ was having an impact on Andean law and politics. On the other hand, considering the region’s history of economic and political turbulence, strong presidents, weak judiciaries and fragile rule of law, we thought it highly unlikely that the ATJ could change state behavior to the same extent as had its European counterpart.

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

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

These findings have important implications for the effectiveness of international adjudication more generally. Regional courts in the developing world operate in challenging environments that more closely resemble those in the Andes than those in Europe. The judges on these fledgling courts are struggling to overcome major legal and political hurdles to removing regional trade barriers, creating a common market and protecting human rights. As discussed in Chapters 8 and 10, the ATJ’s experience suggests that even if international courts cannot fully overcome these challenges, cultivating and maintaining the support of a core domestic constituency may be necessary both for effectiveness and for survival in tough political times.

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

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

Karen Alter launched her career by studying how the ECJ convinced national judges to accept its authority. Her first two books, Establishing the Supremacy of European Law (2001) and the European Court’s Political Power (2009), explore variation in the ECJ’s political influence over time, within member states, and across issue areas. Our coauthored comparison of the Andean and European experiences led us to reassess Alter’s earlier understanding of EC legal integration. In particular, superficial similarities between the two institutions—the predominance of national court references on both courts’ dockets, the common assertion of the direct effect and supremacy of Community law, and the ATJ’s frequent citations to ECJ rulings—are belied by a more complex reality. Whereas in Europe private actors have invoked a broad range of European law to challenge national policies and practices, in the Andes private litigant primarily invoke Andean IP law. In addition, the ATJ’s mostly timid and formalist interpretations of Community rules diverges from the ECJ’s bolder, purposive approach. These surprising findings led us to reconsider whether mobilization in favor of ECJ litigation was as spontaneous as prevailing theories had suggested, and whether all international judges are expansionist lawmakers. This questioning is reflected in the conclusion of Chapter 3 on the ATJ’s interlocutors, and in Chapter 8’s comparison of the two court’s lawmaking across time, and in Chapter 9’s discussion of the importance of jurist advocacy movements.

Laurence Helfer, writing with Anne Marie-Slaughter in 1997, published Toward a Theory of Effective Supranational Adjudication, a pioneering study of the ECtHR and

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9 The project was spearheaded by iCourts, the Danish National Research Foundation’s Center of Excellence for International Courts, based at the University of Copenhagen Faculty of Law. It is published as: Alter, Helfer, and Madsen, 2016; Alter, Helfer, and Madsen, 2017.
Helfer and Slaughter examined the success of both European tribunals, explained the importance of private litigant access to that success, identified a checklist of factors associated with effective adjudication in Europe, and considered the prospects for building a broader community of law to support such adjudication elsewhere. In the ensuing years, states have created new global and regional courts and quasi-judicial review bodies in human rights, criminal law, international economic law, and the law of the sea. The dockets of many of these institutions are growing, mainly in response to suits by private litigants and other non-state actors. A deep study of the ATJ—the third most active international court by number of rulings and one of the oldest regional judicial body outside of Europe—provides an opportunity to revisit Helfer and Slaughter’s theory of effective international adjudication in the context of developing countries characterized by weak domestic judiciaries, limited protection of individual rights, and less deeply embedded commitments to the rule of law. This reassessment is the subject of Chapter 10.

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


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

Our decision to examine the two courts side by side raises a methodological challenge. The ECJ is an older institution than the ATJ, one that operates in a far more favorable legal and political environment than its junior cousin in the South America. It would thus be misleading to evaluate the two courts over their entire lifespans, or to investigate each court’s activities in the same calendar year.

To address these concerns, we focus our comparison on roughly the first quarter century of each tribunal, two staggered twenty-five year time periods—1958-1983 for the ECJ, and 1984-2007 for the ATJ—during which the two courts faced a number of similar

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10 Helfer and Slaughter, 1997. Chapter 10 will update this analysis, and explain the switch from a focus on “supranational” to “international” courts.
challenges. We also include data and analysis of the next seven years of ATJ activities to highlight the two courts’ divergent trajectories during a period of political crisis within the Andean Community.

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

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

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

European integration began with the Schuman Plan of 1950, a proposal to put Germany’s coal and steel industries under collective supranational management. The European Coal and Steel Community, formally constituted in 1952, included a Court of Justice. The ECJ’s role in this Community was to review actions and omissions of the

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

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

13 For more on the origins of the Andean Pact and the ATJ see Saldías, 2013 at 84-97.
supranational High Authority and to facilitate uniform interpretation its rules and regulations. The six original member states enlarged the ECJ’s jurisdiction in 1958 with the founding of the European Economic Community.

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

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

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

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

In addition to formal similarities in institutional architecture and substantive rules, the European legal system of the early 1960s and the Andean legal system of the mid-1980s faced comparable practical challenges. Although sometimes forgotten today, the European integration project was, in its early years, widely viewed as precarious and unlikely to succeed. Reviews of Andean integration in the 1980s expressed similar skepticism. Governments continued to exempt many economically important industries from the Andean Free Trade Program, and the Latin American debt crisis late in the decade created pervasive economic instability that brought the Andean integration project to the brink of failure.

14 Boerger-De Smedt, 2008.
15 For more on how the ECJ’s jurisdiction and mandate changed in this shift, see Alter, 2001 at 5-11.
16 France’s De Gaulle refused to accept a shift to qualified majority voting, using his ‘empty chair policy’ to block all community decision-making until his terms were met. In the 1960s and 1970s, European governments showed little appetite for European integration. See Dinan, 2004 at 104-64. Hoffmann, 1966 at 863-64.
18 O’Keefe, 1996.
For ECJ and ATJ judges, the tenuous political foundations of the two integration schemes raised daunting a question—how to attract the cases needed to establish their legal authority? In their early years, both courts faced wide variations in the willingness of national judges in different member states and at different levels of the judicial hierarchy to refer cases involving issues of Community law. Both tribunals capitalized on the opportunities of the early cases that did arrive, adopting rulings that were doctrinally important but whose political significance was not immediately apparent.

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

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

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

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

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

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

\(^{21}\) Parsons, 2003 at 149; McNamara, 1998 at Chapter 6; Moravcsik, 1998, chapter 4.

\(^{22}\) Moravcsik, 1998, chapter 5.
These two dates—1985 in Europe and 2006 in the Andes—mark the point when the two regional integration projects diverged sharply. The EC continued to take bold steps toward building a single market and a closer economic union. In South America, the political and ideological schisms among the four remaining member states and a focus on other regional cooperation schemes—most notably Mercosur and UNASUR—sapped political support for the Andean integration project and Community institutions.

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

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

Lessons Learned from Studying the Andean Tribunal

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

Our contribution to this body of knowledge draws upon a rich variety of sources. Working over a decade with the help of research assistants, we coded and analyzed most of the ATJ’s more than 2,800 decisions. We made four trips to the region and conducted more than fifty interviews in Spanish and English with government officials, lawyers, national and Andean judges, and Community officials. Our investigations in the Andes were also shaped by our research and field work on the two European tribunals, as well as other ECJ-style transplants in West, East and Southern Africa, and the differently-structured integration systems in MERCOSUR and ASEAN.

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

Adapting transplanted international legal institutions to local contexts

Our book provides new evidence to evaluate theories about transplanted legal institutions. The literature on legal transplants, discussed in Chapter 2, indicates that slavish copies of existing legal institutions are likely to be ignored or resisted by local actors. This is especially true of transplants in developing countries, whose officials often adopt formal institutions and laws in response to pressure from multilateral organizations,

23 These reforms are summarized in Alter, 2014 at 86.
foreign donors, and trading partners. This institutional mimicry may appear significant on paper, but it often occurs without any meaningful change in actual practices.

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

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

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

**Not all international courts seek to expand their influence and authority**

All international courts are called upon to adjudicate cases in which the applicable legal rules do not, on their own, clearly dictate the outcome of the dispute. In this limited sense, all international judges are lawmakers, and such lawmaking is generally uncontroversial and even welcomed. The ATJ is no exception.

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

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

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

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

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

The predominance of formalism in the region also means that, unlike their counterparts in Europe, national courts in the Andes rarely refer bold or provocative questions to the ATJ even when pressed to do so by private litigants. Instead, they often pose the same questions in case after case, knowing in advance what the ATJ’s answer will be. To outsiders, this repetition may appear pointless and inefficient. It also sometimes frustrates attorneys who participate in Andean litigation. Yet as we explain in Chapter 5, formalism and repetition served an important purpose. They habituated respect for legal rules so that when politically contentious cases later arose, legal actors could defend their decisions by invoking longstanding and deeply entrenched rules and procedures.

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

**Expanding the interlocutors and compliance partners of international courts**

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

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

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

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

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

The absence of similar jurist advocacy networks in the Andes helps to explain why sporadic efforts by pro-integration legal entrepreneurs to increase the ATJ’s profile

\textsuperscript{25} Alter, 2000.
\textsuperscript{26} Helfer, 2002.
\textsuperscript{27} For example, see Alter, 1998; Nollkaemper 2011.
\textsuperscript{28} The Peruvian Supreme Court’s decision is discussed in Resolución 771, General Secretariat Noncompliance Decreto No. 173-2003.
and influence never gained traction. The broader lesson is that future studies of why international adjudication succeeds or fails should look beyond the formal connections between national and international judges and the atomistic pursuit of self-interest by attorneys and litigants. Equally if not more important may be other public and private bodies—such administrative agencies, national human rights institutions, bar associations and social movement organizations—whose members mobilize, whether openly, behind the scenes or both, to support or oppose international courts.

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

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

Most observers would expect an international court faced with these unfavorable conditions to have little if any impact. Where political connections and corruption are endemic, individuals and firms are often dubious of invoking domestic legal rules and institutions, let alone placing their trust in a distant tribunal that oversees an unfamiliar legal system to which governments are only sporadically or half-heartedly committed. Yet these difficult conditions more closely resemble those confronting most international courts today—especially courts in developing countries that are modeled on the ECJ and ECtHR—than the far more supportive legal and political contexts in Europe on which many theories of international adjudication are based.

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

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

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

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

**Defending regional IP laws that protect local values and interests**

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

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

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

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


especially drug patents, pharmaceutical test data, and certain trademark rights—to promote public health, reduce local drug prices, and protect consumers.

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

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Chapter 10: Reconsidering What Makes International Courts Effective

This book is a deep exploration of the law and politics of one international court—modeled on the ECJ—operating in a developing country context. We conclude this exploration by revisiting Laurence Helfer and Anne-Marie Slaughter’s seminal article, Toward a Theory of Effective Supranational Adjudication, published nearly twenty years ago in the Yale Law Journal.32 The article was among the first to analyze the rise of international courts as a global phenomenon and to theorize about the factors contributing to their effectiveness. Helfer and Slaughter were motivated to write the article by expanding legal and political footprint of two European tribunals—the ECJ and the European Court of Human Rights (ECtHR)—whose burgeoning dockets, extensive and influential jurisprudence, and high compliance rates offered a stark contrast to the (then) generally moribund, often ignored, and much maligned International Court of Justice (ICJ).

Seeking to reverse engineer the essential ingredients of the European courts’ “striking success,”33 the authors identified a checklist of thirteen factors that seemed to co-vary with effective supranational adjudication in Europe, the most important among them being the ability of private litigants to file cases directly with ECtHR and ECJ. Helfer and Slaughter applied the checklist of factors to the complaints mechanisms of a U.N. treaty body—the Human Rights Committee—and analyzed the Committee’s aspirations to bolster its quasi-judicial character and expand its influence. And they posited that bolstering the factors on the checklist was “the most likely prescription for increased effectiveness” of supranational adjudication.34

The final sections of Toward a Theory of Effective Supranational Adjudication discussed the legal, political and institutional elements for building a global community of law. Key members of that community, Helfer and Slaughter predicted, would be the growing number of international courts and tribunals that states had recently established.

33 Ibid., at 337.
34 Ibid., at 338.
such as the World Trade Organization (WTO) Appellate Body, North America Free Trade Agreement dispute settlement panels, and the ad hoc criminal tribunals for Yugoslavia and Rwanda, as well as other adjudicatory bodies on the horizon, such as the International Criminal Court. The ATJ—which had issued its first rulings more than a decade earlier and that was directly modeled on the ECJ—was not mentioned, even in passing. In fact, if memory serves, neither author was aware of the ATJ’s existence, let alone that it had decided any cases.

Two decades later, there are twenty four international courts operating across the world.\(^{35}\) The ATJ is the third most active in terms of number of decisions issued, having issued fewer rulings than either of the two European courts featured in \textit{Toward a Theory of Effective Supranational Adjudication}, yet far more decisions than courts with much larger membership and populations.\(^{36}\) The ATJ’s origins, its contribution to building an island of effective international adjudication for intellectual property disputes, and its survival in the face of serious political challenges and crises in the Andean Community has provided rich fodder for Alter and Helfer’s joint research for more than a decade. The capstone of that collaboration—a book devoted to the ATJ as a transplanted international court—provides a fitting opportunity to revisit and reassess the ideas and arguments that Helfer and Slaughter advanced in that early and influential journal article.

This concluding chapter reflects upon the publication of \textit{Toward a Theory of Effective Supranational Adjudication} and revisits some of its central claims, conclusions, and predictions in light of the Andean Tribunal’s experience. …

\textbf{Revisiting \textit{Toward a Theory of Effective Supranational Adjudication}}

\textit{Effective international adjudication is not confined to Europe}

One impetus for \textit{Toward a Theory of Effective Supranational Adjudication} was a desire to show that the successes of the ECtHR and ECJ could be replicated in some form in other regions, or even on a global scale. To a world becoming ever more interdependent, the prospect that any group of countries could create a genuinely effective system of international adjudication held enormous promise. With national borders increasingly permeable to people, goods and information, governments confronted a growing and diverse array of regulatory challenges that required multilateral solutions. To effectuate those solutions, however, states would need to comply with their international commitments. International courts offered one way to hold states to account.

Most observers were skeptical of this claim. They attributed the European tribunals’ success to one all-embracing fact—the founders of the Treaty of Rome and the European Convention on Human Rights were a closely knit community of liberal democracies with a shared and deep-seated commitment to regional integration, the rule of law, human rights, and cooperation through intergovernmental organizations. This contrasted sharply with international institutions in other regions and at the United Nations, whose members included longstanding democracies, poor developing nations, fragile regimes in transition, and repressive autocracies.\(^{37}\)

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\(^{35}\) Alter, 2014 at Chapter 3.

\(^{36}\) See Chapter 1, note 1 comparing the ATJ’s caseload to rulings by the ICJ, the WTO dispute settlement system, the International Tribunal of the Law of the Sea and the International Criminal Court.

\(^{37}\) For example, Eric Posner and John Yoo 2005 at 55. argued that the ECJ and ECtHR each belong to a “political community” and thus cannot be models for other international courts; “Europe has such a
For Helfer and Slaughter, however, the secrets of the ECJ and ECtHR’s success were only partly due to the liberal democratic bona fides of the nations subject to their jurisdiction. To be sure, a state comprised of institutions and actors already habituated to following domestic legal rules was more likely, all other things equal, to comply with international law. Yet a closer review of the origins of two European tribunals—since confirmed by in-depth historical studies by Alter, Madsen, Vauchez, and Rasmussen—revealed that neither the ECJ nor the ECtHR were embraced by political leaders, legislators, and even many national judges during the courts’ first few decades. The jurists appointed to the tribunals worked assiduously to gain the trust of these actors while, at the same time, building constituencies of supporters—the jurist advocacy networks described in Chapter 9 of this book—who filed test cases and pressured governments to comply with the tribunals’ rulings. To capture these relationships, nearly half of Helfer and Slaughter’s checklist focused on factors within the control of international judges—awareness of audience, demonstrated autonomy from political interests, quality of legal reasoning, incremental decision-making style, the form of judicial opinions, and dialogue with other tribunals.

These factors are not limited to Europe. They could be—and indeed were—taken into account by international courts in other regions and by subject-specific tribunals with global reach. As with the early years of the ECJ and ECtHR, the judges on the nascent judicial bodies that comprise this new terrain of international law (to quote the title of Karen Alter’s 2014 book) did more than merely decide cases. They sought to increase public awareness, disseminate decisions, and build relationships with lawyers and civil society groups; they interpreted and applied international law and developed new legal doctrines; and they engaged governments whose responses to their rulings ranged from genuine acceptance and grudging acquiescence to foot dragging and occasionally furious rejection. Not surprisingly, each court tailored the mix of factors within the control of judges in light of its legal rules, institutional structures, and political context—variations that Helfer and Slaughter both predicted and embraced. The essential point, however, is that the foundations for effective international adjudication have been laid far more widely—and in far more diverse and less hospitable environments—than proponents of the “Europe is unique” thesis had predicted.

The ATJ may be the most prominent illustration of this trend, yet it also demonstrates the limits of the judicial strategies that Helfer and Slaughter documented. Legal, political, and economic conditions in the Andes are very different from those in Europe. Democratic governments—where they exist—have often been unstable, the independence of national judges varies widely, and the space for advocacy by civil society groups waxes and wanes with the political and economic forces that regularly buffet the region. Yet as documented in Chapter 5 of this book, Andean judges nevertheless managed to establish a toehold in national legal systems—although primarily in one issue area (intellectual property) and with one set of interlocutors (domestic IP administrative agencies)—which later expanded into an island of effective community; the rest of the world does not.” Jose Alvarez 2003 at 430. notes “the suggestion that other international dispute settlers need to follow the path taken by Europe . . . ignores the possibility that what has worked for Europe may not work well elsewhere.”

38 Alter, 1996; Alter, 2001; Cohen and Madsen 2007; Vauchez 2007; Vauchez 2007; Vauchez 2008; Rasmussen, 2008; Rasmussen 2010.
international adjudication that has survived and even thrived as other parts of the Andean integration project have faltered. This is the glass half full version of the effective international adjudication story in the Andes. The glass half empty counterpoint is reflected in the ATJ’s inability to mobilize a jurist advocacy network, discussed in Chapter 9 and the end of this chapter, and in limited impact the Tribunal has had on Andean law outside of IP.

The ATJ is hardly the only court that is beginning to make a mark. A 2016 special issue of Law and Contemporary Problems and a forthcoming edited volume devoted to *The Variable Authority of International Courts*, reveal that other tribunals—including the WTO Appellate Body, the ICC, the ad hoc criminal tribunals, the East African Court of Justice (EACJ), the Inter-American Court of Human Rights (IACtHR), the ECOWAS Community Court of Justice, the Caribbean Court of Justice (CCJ), and the OHADA Common Court of Justice and Arbitration—have, albeit in different ways and to different degrees, influenced the behavior of states. 39

It is important not to overstate this claim, however. In the aggregate, the impact of these courts’ decisions has—with the possible exception of the WTO—been marginal in comparison to the far more numerous rulings of the ECtHR and ECJ and the consequential legal and policy reforms adopted by European governments in response to those rulings. But as we explain in Chapter 7 when comparing the divergent doctrinal trajectories of the ECJ and ATJ, it is problematic to contrast the European tribunals of today with their contemporary non-European counterparts. A more appropriate comparison focuses on the first x years of operation for each tribunal. However, with the exception of the ATJ and the IACtHR—which have been hearing cases since the mid-to-late 1980s and thus offer data to compare 25 or 30 years of adjudication in the Americas to adjudication in Europe—no other permanent international court has been operating for more than a decade, making period-adjusted comparisons more tentative and less illuminating.

The mere fact that such comparisons are now possible as courts around the world continue to attract litigants and decide cases refutes the claim that the ECJ and ECtHR can never serve as models for international courts elsewhere. Yet the far more modest accomplishments of these tribunals—even those that follow many of the techniques discussed on the Helfer and Slaughter checklist—suggest that contextual factors can frustrate even the most strategic of judges, a reality envisioned in Helfer and Slaughter’s discussion of factors beyond the control of international judges.

### Revisiting the supranational vs. international adjudication debate

A central analytical move of the 1997 article was the focus on supranational rather than international adjudication. Although acknowledging that the ECJ and the ECHR have the power to adjudicate state-to-state disputes—the province of traditional international adjudication—each has compiled a more successful compliance record in cases involving private parties litigating directly against state governments or against each other. We define adjudication of these cases as supranational adjudication and jurisdiction over these categories of cases as supranational jurisdiction.… [Such jurisdiction] creates the possibility of direct relationships

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between the tribunals and different governmental institutions such as courts, administrative agencies, and legislative committees.\textsuperscript{40}

Helfer and Slaughter claimed that supranational jurisdiction is essential to the effectiveness not only of the ECtHR and ECJ but to other international courts as well. Such jurisdiction enables private litigants—including individuals, NGOs, corporations, and other non-state actors—to file complaints directly with a tribunal, which, in turn, allows their judges to cultivate interlocutors and compliance partners who can pressure governments to implement the tribunal’s rulings. In contrast, where only states have access to a court, the decision of whether to bring suit is often highly politicized, with political leaders weighing not only the merits of a claim but also the risks of a countersuit, diplomatic pressure or countermeasures by the defending state.

In subsequent publications, Karen Alter analyzed the growing number of “new-style” courts, which she defined as tribunals with compulsory jurisdiction over states and the ability to review complaints by a range of non-state actors. The judges on these courts have been far busier than their colleagues on “old-style” judicial bodies, whose jurisdiction is optional and limited to disputes between states. A statistic from Alter’s 2014 book is revealing. New style international courts issued 36,774 binding rulings in contentious cases from their founding through 2011; interstate tribunals issued only 462 binding rulings through 2011, despite their longer period of operation and larger state memberships.\textsuperscript{41} By the early 2000s, the predominance of courts with compulsory jurisdiction and direct access to non-state litigants had become so evident that most scholars, including Alter and Helfer, abandoned the “supranational” label, referring to all judicial bodies operating above the level of the state as international courts.

\textit{Toward a Theory of Effective Supranational Adjudication} also discussed the benefits of compulsory jurisdiction and private litigant access, noting that reforms of the European human rights system—which came to fruition in 1998 with the entry into force of Protocol No. 11—would “revolutionize the treaty’s enforcement machinery” by requiring all states parties to “recognize the compulsory jurisdiction of the permanent court and permit individuals direct access to it in all cases.”\textsuperscript{42} Yet because the ECJ had always possessed the power to hear private actor complaints against EC countries simply by virtue of their membership in the Community, and because the ECtHR and the European Commission on Human Rights had long enjoyed similar authority over all Council of Europe member states in practice if not \textit{de jure},\textsuperscript{43} Helfer and Slaughter may have underestimated the importance of compulsory jurisdiction and providing multiple access points for non-state litigants.

This book’s decade-long study of the Andean legal system provides new evidence to support the claim that pairing compulsory jurisdiction with the ability of non-state actors to initiate litigation via different types of legal proceedings is critical to an

\textsuperscript{40} Helfer and Slaughter, 1997 at 277.
\textsuperscript{41} These figures exclude advisory opinions and rulings in staff cases. Old-style international courts includes the ICJ (152 rulings), ITLOS (17 rulings), and 176 panel decisions by the World Trade Organization, and 117 panel decisions issued by its GATT predecessor. Data in Alter, 2014 at 72-5.
\textsuperscript{42} Helfer and Slaughter, 1997 at 296.
\textsuperscript{43} Prior to 1998 the European Convention did not compel states parties to recognize the right of individual petition or the compulsory jurisdiction of the ECtHR, but in practice all of the treaty’s signatories had filed permanent or renewable declarations accepting both obligations.
international court’s effectiveness. Chapter 2 described the Andean decision to copy the ECJ model. When national political leaders added a tribunal to the regional integration project in 1979, they made its compulsory jurisdiction a mandatory element of the Andean Pact. The Original ATJ Treaty asserts that “states which accede to the Cartagena Agreement must accede to this Treaty.”\footnote{Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, Article 36.} Equally as important, states are barred from withdrawing from the Tribunal’s jurisdiction without also exiting the Andean Pact.\footnote{“This Treaty shall remain in effect for as long as the Cartagena Agreement is in force, and it may not be denounced independently of the latter.” Ibid., Article 38.}

Tying the Tribunal to the Andean integration project as a whole precludes a state from retaining the benefits of regional cooperation while jettisoning the burdens of international judicial review. This “package deal” makes it all but impossible for national political leaders to avoid the public pressure and legal scrutiny of Andean litigation, even as it increases the risk of noncompliance with ATJ judgments as a type of exit within the system. These insights also illuminate the high stakes involved in Ecuador’s recent flagrant violations of Andean free trade rules, an issue discussed in Chapters 6 and 7. They help to explain why private firms believe it is worthwhile to challenge these violations before the General Secretariat and the ATJ, and why Ecuador’s response to a Tribunal judgment against it may threaten the future of the entire Andean integration project.

The existence of multiple access points for international litigation is also a striking feature of the Andean legal system. Chapter 2 contrasted ECJ-style international courts to WTO-style dispute-settlement systems, identifying as key distinctions the existence of directly applicable Community rules and the different avenues for litigants to challenge the validity and implementation of those rules. Since the Cochabamba Protocol reforms of 1996, private litigants can file complaints challenging member state violations of Andean law with the General Secretariat, which also launches investigations on its own authority. Equally as important, both actors can refer noncompliance suits to the ATJ over a state’s objection. These access routes are important given the limited willingness of national judges to challenge noncompliance with Andean law. Finally, the omission and nullification procedures enable private litigants to spur Andean officials to act as Community law requires and to ensure that they do not exceed their powers when doing so.

The key point is that the full impact of the ATJ’s jurisprudence is revealed only by tracing legal disputes across the different access points and procedures. For example, Chapter 4 describes how the ATJ has drawn on the combination of preliminary rulings, nullification suits and noncompliance cases to develop legal doctrines that adapt the ECJ’s jurisprudence to the distinctive legal and political environment of the Andes. And Chapter 6 explores how litigants employ different legal procedures, sequentially or in tandem, in an effort to align national policies with Community legal rules.

Evidence from other international courts underscores the importance of multiple access points and giving non-state litigants the right to file complaints. The IACtHR, ECOWAS Court, EACJ, CCJ, and the SADC Tribunal all have the power to review complaints by one member state against another alleging violations of applicable treaties and other international rules. Yet not one of these courts has heard a single interstate
dispute.\textsuperscript{46} In addition, the Inter-American Commission continues to act as the gatekeeper to the IACtHR for suits alleging human rights violations in the Americas, the dockets of the EACJ and ECOWAS Court include complaints filed by Community institutions and officials, and most cases heard by the African Court of Human and Peoples’ Rights concern a handful of countries that have filed optional declarations giving individuals and NGOs direct access to the Court.\textsuperscript{47}

Yet recent events also reveal that Helfer and Slaughter underestimated the persistence of interstate adjudication, both in its own right and as a catalyst for suits by individuals and NGOs. Chapter 6 of this book describes four politically fraught cases that involve Andean-level litigation between member states, private actor suits before national courts, and ATJ preliminary references. Military activities by Russia against the Ukraine and Georgia generated similar litigation patterns. Both conflicts have been the subject of rare interstate petitions before the ECtHR, but have also triggered thousands of individual human rights complaints.\textsuperscript{48}

At the global level, the WTO's inter-state dispute settlement system remains active and influential (and Helfer and Slaughter’s expectation that private businesses would become active behind the scenes participants has been born out in practice).\textsuperscript{49} More surprisingly, the ICJ’s docket began to rise in the early 2000s, and its steady diet of interstate cases has not been limited to low-politics disputes but also politically charged controversies involving the use of force, genocide, and mass human rights abuses. And the ICC’s jurisdiction has as often been triggered by state self-referrals and referrals from the UN Security Council as by the ICC Prosecutor’s independent investigations.\textsuperscript{50}

Finally, the growing number of active international courts has opened up possibilities for litigating different facets of the same dispute in multiple judicial venues, simultaneously and sequentially. A striking recent example involves efforts to prosecute former Chadian President Hissein Habré for torture and other international crimes, which has generated private actor complaints to the African Court of Human and Peoples’ Rights and the ECOWAS Court, an ICJ dispute between Belgium and Senegal, and the creation of a new hybrid tribunal in Senegal—the Extraordinary African Chambers.\textsuperscript{51}

**Reassessing the importance of national courts and other domestic actors as interlocutors**

Helfer and Slaughter’s 1997 article built upon decades of scholarship identifying mutually advantageous relationships between international and national judges as the lynchpin of effective supranational adjudication in Europe. The ECJ actively encouraged national courts to send preliminary references, ultimately establishing partnership with them over the interpretation and enforcement of EC law. Although lacking direct links to domestic judiciaries, the ECtHR was equally aware of the importance of aligning its case

\textsuperscript{46} The Inter-American Commission on Human Rights has reviewed two interstate petitions, but neither case was referred to the Court. Pasqualucci, 2014 at 116. In addition, the IACtHR has addressed some interpretive disputes between members of the Organization of American States under its advisory jurisdiction. Ibid., at 37-82.

\textsuperscript{47} Article 34(6) of the African Court Protocol permits states to file such a declaration.

\textsuperscript{48} Bowring 2015 at 437.

\textsuperscript{49} Shaffer, 2003.

\textsuperscript{50} Stahn, 2015.

\textsuperscript{51} Shah, 2013 at 363-6; Stahn, at 563-6.
law with the independent incentives of national judges to protect the human rights enshrined in both domestic constitutions and the European Convention.

National judicial support surely contributes to an international court’s effectiveness. As Karen Alter has argued, "increasingly the international and domestic rule of law are intertwined and codependent, rising and falling in legitimacy and effectiveness together." Yet building support in national judiciaries raises challenges that Helfer and Slaughter did not anticipate, suggesting that the authors may have put too much faith in trans-judicial alliances. Equally important are the relationships that international judges forge with other domestic actors, including administrative agencies, bar associations, civil society groups, and national human rights institutions.

Studies of European integration emphasize the preliminary reference mechanism as the key to fostering symbiotic relationships between the ECJ and national courts. Nine other International courts include a preliminary reference mechanism, but the ATJ is the only non-European international court that actually receives a steady stream of referrals from national courts. With more than 2,600 preliminary rulings through 2014, the Andean Tribunal presented an unparalleled opportunity to study how this mechanism operates in a markedly different legal and political context.

On the surface, the sheer number of ATJ references and their persistence during fraught political times suggest the kind of deep judicial cooperation that exists in Europe. The reality, as Chapter 3 describes, is quite different. In both Communities, many national judges initially resisted sending preliminary references. But once that resistance was overcome, the practices in the two regions diverged markedly. Whereas national judges in Europe often pose bold and far-reaching questions to the ECJ, the questions that their colleagues in South America refer to the ATJ are generally narrow and repetitive. This suggests that national judges in the Andes view referrals mostly as a box checking exercise. The absence of domestic noncompliance suits—an enforcement mechanism listed in the Revised ATJ Treaty but never operationalized—underscores this view. Given widespread judicial disinterest in the Andean legal system, private litigants challenging national laws as contrary to Andean law unsurprisingly prefer to approach the ATJ through the noncompliance procedure of the General Secretariat.

Recent work on other international courts paint a darker picture. In her study of the Inter-American human rights system, for example, Huneeus identifies "institutional factors point[ing] to judicial resistance" to the IACtHR. By casting national courts as "the subjects which must comply with Court orders" and by "prescribing particular remedial actions courts must take, the [IACtHR] situates itself as hierarchical superior, something local legal actors easily resent." In West Africa, the ECOWAS Court has a mandate to review human rights complaints from individuals and to receive preliminary references regarding the interpretation ECOWAS law. While the Court’s docket has grown rapidly, it has yet to receive a single reference from a national court. More

52 Alter, 2014 at 365.
53 Alter, 2012 at 139.
54 Article 31 of the Revised ATJ Treaty provides that “[n]atural or artificial persons shall have the right to appeal to the competent national courts as provided for by domestic law should Member Countries fail to comply with” Andean law.
55 Huneeus, 2011 at 515.
56 Ibid., at 516.
ominously, some domestic judges have defied the ECOWAS Court, as recently revealed by a 2013 ruling of the Supreme Court of Liberia that categorically rejected a judgment and monetary damages award against the Liberian government.  

To be sure, the evidence is not all bleak. South African courts enforced a highly controversial land rights judgment of the now-suspended SADC Tribunal against Zimbabwe, for example. But studies of the ATJ and other international courts underscores that court-to-court collaboration to enforce international law cannot be assumed.

When national judicial support is off the table, can international judges find allies among other domestic actors? In one passage in their 1997 article, Helfer and Slaughter suggested that courts with jurisdiction over illiberal or quasi-authoritarian nations might forge relationships with domestic institutions that operate with at least a modicum of independence from the state.

Even in a political system that is otherwise corrupt or oppressive, it is possible that a particular government institution—a court or administrative agency or even a legislative body—will choose to forge a relationship with a supranational tribunal as an ally in a domestic political battle against corruption or oppression. Whether such an alliance would be efficacious depends on the nuances and sensitivities of local politics, but the larger point is that participation in the “community of law” constructed by a supranational tribunal is open not only to countries but also to individual political and legal institutions, regardless of how the state of which they are a part is categorized or labeled.

The symbiotic relationship between the ATJ and domestic IP administrative agencies described in Chapters 3 and 5 supports this prediction. In countries across the world, businesses seeking a trademark or patent must apply to such administrative agencies, which grant the application if it meets certain legal criteria. In the Andes, those criteria are found in Andean-level IP legislation. Agency administrators were thus natural consumers of Andean IP Decisiones. The officials were also eager for the ATJ’s interpretive guidance to address the ambiguities, gaps and complex interpretive issues that they encountered on a daily basis.

When firms were dissatisfied with the agencies’ registration decisions, they challenged them in court. The agencies—who were often named as parties in these appeals—urged national judges to refer cases to the ATJ to seek guidance on the finer points of Andean IP rules. Lawyers and their clients, who were skeptical that national judges had much to say on the specialized and technical field of IP law, supported the reference requests. Once domestic courts began to make these referrals, they did so habitually. In case after case, the Tribunal responded by providing the guidance that the agencies were seeking.

Agency administrators applied the ATJ’s preliminary rulings to decide whether to grant or deny the trademark or patent application that had been litigated before the Tribunal. As a member of the INDECOPI administrative tribunal in Peru explained: “We apply the rulings as soon as they come down from the Tribunal, and we reference the

58 Republic of Liberia v. Valentine Ayika, Judgment of Supreme Court of Liberia (July 15, 2013) (copy on file with authors).
59 De Wet, 2014.
60 Helfer and Slaughter, 1997 at 335.
rulings in the texts of our decisions about registrations.”

But the interpretations embedded in the ATJ rulings had a far wider impact—they were inculcated into the agencies’ day-to-day practices. As Chapter 5 notes, the ATJ’s guidance eventually became so extensive that it was restated in compendiums of legal doctrine that administrators referenced in their work. And as Chapter 3 explains, the Tribunal recently elevated the agencies’ status in the Andean legal order. By permitting agencies to send references directly to Quito and bypass national courts altogether, Andean judges implicitly recognized that agency administrators are their primary interlocutors and compliance partners.

Recent studies of other international courts explore how a range of domestic actors—including customs agents, bar associations, and private companies—surmount apathy or opposition from national courts to forge alliances directly with international judges. The Central American Court of Justice (CACJ) has faced significant hurdles to establishing its authority among governments and national courts. But suits by national associations of customs agents seeking to invalidate regional tariffs and customs decisions has been one of the CACJ’s most consistent source of cases.

In East and West Africa, law societies and bar associations are ardent proponents of international litigation. Although these organizations and their members can and do file cases in national courts, they have capitalized on the absence of an exhaustion of local remedies requirement to become repeat players before the EACJ and ECOWAS Court. The judges on these courts, in turn, have targeted their outreach efforts to these associations. A different pattern is emerging in the Caribbean. Businesses with regional economic interests have served as catalysts for activating the CCJ’s original jurisdiction, while national courts have yet to send a single preliminary reference.

Taken together, these examples illustrate that international courts outside of Europe cannot necessarily count on the support of their national judicial colleagues. When national judges are indifferent or hostile, however, international courts may be able to build their authority by forging alliances with other domestic actors that are part of the state or well positioned to influence its policies.

The strategic choices of international judges in challenging legal and political environments

At the heart of Toward a Theory of Effective Supranational Adjudication was a claim that international courts are, at least in part, masters of their own destinies. Although bound by their delegated powers and professional norms, international judges nevertheless have considerable strategic space within which to decide cases and develop legal doctrine. More concerned with survival than ideology, Helfer and Slaughter investigated the “sustained effort by two [European] tribunals to enhance their effectiveness” by “manipulat[ing] factors within their control to maximize their impact on the relevant national actors.” As noted at the beginning of this chapter, those factors included awareness of audiences, demonstrated autonomy from political interests,

61 Interview with Member of INDECOPI Tribunal, Lima, Peru (June 21, 2007).
62 Caserta 2016 at 214.
63 Gathii, 2014 at 262.
64 Caserta, 2016 at 155-75.
65 Helfer and Slaughter, 1997 at 308.
incremental decision-making style, quality of legal reasoning, judicial dialogue, and the form of opinions.

This book’s decade long study of the Andean legal system provides new evidence to assess these judicial strategies in a very different and more challenging legal and political environment. As Chapters 2 and 4 explain, the early ATJ decisions were overtly didactic. The judges carefully explained the preliminary ruling mechanism—a novelty in South America—to national judges, government officials, and private litigants. The Tribunal also used these lessons in Andean legal procedure to manage expectations about how the system would operate.

The Tribunal’s lessons cut in two directions. On the one hand, the ATJ unequivocally affirmed—relying on the intent of the Cartagena Agreement’s drafters and the settled ECJ doctrines—the supremacy of Andean law and its direct effect in national legal orders. At the same time, the judges also recognized that the political support for integration was far shallower in the Andes than in Europe. Instead of embracing ECJ integration doctrines tout corps, the ATJ selectively modified those doctrines. These revisions were politically astute. They gave member states as a group leeway to advance integration at a slower pace than the Andean Pact’s founders had originally (and over-optimistically) planned, and they allowed national legislatures, executives and judges leeway to preserve important domestic policies and fill in gaps in Andean rules, thus avoiding direct confrontations that the Tribunal was unlikely to survive.

In the mid-1990s, the number of preliminary references began to increase rapidly, with the vast majority originating in the domestic administrative agencies that apply regional IP rules. As case after case arrived in Quito—nearly all of which raised detailed and often technical questions of IP law—Andean judges realized that agency administrators were their most attentive audiences. The previous sections explained how these administrators became the ATJ’s primarily interlocutors. This section focuses on the style of the Tribunal’s opinions and their impact on national court referrals and administrative agency decision-making.

ATJ preliminary rulings on IP issues are highly repetitive, often reiterating the same analysis in case after case. For many private IP attorneys, especially repeat player law firms in Peru and Colombia, this style is frustrating. Yet, as Chapter 5 explains, repetition helped to overcome resistance to referrals from national judges, who soon recognized that their Andean colleagues would not venture beyond well-worn legal territory. And it bolstered the quality of agency decision-making, by directing officials to use evenhanded procedures, provide reasons for their decisions, and adhere to preexisting legal principles. When viewed in the aggregate, therefore, the ATJ’s practice of issuing repetitive preliminary rulings paid multiple dividends—it clarified Andean IP rules, enhancing the value of trademarks and patents; it improved the agencies’ ability to fairly and effectively resolve disputes between private businesses; it made national judges more amenable to referring cases; and it reinforced the agencies’ independence from political meddling and their fidelity to the rule of law.

ATJ judges may have hoped that the effectiveness IP adjudication in the region would spill over to other areas of Andean law. As documented in Chapter 3, preliminary references involving tariffs, customs, taxes and other integration law issues have expanded modestly over the last decade. Nevertheless, the ATJ remains overwhelmingly concerned with suits involving trademark and patent registrations.
The predominance of IP cases helps to explain the Tribunal’s decision, discussed in Chapter 3, to overturn its past practice and accept references from IP administrative agencies. By opening a direct channel of communication to the agencies and bypassing domestic courts, the ATJ developed a doctrine tailored to the interests and incentives of the primary suppliers and consumers of its rulings. Given the crisis of Andean integration over the last decade, this strategic move may have been prescient. In a fraught political environment, national judges may once again become reluctant to send preliminary references. But the specialized administrative bodies that apply Andean legal rules on a daily basis are unlikely to refrain from seeking the Tribunal’s guidance, at least where governments are agnostic about the practice.

Scholars are beginning to analyze the strategies deployed by other international courts operating in developing countries. The strategies of Africa’s sub-regional courts are among the most interesting. In its first decision, the ECOWAS Court rejected a purposive interpretation that would have enabled it to hear a private litigant’s challenge to a blatant violation of Community law. Instead, the judges dismissed the suit while simultaneously launching a campaign to persuade West African governments to grant the Court a human rights mandate. Elsewhere on the continent, the EACJ and the SADC Tribunal have also faced demands from civil society groups and private litigants to adjudicate human rights cases. Both courts acceded to these pressures by adopting expansive interpretations of their founding treaties’ fundamental principles and objectives clauses, which include references to human rights, good governance, and the rule of law. These examples provide further support for the claim that international courts in developing countries deploy strategies that diverge from those of the European tribunals in response to the distinctive legal and political contexts that these emerging courts face.

**From compliance to effectiveness and beyond**

*Toward a Theory of Effective Supranational Adjudication* was written against a backdrop of pervasive skepticism about international courts as venues for enforcing international legal commitments. As a first step in challenging this conventional wisdom, Helfer and Slaughter argued that the ECJ and ECtHR were effective in a very basic sense—European governments changed their national laws and policies in response to the two courts’ rulings against them. The authors thus equated effectiveness with state compliance with judicial rulings:

> We define effective adjudication in terms of a court’s basic ability to compel or cajole compliance with its judgments. In the supranational context, effective adjudication depends on a supranational tribunal’s ability to secure such compliance by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf.

This definition recognized that most international courts cannot count on international enforcement mechanisms and must instead build support among domestic actors who, in

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67 As we explain elsewhere, the SADC Tribunal was suspended and ultimately stripped of the power to hear complaints from private litigant following a sustained backlash campaign by Zimbabwean President Robert Mugabe Alter, Gathii, and Helfer, 2016.
68 Helfer and Slaughter, 1997 at 278.
turn, pressure governments to give effect to the courts’ rulings. But the definition also expressly conflated the concepts of case-specific effectiveness and compliance. 69

Subsequent studies have treated compliance and effectiveness as distinct concepts. Whereas compliance is measured by conformity between behavior and a specified legal rule, effectiveness involves “observable, desired changes in behavior” attributable to that rule. High levels of compliance can thus occur “for reasons entirely exogenous to the legal process,” such as where states negotiate treaties that mirror their preexisting behavior. Conversely, for international laws that demand extensive changes in state behavior, effectiveness may exist even if compliance with those laws is partial or uneven. 70

The distinction between compliance and effectiveness may also explain why “old-style” international courts that require the consent of both complaining and defending states before they can adjudicate a particular dispute sometimes see higher levels of compliance than tribunals with compulsory jurisdiction. Requiring state consent to adjudication after a conflict has arisen is likely to limit cases to those for which both parties view a judicial ruling as beneficial. Compliance in this context says little about a court’s ability to modify state behavior in situations where international obligations are more onerous.

For international courts with compulsory jurisdiction, in contrast, compliance may in fact be a good measure of effectiveness. International litigation occurs, after all, only if a state has refused to change its behavior following a demand to comply with the law. When a state resists long enough for an international court to rule against it—and when the state subsequently changes its behavior following the court’s ruling—it is reasonable to conclude that the ruling contributed to the change in behavior, even if other factors are also relevant. As Hawkins and Jacoby have explained, “[t]his creates a class of cases where instances of compliance will be coextensive with those of effectiveness and where effectiveness can therefore be objectively measured through the proxy of state compliance.” 71 Or as Huneeus has stated, if a court “orders compensation of the victim by a certain amount, and the state compensates by that amount, drawing a causal inference is not particularly fraught. The answer to the counterfactual—would the state have done the same without the order—seems self-evident.” 72

Our study of the Andean legal system provides new evidence to assess when compliance and effectiveness should nevertheless be treated as distinct concepts. As Chapters 4 and 5 explain, most ATJ preliminary rulings on IP are highly repetitive, even formulaic. Andean judges have not yet endorsed the ECJ’s act clair doctrine, which directs national courts to refrain from referring cases when the applicable Community law is well settled. National court compliance with these repetitive rulings is thus a poor proxy for effectiveness; national judges already know the answer to most of the questions they pose to their colleagues in Quito and would likely have applied Andean IP law even if they had not referred the case.

69 Helfer 2014 at 467.
70 Raustiala, 2000 at 393-4.
71 Hawkins and Jacoby, 2010 at 40.
72 Huneeus, 2011 at 505 n.61.
This book’s in depth analysis of the Andean legal system also finds other metrics of international judicial influence that extend beyond traditional measures of case-specific compliance and effectiveness. First, as explained in the previous discussion of judicial strategy, ATJ rulings helped to inculcate rule of law values in the domestic IP agencies. By directing the agencies to provide reasons for their decisions, follow evenhanded procedures, and apply preexisting legal principles, the Tribunal reinforced the agencies’ independence and ability to resist political meddling. In this respect, ATJ case law contributed to the “transparency, participation, reasoned decision, and legality” that are hallmarks of global administrative law.\(^73\)

Second, the mutually beneficial relationship between the IP agencies and the ATJ was crucial to winning what Helfer and Slaughter described as a “domestic political battle against corruption or oppression.” In the Andes, that battle is aptly illustrated by the collusion of national political leaders and US pharmaceutical firms to circumvent Andean rules banning second-use patents—most notably for the lucrative erectile dysfunction drug Viagra. As Chapter 5 explains, when the Fujimori regime in Peru adopted a decree directing INDECOPI to grant a second-use patent for Viagra, the agency reluctantly complied. But it did so knowing that a local association of generic drug manufacturers had filed a complaint with the General Secretariat that eventually led to an ATJ judgment finding Peru in breach of Andean IP law. The judgment emboldened INDECOPI to revoke the Viagra second-use patent. Although the Fujimori degree was never officially abrogated, it was ignored in practice with the result that generic versions of Viagra have remained on the market in Peru.

Third, some ATJ rulings have had effects beyond the cases actually litigated. The ATJ judgment in the second use patent case against Peru quickly reverberated across the Andes, with copycat litigation leading to the invalidation of Viagra patents in the other member states. The ban remained in force even in the face of strident opposition from the US pharmaceutical firms, pressure that, as Chapter 5 explains, led to the granting of second-use patents in many other countries in Latin America. The shadow effect of Andean litigation even extends beyond the borders of the Community. In Venezuela, national courts and the domestic IP agency SAPI continued to apply regional IP Decisiones as interpreted by the ATJ after the country withdrew from the Andean Community in 2006.

These indications of the ATJ’s wider impact suggest that scholars should look for evidence of judicial influence in addition to case-specific compliance. For example, the distinctive design of the CCJ—which has an appellate as well as original jurisdiction—has created opportunities to build a broad array of compliance constituencies in the Caribbean.\(^74\) In West Africa, a Liberian Supreme Court decision rejecting an ECOWAS Court judgment “triggered a national debate” among lawyers, journalists and NGOs, leading the Liberian House of Representatives to ratify a legal instrument “bringing Liberia into compliance with its international obligations under the ECOWAS Treaty.”\(^75\) And in South Africa, judges enforced a SADC Tribunal money damages award against Zimbabwe that could not be enforced in the courts of that country.\(^76\) Studies of other

\(^{73}\) Kingsbury et al., 2005 at 17.
\(^{74}\) Caserta, 2016 at 189-90.
\(^{75}\) Ebobrah, 2017.
\(^{76}\) De Wet, 2014.
international courts are likely to reveal additional ways in which international rulings alter national law and politics even if states do not immediately or fully complied with those rulings.

**Backlash: An endemic concern for international courts?**

The 1990s and early 2000s were a heady time for the international adjudication. New courts and tribunals were being created with astonishing rapidity, suggesting that international judges might eventually extend their reach across the length and breadth of international law and include countries, such as the United States, that had long been resistant to external judicial scrutiny. Reflecting this optimism, scholars of the time penned articles with audacious titles—*International Law and Institutions for a New Age, The New World Order and the Need for an International Criminal Court,* and *Toward an International Judicial System*—that advanced equally audacious proposals for new or expanded judicial review mechanisms. 77

Readers of *Toward a Theory of Effective Supranational Adjudication* will catch a whiff of this millennialism. The article’s central claims—that politically meaningful international courts were an established and essential element of Europe’s supranational legal orders, and that, under the right conditions, similar courts could be established globally and in other regions—were hopeful but not idealistic. Helfer and Slaughter identified many challenges to expanding international judicial review, and their specific proposal—linking the UN Human Rights Committee to the burgeoning jurisprudence of the ECtHR, as first step toward “a genuinely global dialogue among a wider range of supranational and international tribunals and domestic courts”—was modest. 78 The authors urged the Committee to pursue “a policy of thoughtful convergence with European jurisprudence, supplemented by informed divergence where there are justifiable and articulated reasons for doing so.” 79 The broader normative vision underlying this specific recommendation, however, was the hope that other international courts and UN treaty bodies would work toward a common enterprise—reinforcing and expanding the “community of law that has nurtured the existence and growth of effective supranational adjudication” in Europe. 80

Two decades later, what is strikingly absent from Helfer and Slaughter’s prediction that politically consequential international courts would arise outside of Europe is any suggestion that states might rebel against the courts and tribunals that tracked their prescription for effective international adjudication. The absence of any discussion of backlash perhaps reflects the fact that the authors wrote the article only few years after the creation of several new courts and tribunals and before other judicial institutions had been established or started to receive cases. Since no international court

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77 John Barton and Barry Carter, 1993 at 557, for example, urged the United States to “push[ ] for a global umbrella organization comprised of all those democracies willing to submit themselves to the type of international judicial human rights review now available in Europe.” See Gianaris, 1992; Martinez, 2003.
78 Helfer and Slaughter, 1997 at 389.
79 Ibid., at 374.
80 Ibid.
can review the actions of state that has not formally accepted its jurisdiction,\textsuperscript{81} perhaps Helfer and Slaughter can be forgiven for assuming that political leaders would not seek to tear down judicial edifices they had so recently built. Yet such clashes were surely foreseeable based on the trajectories of other international institutions.

If the late 1990s and early 2000s were the apogee of hopefulness for international adjudication, the 2010s may mark a new low. The last several years have seen a slew of state backlashes against international courts. These events go well beyond mere disagreements with the reasoning or results of particular rulings and instances of foot dragging or noncompliance. They are, instead, deliberate and strategic challenges by political leaders to the formal powers and de facto authority of the courts and the judges who penned the offending decisions.\textsuperscript{82}

The backlash against the ICC in Africa is perhaps the most well-known example. Political leaders on the continent, outraged that the overwhelming majority of investigations and all prosecutions have involved African officials and warlords, have orchestrated a collective campaign to undermine its authority. Their actions have included threatening en masse withdrawal from the Rome Statute, proposing alternative venues for prosecuting international crimes, refusing to arrest indicted officials, and openly defying the ICC and its chief prosecutor in pending cases.\textsuperscript{83} Other recent backlashes have targeted three of Africa’s sub-regional courts, which expanded their jurisdiction from disputes involving trade restrictions and barriers to integration to include human rights and the rule of law. These backlashes, orchestrated by member states in response to politically embarrassing rulings, produced divergent outcomes that included the emasculation of one tribunal and a major restructuring of another.\textsuperscript{84}

More unexpected from the perspective of \textit{Toward a Theory of Effective Supranational Adjudication} are challenges to the authority of the ECtHR and ECJ. This is true not only in recent-accession countries such as Russia and Hungary,\textsuperscript{85} where the rule of law and judicial independence are fragile and under threat, but also in longstanding democracies and member states such as the United Kingdom, Germany and Switzerland. And the open resistance includes not only national executives and parliamentarians, but also national judges who were long thought to be the European tribunals’ most stalwart partners.\textsuperscript{86} To date, no European state has withdrawn from the jurisdiction of either the ECJ or the ECtHR. The same cannot be said of the Americas, where Trinidad and

\textsuperscript{81} The ICC’s power to investigate non-party nationals alleged to have committed genocide, crimes against humanity or war crimes on the territory of a state party is a notable—but rare and controversial—exception.


\textsuperscript{83} See, e.g., \textit{African Union members back Kenyan plan to leave ICC}, The Guardian (Feb. 1, 2016); Werle, Fernandez, and Vormbaum, 2014; Nichols, 2015.

\textsuperscript{84} Alter, Gathii, and Helfer, 2016.

\textsuperscript{85} Russia ratified the European Convention on Human Rights in 1998, and Hungary joined the European Union in 2004, both after the publication of Helfer and Slaughter’s article.

\textsuperscript{86} See, e.g., Kelemen, 2016; Madsen, 2016.
Tobago and Venezuela have denounced the American Convention on Human Rights and with it the IACtHR’s power of judicial review.87

In the Andean context, political leaders have occasionally used accepted legal processes to reverse the impact of particular ATJ rulings. As Chapter 5 explains, when the member states overturned a controversial Tribunal judgment on data protection they followed the amendment procedures specified by the Cartagena Agreement and characterized their decision as a clarification of existing law rather than a rebuke of the ATJ.88 The data protection controversy added to growing political tensions in the region, which later led Venezuela to leave the Andean Community. Yet Venezuela’s decision was triggered primarily by Colombia and Peru agreeing to negotiate bilateral free trade agreements with the United States rather than opposition to the ATJ or its rulings.

More recently, as Chapter 7 explains, Ecuador and Bolivia—the two populist-leftist member states remaining in the Community—have raised significant challenges to the free trade orientation of the Andean integration project. Ecuador’s President Correa commissioned a study of the ATJ’s jurisdiction, pushed to restructure existing Andean institutions, and advocated merging the Community into UNASUR—a South American cooperative initiative less focused on economic integration and legal institutions. In addition, pending noncompliance suits against Ecuador challenge non-tariff barriers and safeguards intended to restrict imports from other Andean countries. These events have aggravated already tense relations among the ideologically divided member states.

The fate of the institutional reforms and the Ecuador noncompliance litigation are now uncertain in light of a recent turn against leftist-populist leaders across South America. Meanwhile, the island of effective international adjudication for IP disputes continues to function, and the ATJ’s docket is busier than ever with IP preliminary references. But if the Tribunal concludes that Ecuador has breached core Andean free trade rules, its finding may trigger renewed challenges to Andean judges or a decision by the government to withdraw from the Community. If those events do occur, the IP island is unlikely to survive.

**Conclusion: Toward Effective International Adjudication in a Developing Country Context**

Many scholars, ourselves included, have put great faith in the belief that a combination of compulsory jurisdiction, broad access rules, high-quality legal reasoning, and astute judicial strategy contributes to the success of international adjudication. Today, there are eighteen “new-style” international courts with compulsory jurisdiction over complaints filed by non-state actors.89 These courts have issued a growing number of high-profile rulings and are fashioning strategies that respond to their distinctive legal

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88 Chapter 7 describes noncompliance litigation regarding an Andean pesticides regulation, which member states revised to give greater leeway for domestic regulation, thereby avoiding further ATJ condemnations.

89 Alter, 2014 at 84. Alter identifies 19 “new-style” international courts, but the SADC Tribunal is now suspended and will be reconstituted as a court to which only states have access and from which states can unilaterally withdraw.
and political environments. Yet few of these courts have replicated the success of Europe’s tribunals in attracting litigants, developing consequential doctrines, influencing state behavior, and casting a lengthy shadow over domestic law and politics.

The Andean Tribunal was the first ECJ-style transplant in a developing country context, and it is one of the most successful non-European new-style international courts. We highlight six distinctive aspects of the ATJ’s experience to support this claim. First, the continued output of ATJ decisions over three decades indicates that Andean litigation is helpful to the private firms and attorneys who file suits that are later referred to the Tribunal. To be sure, activity is not the same thing as effectiveness, but the existence of repeat-player litigation demonstrates that a set of domestic actors sees Andean law and ATJ rulings as useful.

A second hallmark of the ATJ’s relative success is the fact that the Tribunal receives dozens of preliminary references from national courts each year. Chapter 3 describes the activation of the preliminary ruling mechanism, first in Colombia, then in Ecuador and Peru, and most recently in Bolivia. As legal, informational, and motivational impediments were overcome in each country, references became almost habitual in IP cases. Meanwhile, no other ECJ-style international court enjoys even the tentative beginnings of a referral relationship with national judges.

A third indicator is the ATJ’s creation and persistence of the island of effective international adjudication for intellectual property, a zone in which—largely as a result of hundreds of rulings responding to questions posed by domestic IP administrative agencies—legal rules rather than power, political influence, or bribery govern decision-making by public actors. We document the different facets of this island and its limits in Chapter 5.

A fourth measure is the breadth of disputes that the Tribunal adjudicates as compared to international courts in other developing country contexts. To be sure, the overwhelming majority of preliminary rulings—more than 90%—relate to trademarks, patents, and other forms of IP, and the large majority of these involve contestations between private parties over IP registrations by domestic administrative agencies. However, as Chapters 4 and 6 reveal, the Tribunal has also issued 114 preliminary rulings on non-IP subjects—including tariffs, customs valuations, taxes, and insurance—as well as 113 noncompliance judgments, most of which do not involve IP issues. Although small in percentage terms, in absolute numbers and in the range of topics adjudicated, these cases stand out in comparison to other tribunals modeled on the ECJ, which have fewer rulings overall involving a smaller range of subject areas.

A fifth indicator of the ATJ’s success is the regular, if sporadic, use of the ATJ’s noncompliance procedure. Since the mid-1990s, this procedure has required the General Secretariat to investigate government and private actor complaints alleging that a member state is violating Andean rules. For other ECJ-style transplants outside of Europe, Community Secretariats and private litigants rarely if ever exercise their power to initiate noncompliance actions.

Sixth, the Andean legal system is the only ECJ-style court where all modes of litigation have been activated. The use of the nullification and omission procedures in particular indicates that governments, private litigants and Andean officials value adherence to Community consultation and decision-making procedures. ATJ litigation has pushed these actors to follow collective decision-making processes, for example with
regard to the derogation granting Peru an exceptional status in the Community during the 1990s—a case discussed in Chapter 6.90

At the same time, the relative success of the ATJ should not be overstated. We have endeavored in this book to be forthright about the significant limits of the Tribunal’s legal authority and political power. In particular, although the ATJ has at times seemed poised to expand its jurisprudential reach and influence, it has mostly failed to do so. Only in the circumscribed area of IP has the Tribunal achieved anything close to the influence that the ECJ, ECtHR, and many national high courts possess across a much wider and more politically consequential terrain.

If the ATJ is the most successful example of an international court in a developing country context, the significant limits of its success should instill caution in those who hope that such courts will transform the legal and political landscape. The most that an international court can do, we argue, is to help states individually and collectively adhere to legal rules that they have imposed upon themselves. This goal can contribute much to promoting compliance with international law, stabilizing domestic politics, and providing a venue to oppose corrupt decisions and practices. For countries where the rule of law is mostly a distant aspiration, a functioning international court is surely better than relying on politically penetrated or corrupt national legal systems. But without a groundswell of legal and political support—including from the jurist advocacy networks we analyze in Chapter 9—the impact of international adjudication will be inherently limited.

For advocates who want international courts to correct wider political failures, such a modest role will likely be insufficient. Yet no legal system can end crime, erase the power and privilege that often confer impunity, or right all wrongs. International judges do not control a magic fairy wand, and law is not a panacea. If rich OECD countries cannot collectively end corruption in foreign business practices, international courts are unlikely to be able to do any better. If pressure and sanctions from the most powerful nations cannot end human rights violations, the rulings of international judges will also surely fail to do so. But international courts can provide a useful bulwark to reinforce the actions of courageous domestic politicians, judges, prosecutors, lawyers, and citizens who demand respect for domestic and international legal rules and seek international judges as allies in that enterprise.

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90 The East African Court of Justice also regularly hears challenges to East African legislation that allegedly violates Community decision-making procedures. Elsewhere we argue that public demands that governments follow these procedures helps to thwart government backlashes against international courts. Alter, Gathii, and Helfer, 2016.