

## Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice\*

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### Abstract

Although there is an extensive literature on domestic legal transplants, far less is known about the transplantation of supranational judicial bodies. The Andean Tribunal of Justice (ATJ) is one of eleven copies of the European Court of Justice (ECJ), and the third most active international court. This article considers the origins and evolution of the ATJ as a transplanted judicial institution. It first reviews the literatures on legal transplants, neofunctionalist theory, and the spread of European ideas and institutions, explaining how the intersection of these literatures informs the study of supranational judicial transplants.

The article next explains why the Andean Pact's member states decided to add a court to their regional integration initiative, why they adapted the European Community model, and how the ECJ's existence has shaped the evolution of Andean legal doctrine and the political space within which the ATJ operates. We conclude by analyzing how the ATJ's experience informs the challenges of supranational transplants and theories of supranational legal integration more generally.

### Key words

European Community; Andean Community; International Courts and Tribunals; European Court of Justice; Andean Tribunal of Justice; Regional Integration; Legal Transplants; Neofunctionalist Theory; Ideational Diffusion

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In the 1950s, in the wake of a devastating world war, European countries began a process of pooling sovereignty to collectively rebuild their security and economies. This process, which involved the creation of supranational institutions to promote economic, legal and political integration, soon attracted new adherents. Beginning in the 1960s, other governments around the world emulated Europe's model of regional integration, proposing common markets and copying the institutions of the European Community (EC).

The EC from its inception included a court of justice, but early replications of European integration did not.<sup>1</sup> Although these regional integration projects did not live up to the aspirations of their proponents, few attributed their failure to the lack of supranational judicial bodies. Rather, scholars stressed the absence of economic and political preconditions required for regional integration to succeed (Schmitter 1970, Nye 1971, Mattli 1999).

The inattention given to supranational judicial systems in the 1960s and early 1970s reflected the limited role that the European Court of Justice (ECJ) played in advancing European integration. The ECJ made doctrinally important rulings during these years,<sup>2</sup> but it refrained from applying those rulings in ways that provoked political controversy. As a result, ECJ case law was of greater doctrinal than political significance (Alter 1998).

Politicians, practitioners, and scholars began to pay more attention to the ECJ in the late 1970s, when the court began to dismantle national barriers to the free movement of goods, capital, labor, and services. These actors came to view the ECJ as an engine for helping to overcome political blockages and build integration through law (Weiler 1991, Maduro 1998, Stone Sweet 2004, Cichowski 2007). Observers also credited the ECJ's alliance with national courts with increasing respect by member states for EC rules and with coordinating interpretations of common EC rules across borders (Weiler 1991, p 2424-31, See also Alter 1998). When critics began to question the EC's political accountability and democratic legitimacy, the court's proponents responded by citing the ECJ's key role in upholding the rule of law. The court ensured that Europe's supranational administrative institutions faced legal checks, just as did domestic administrative actors (Alter 2001, especially 87-117). And the court's review of the validity of EC legislation further bolstered the accountability of European institutions, even if some claimed that the ECJ was biased in favor of community over state interests (Hartley 1996).

The increasingly important role of the ECJ in promoting European integration eventually led other regional integration systems to establish their own supranational courts. The Andean Pact (later renamed the Andean Community) was one of the first such systems to create a court.<sup>3</sup> In 1969, five countries on the western edge of South America imported from Europe the idea of building a regional common market. The Andean Pact envisioned community legislation that would be directly applicable within member states, but it lacked a judicial body to interpret or help enforce those rules. By the late 1970s, member governments began to draft a treaty to create a supranational court. In 1984 they created the Andean Tribunal of Justice (ATJ or the Tribunal), explicitly modeling its design on the ECJ. Initially the ATJ received few cases, but over time its docket has grown to

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<sup>1</sup> The Benelux system is a partial exception. Belgium, the Netherlands and Luxembourg created a customs union in 1947, without a court. When all three countries joined the EC, they continued their union which to this day coordinates regulation in areas not covered by the EC. In 1965 member states adopted the treaty establishing a Benelux Court of Justice, although the court was not created until 1975. The Benelux Court is today an adjunct to the ECJ, conducting review with respect to BENLUX countries that are not also EC members.

<sup>2</sup> Indeed, Joseph Weiler considers the 1960s and 1970s to be a "foundational period" during which the ECJ transformed the Treaty of Rome into a constitution and closed state "exit" from EC law (Weiler 1991, p. 2424-31).

<sup>3</sup> See Note 1.

the point that the ATJ is the third most active international court today (after the ECJ and the European Court of Human Rights).<sup>4</sup>

In the 1990s, the end of the Cold War, the rise of the Washington Consensus,<sup>5</sup> and the creation of the World Trade Organization spawned a new wave of regional integration (Romano 1999, Alter 2011a). This second generation incorporated supranational judicial institutions that had proven so important to advancing integration in Europe. There are now at least ten copies of the ECJ, each of which replicates two key features that commentators agree have been critical to the ECJ's success: a noncompliance procedure that authorizes the secretariat, member states, and sometimes private litigants to challenge national policies that conflict with community rules; and a preliminary reference mechanism that allows, and sometimes requires, national courts to suspend legal proceedings and send questions of interpretation to the supranational court.<sup>6</sup>

Transplanting European laws and legal institutions around the world is hardly a new phenomenon. Many legal systems incorporate transplants from France, Britain, Germany, Spain or the Scandinavian countries (Berkowitz *et al.* 2003, p. 163-7). This paper explores a different and understudied issue—the consequences of copying a European *supranational* judicial institution. Specifically, we ask two related questions: how did the existence of the ECJ influence the founding of the ATJ, and how, if at all, has the ECJ's experience—its doctrinal innovations and the responses of litigants and governments to watershed rulings—shaped the ATJ's trajectory?

Section I summarizes and synthesizes the literature on legal transplants, regional integration, and the diffusion of ideas to provide a framework to examine how transplanting supranational judicial institutions shapes the trajectory of the transplanted copies. Section II explains why Andean Community member states decided to emulate the ECJ, and it investigates adaptations that Andean leaders made as they considered the ECJ's track record. Section III builds upon a previous study of the ATJ's preliminary rulings to develop insights about how the ECJ's trajectory did and did not influence the development of Andean legal doctrine and the political space within which the ATJ operates.

Section IV investigates a broader issue: what the ATJ's experience tells us about supranational courts and supranational integration efforts more generally. First, theories of supranational judicial systems have yet to take into account of insights from the literature analyzing the challenges of transplanting national laws and institutions. Our study of the ATJ leads us to hypothesize that mimicry is the principal mode through which the ECJ model is diffused. In particular, Andean Community actors emulate ECJ practices only when and to the extent they see ECJ practices as helpful to achieve their collective goals. As a result, copying is selective rather than wholesale. The more general insight is that even when supranational

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<sup>4</sup> Statistics on the number of decisions issued by international courts up to the end 2009 include the following: ECJ (13,377); European Court of Human Rights (10,659); ATJ (1,786); GATT/WTO (370); Organization for the Harmonization of African Law (358); and Inter-American Court of Human Rights (152). See Alter 2013, and for earlier statistics, see Alter 2010.

<sup>5</sup> The "Washington Consensus" was the term coined by John Williamson to encompass a package of reforms advocated by a set of Washington based institutions (e.g. the US Treasury and the International Monetary Fund). Originally the term applied to a specific set of policies, but now it is used to denote the neoliberal economic reform agenda of pro-market economists and policy-makers. See: (Williamson 1990).

<sup>6</sup> Ten ICs copy both design features from the ECJ albeit with some variations: The Benelux court, Andean Tribunal of Justice, European Free Trade Area Court, West African Economic and Monetary Union Court, Common Market for East African States Court, Central African Monetary Community Court, East African Community Court, Caribbean Court of Justice, Court of Justice of the Community of West African States, and the Southern African Development Community Court. The Common Court of Justice and Arbitration of the Organization for the Harmonization of African law and the Central American Court of Justice have preliminary ruling mechanisms. There are proposals to convert existing ICs of the Caribbean Community and the Economic Community of the Commonwealth of Independent States into ECJ style ICs. And the proposed Court of the African Mahgreb is modeled on the ECJ. For more, see: (Alter 2011b).

courts are modeled on the ECJ and expressly incorporate ECJ doctrines, they develop and apply those doctrines differently by adapting them to the distinctive legal and political contexts in which they are embedded. These adaptations in themselves may be key for successful transplantation.

Second, we find that copying brings tangible benefits that exist in large part because the Andean Community is modeled on its European predecessor. The EC's experience provides useful information to Andean decision-makers considering how to respond to new situations and controversies. The EC also provides legal and technical expertise, financial support, access to a network of legal and other experts, and encouragement to ATJ judges and Andean officials to develop their jurisprudence and political authority. These forms of assistance are especially helpful because most ECJ transplants exist in regions whose member states are short on material and political resources.

Third, the ATJ's distinctive trajectory has implications for theories of supranational legal integration, especially neofunctionalist theory. The ATJ has the same design features as the ECJ, and it could have adopted a teleological interpretation of the ambitious goals in the Andean Pact's founding treaties and actively solicited support from national judges and private litigants to build regional integration through law. As we explain elsewhere, however (Helfer *et al.* 2009, Alter and Helfer 2010), the ATJ has not emulated the ECJ's penchant for expansionist judicial lawmaking, nor has it sought to create national-level demand for judicial enforcement of community rules. The Tribunal has instead allowed member states to set the pace and scope of integration via Andean secondary legislation. According to longstanding ATJ doctrine, the more extensively states collectively legislate, and the more detailed that legislation, the more sovereignty they transfer to the community level. Thus, contrary to neofunctionalist theory, the ATJ has required an initial top-down expression of political support before it will circumscribe the power of national governments in response to requests by private litigants.

## **1. Transplanting, Emulating, Appropriating: The Diffusion of Supranational Legal Institutions**

How do institutions diffuse around the world? When do borrowed institutions thrive in new contexts? These questions have long interested practitioners and scholars.<sup>7</sup> This section summarizes and synthesizes three distinct lines of scholarship that focus on the legal dimensions of the diffusion question—literatures on legal transplants, neofunctionalist theory, and the spread of European ideas and institutions—whose previously unexplored intersection helps to understand the ECJ's influence on the ATJ.

### *1.1. Insights from the Literature on Legal Transplants*

Legal transplants have a long lineage dating back at least as far as the Roman empire. The concept of a "legal transplant" is primarily a metaphor (Nelken 2001). In medicine, transplants replace damaged body parts, with the hope that the body will be fooled into thinking the transplant is original. For legal transplants, in contrast, the foreign nature of the transplant is often precisely the attraction. Legal transplants are designed to emulate best practices or to import "foreignness" into a context where actors who favor importation have lost confidence in existing laws and institutions.

Scholars who study transplants recognize that the transplant analogy is flawed in another way (Legrand 2001). Nearly all contemporary legal systems consist of some amalgam of indigenously generated laws, imported legal traditions, and laws

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<sup>7</sup> The literature is vast. According to one study, over 400 articles on policy diffusion were published between 1998 and 2008, just in the discipline of political science. For stock taking on this literature see: (Jacoby 2006, Graham *et al.* 2008).

and institutions that emulate global practices or practices in other countries. As a result, it is increasingly difficult to distinguish transplanted from homegrown laws and legal systems.

Commentators are also troubled by the claim that transplanting foreign institutions improves local practices, an idea that tends to be associated with colonialism and imperialism. In the 19th century, European governments transplanted their institutions to help “civilize” the populations they colonized. Following World War II, the United States transplanted its own institutions around the world, including constitutional courts, elections, business associations, and multiparty political systems (See for example Jacoby 2000). The end of the Cold War ushered in a period of economic liberalism and a renewed enthusiasm for legal transplants by international institutions (Berkowitz *et al.* 2003, p. 163-7). This latest penchant for exporting model laws and institutions was especially controversial to the extent that its proponents asserted the superiority of the Western industrial model of market regulation and the common law model of national legal systems (La Porta *et al.* 1997, La Porta *et al.* 1998).

Notwithstanding persistent critiques, scholars and policymakers continue to explore when and how transplanting laws and legal institutions changes the behavior and politics of the actors at the site of the transplant. Their studies suggest a number of conclusions. First, legal transplants are more likely to succeed when law is transplanted within the same legal family because, as Alan Watson explains, the success of a transplant will depend on its ability to graft onto existing legal norms and practices (Watson 1976).

Second, transplants not adapted to local contexts are unlikely to be effective. Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard argue that legal transplants succeed only where they respond to local demand and where they are adapted to local needs. In the absence of these conditions, the authors observe a “transplant effect”—a formal copying of rules that creates a “mismatch between preexisting conditions and institutions and the transplanted law, which weakens the effectiveness of the imported legal order.” (Berkowitz *et al.* 2003, p. 171) Their key insight is that, in the absence of local demand and adaptation, transplanted legal rules and institutions that look the same on paper are largely ignored in practice.

Third, the act of creating and diffusing transplants may itself shape understandings of the transplant such that what is actually transplanted is not a true copy but instead reflects the normative preferences of transplant advocates. The original laws and institutions are revised through conversations about the rationales for and objectives of the transplant. As a result, imported legal rules are recast through selected invocations and stylized interpretations of the original (Graziadei 2009, p. 737).<sup>8</sup>

These insights about legal transplants apply to supranational transplants in distinctive ways. For example, the finding about legal families helps to explain why common market systems are especially likely to emulate the ECJ. Architects of international legal systems select from a menu of existing laws and institutions. For international economic law, there are two dominant models: the dispute resolution system of the General Agreement on Tariffs and Trade (GATT), which became transformed into that of the World Trade Organization (WTO), and the ECJ’s supranational judicial system. The WTO model relies on states to file complaints, which are reviewed by ad hoc panels whose decisions may be appealed to a standing appellate body. The WTO also uses a system of reciprocal sanctions to enforce these decisions. States that prove violations of WTO obligations can apply trade sanctions, usually by raising tariffs on imports from the violating country, as a

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<sup>8</sup> Frances Foster argues that conversations about transplants end up being informative for exporting as well as importing countries, since they serve as a “mirror” that the exporting state can hold up for self-scrutiny. (Foster 2010, p. 621).

form of compensation and to induce compliance. In contrast, the EC model has four distinctive features not found in the WTO system:

1. *Directly applicable community legal rules.* Supranational legislative bodies create secondary legal rules, granting rights and imposing obligations on private parties and public bodies, that are directly applicable in domestic legal orders.
2. *A preliminary ruling mechanism.* National judges refer to the supranational court questions of interpretation regarding community rules. National courts of last instance are required to refer cases.
3. *Private parties may challenge the validity of decisions and actions of supranational legislative and political institutions.* Both private actors and states can challenge supranational administrative decisions and legal rules that directly affect them.
4. *Noncompliance procedures allow nonstate actors to challenge state actions that violate community rules.* A supranational body is empowered to investigate allegations of noncompliance and file complaints with the supranational court.

ECJ transplants need not copy all four of these design features. Rather, they can selectively choose features from both the ECJ and WTO models.<sup>9</sup> Most ECJ emulators in fact copy at least three of these features, albeit with some variations.<sup>10</sup> As we explain below, the ATJ includes all four features, adds a WTO-like system of reciprocal sanctions, and includes other adaptations of the ECJ's design.

We take from this literature the following lines of inquiry. First, we focus on the channels, agents, and mechanisms involved in diffusing the EC model. Second, we explain how the ECJ's experience shaped adaptations of the model in the Andean context. Third, we build upon this analysis to explore the limitations and challenges of supranational legal transplants in general. Before turning to this analysis, we first review how the legal transplants literature intersects with theoretical debates about the dynamics of legal integration and the transformative nature of the ideas that animated integration in Europe.

### *1.2. Neofunctionalist Theory, Supranational Integration, and Legal Transplants*

The success of the European integration project led early supporters to develop neofunctionalism, an institution-based political process theory applicable to all regional integration efforts. Proponents believed that supranational institutions would forge alliances with sub-state actors to address common functional problems whose solution would propel integration forward. In the 1960s, adherents of neofunctionalism predicted that regional integration would become a global phenomenon. Ernst Haas, the theory's most prominent advocate, recognized that the success of European integration was unusual in that EC member countries were economically advanced and ideologically similar. But he and other neofunctionalists nonetheless expected regional integration processes to develop elsewhere in the world and to result in similar economic and political outcomes (Haas, 1961, Haas, 1970).

By the 1970s, however, neofunctionalists had thoroughly repudiated their theory and candidly acknowledged its many shortcomings. First, neofunctionalist theory did not predict the trajectory of regional integration in other locales. Second, even in Europe the theory did not apply as expected. The dynamism of the integration process proved to be fragile and subject to political turbulences that derailed

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<sup>9</sup> The notion that importers 'order from a menu' comes from: (Jacoby 2004).

<sup>10</sup> For example, some ECJ emulators have adapted the ECJ model to protect national sovereignty or to increase international oversight of domestic actors. See (Alter 2011b).

forward momentum. The sharp discrepancies between theoretical predictions and empirical reality led Haas to declare neofunctionalism to be “obsolescent” (Haas 1975). Ever since, most political scientists have shied away from invoking the theory (Caporaso and Keeler 1995).

Neofunctionalism is, however, very much alive as a theory of *legal* integration. The theory was resurrected by Anne-Marie Slaughter (then Burley) and Walter Mattli, who argued that Haas had accurately predicted how legal (rather than political) integration institutions evolve (Burley and Mattli 1993). Slaughter and Mattli observed that the structure of the European legal system allowed legal integration to proceed via alliances between supranational and sub-national actors who worked together to promote their mutual self-interest. The authors also predicted that EC law would inevitably spill into new legal domains as litigants realized that ECJ precedents could apply to a broad range of issues. Slaughter and Mattli argued that law could more easily be shielded from political turbulence, and they observed that the ECJ frequently sought to “upgrade the common interest” by linking individual cases to larger objectives. In short, the expansion and penetration of supranational law into national legal orders advanced following the political dynamics Haas expected: alliances between supranational and subnational actors, spillovers, and the enhancement of common interests.

Alec Stone Sweet later extended these insights, connecting neofunctionalism to a theory of how international courts contribute to the creation of law. Stone Sweet argued that a general dynamic emerges in the presence of economic rules that promote intra-community trade and a legal system to which self-interested litigants have access. Where these conditions exist, economic self-interest leads litigants to invoke international economic law before international judicial bodies. Since law is inevitably incomplete, courts will be drawn into developing it. The result is the construction of new legal rules, which lead to new cases, which create additional opportunities for litigation and law expansion. Stone Sweet’s theory does not require embracing the teleology advanced by Haas; politicians can change legal rules and thereby redirect the integration process. But it suggests that such interventions will be rare and that courts will, over time, expand the scope and reach of the law (Stone Sweet 1999, Stone Sweet 2010).

Stone Sweet sees law, trade, and litigation as creating virtuous circles of law generation. But the relationship among these three elements is unclear. In particular, it is unclear whether bottom-up economic interests generate demand for international legal rules—so that both governments and courts primarily respond to the self-interest of firms—or, conversely, whether a top-down political commitment to integration drives firms to invest in cross-border production and trade and to litigate when rules are ambiguous.<sup>11</sup> The issue of whether bottom-up demand or top-down policy choices drive the legal integration process goes to the heart of the debates about legal transplants. The transplant literature suggests that importing foreign laws and institutions is insufficient to stimulate local demand, signal a credible government commitment, or give domestic actors a stake in implementing or enforcing legal rules. To the contrary, the transplanted nature of foreign laws and institutions—especially those seen as externally imposed—may signal that national political commitment is lacking.

The legal transplants literature thus hones in on a key challenge that derailed Haas’ neofunctionalist political theory: how to create local demand for transplanted institutions and laws. Neofunctionalism cannot answer this question because it is

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<sup>11</sup> Stone Sweet’s work includes a number of caveats—factors that limit judicial discretion (Stone Sweet 2004, p. 23-30)—but he is ultimately unable to untangle the relationship between laws, trade and litigation, since in Europe they rose in tandem with each other (Ibid, p. 55-92). Pitarakis and Tridimas reanalyze Stone Sweet’s data, finding support for the conclusion that international legal rules lead to trade, suggesting that political factors drive economic decisions rather than *visa versa*. Studies of the WTO also reach this conclusion. (Pitarakis and Tridimas 2003, Goldstein *et al.* 2007).



premised on the same assumption that guided policy-oriented enthusiasts of legal transplants during the period of the Washington Consensus. Even if one sheds the teleology of early neofunctionalism, the theory retains an expectation that transplanted free market rules and institutions will trigger economic actors to trade, invest, and litigate. Mattli, Slaughter, and Stone Sweet added a legal dimension to this equation, drawing attention to the importance of litigation as a tool for spurring market-integrating lawmaking and judicial precedent as a mechanism of policy spillover. But self-interest remains the underspecified engine of the theoretical apparatus. It is far from clear, however, why local litigants, scholars, and judges will embrace transplanted rules, let alone view their respective self-interests as aligning with regional integration initiatives.

### 1.3. Legal Transplants and the Diffusion of European Ideas

Supranational transplants also provide evidence to assess theories of how ideas, policies, and institutions diffuse across borders. Scholars who promulgate such theories are interested in the mechanisms of diffusion and the associated transformation of politics and identities. Tanja Börzel and Thomas Risse identify five mechanisms: (1) exporters of ideas, policies, and institutions can use legal, economic or physical *coercion*; (2) exporters can *manipulate the utility calculations* of political elites, for example by conferring or withholding inducements; (3) exporters can *socialize* importers, dispersing their ideas and institutions via normative pressure such that local actors internalize an authoritative model; (4) supporters of external ideas and institutions can use *persuasion*, providing reasoned arguments that convince local actors to accept exported models; and (5) adopters may *emulate* either by drawing lessons for themselves, *mimicking* foreign models to reap benefits or to send a signal to external and internal actors (Börzel and Risse 2009).

Risse and Börzel are primarily interested in the role of the EU in exporting ideas. They suggest, however, that each diffusion mechanism shapes the extent to which the foreign import becomes domestically entrenched.<sup>12</sup> For example, Börzel and Risse expect persuasion and socialization to have the greatest potential to meaningfully transform the identities and interests of recipients. They see mimicry as reflecting an indirect influence by the ideational exporter and assert that political scientists know very little about how emulation works in practice.

This is where the legal transplants literature may be of some help. Berkowitz, Pistor, and Richard argue that the way in which the local recipient receives the law will determine the success of the legal transplant. They expect that “a voluntary transplant increases its own receptivity when it makes a significant adaptation of the foreign [model] to initial conditions, in particular to the preexisting formal and informal legal order. Changes in the transplanted rules or legal institutions indicate that the appropriateness of these rules has been considered and modifications were made to take into account domestic legal practice of other initial conditions” (Berkowitz *et al.* 2003, p 179). In other words, blind mimicry, or copying inspired by coercion and inducement, is likely to generate a “transplant effect” in which those expected to use the transplant may resist transplanted ideas and institutions. In contrast, the existence of local adaptations may be a sign that importers are considering local needs and making adjustments to increase the likelihood of the transplant’s success.

We found no evidence that EC officials used coercion or inducements to influence local actors to adopt a supranational court. This leaves three potential mechanisms of institutional diffusion—socialization, persuasion, and some form of mimicry. If a community legal system is a product of socialization of local elites, then we should

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<sup>12</sup> The mechanisms are also relevant to testing the claims of neofunctionalist theory. For example, if mimicry were the dominant mode of transplantation, it would cast doubt on whether there is any inherent logic of integration that arises when other regions copy the European model.

observe a higher incidence of emulation among those actors who have more contact with their European counterparts. The question then becomes whether or not this socialization penetrates the local context, and thus whether institutional diffusion via socialization of elites gives rise to a transplant effect. Alternatively, if persuasion is the mechanism of diffusion, we should observe importers invoking the persuasive value of European law in promoting integration through law. To the extent that local actors are also persuaded, we might not observe a transplant effect. Finally, mimicry has multiple forms that yield contrasting expectations. Blind mimicry, where there is no effort to adapt the model to the local context, is likely to give rise to a transplant effect. Lesson drawing and adaptations, in contrast, are more likely to lead to successful engrafting of the transplant.

Having summarized the literatures on legal transplants, neofunctionalism, and the spread of European ideas and institutions, we next investigate how the ECJ's existence shaped the establishment and trajectory of the ATJ.

## 2. Copying the ECJ: The Founding of the Andean Tribunal of Justice

This section focuses on the decision to transplant the European integration model from the ECJ to the Andes. In 1969 Chile, Bolivia, Colombia, Ecuador, and Peru agreed to create a common market intended to spur regional economic growth.<sup>13</sup> The five Andean member countries did not trade extensively with each other. But they hoped that a regional market would attract foreign capital, increase each state's negotiating leverage, and induce investors to keep profits in the region (Avery and Cochraine 1973, p. 198-9). The Andean leaders adopted the European model to promote import substitution to lessen dependency on foreign markets, organize different manufacturing sectors according to regional capabilities, and distribute the benefits of foreign investment so as to lessen economic disparities across the region (Horton 1982, p. 40-1).

The Andean Pact's founding treaty, the Cartagena Agreement,<sup>14</sup> largely copied EC institutions. It established a supranational governance structure that included a "Commission" of national executives who adopted Andean secondary legislation (known as "Decisions") and a regional administrative body (the "*Junta*") that supervised the implementation of those Decisions.<sup>15</sup> Originally, the Andean Pact did not include a court, and Commission Decisions did not have direct domestic effect (Horton 1982, p. 44). According to David Padilla, most Latin American trade agreements in the 1970s lacked legalized dispute resolution bodies. Padilla attributes this omission to the fact that economists—the chief negotiators of these agreements—were wary of "legalism" and feared that formal adjudication mechanisms would empower politically conservative lawyers and engender adversarial litigation (Padilla 1979, p. 91).

Why, then, did Andean governments decide to create the ATJ? To answer this question, we first describe how the idea of creating a supranational court emerged almost immediately after the founding of the Andean Pact. We then explain how foreign models influenced debates about whether and what type of court to establish and why Andean leaders chose to emulate Europe. The section concludes with a discussion of Andean adaptations to the ECJ model.

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<sup>13</sup> The 1966 Bogota Agreement that launched the Andean Integration project envisioned border integration, building a regional infrastructure and coordinating monetary policy so that the entire region would be one large common market (García Amador 1978, p. 2)..

<sup>14</sup> Andean Subregional Integration Agreement, May 26, 1969, 8 I.L.M. 910 [hereinafter "Cartagena Agreement"].

<sup>15</sup> The original Junta had three decision-makers, and thus it was meant to be a more nimble leadership body than the Commission. For more on the Andean Pact, see (O'Keefe 1997, p. 1; 5-7)(Wionczek 1970, p. 59-61).

### 2.1. *The Decision to Create the Andean Tribunal of Justice*

From the Andean Pact's inception, Andean governments believed that they possessed the authority to implement the Cartagena Agreement via Presidential decrees,<sup>16</sup> and they used such decrees to bring the treaty into force.<sup>17</sup> This route had the advantage, from their perspective, of avoiding national parliaments, in which fractious political parties might attempt to block or revise implementing legislation (Avery and Cochraine 1973, p. 198 note 36, Thomas 1973, p. 117). But the approach also generated opposition from business elites, who disliked the Andean Pact's import substitution policies and invoked the failure to submit the treaty to national parliaments to challenge its validity. As we explain below, these efforts failed. But the manner in which domestic actors responded to these challenges suggested that Andean Decisions would not be given effect within domestic legal orders—a prospect that served as a catalyst to create a supranational court.

Business elites filed a key lawsuit in Colombia. In 1971, the Supreme Court rejected the suit,<sup>18</sup> invoking a long-standing doctrine that disallows procedural invalidation of international treaties adopted in good faith.<sup>19</sup> But the ruling applied only to the Cartagena Agreement itself, implicitly suggesting that Andean secondary legislation needed parliamentary approval to be valid in Colombia.<sup>20</sup> However, the decision also included an integration-friendly dissenting opinion which intimated that the court's concerns about Andean secondary legislation would be alleviated if there were an Andean tribunal to address challenges to that legislation.

Businesses opposed to the Andean Pact filed a second suit in the Colombian Supreme Court one year later. This time the challenge was to the Andean investment code, a centerpiece of the integration process and a lightning rod of contestation (O'Keefe 1996). The investment code's strict limits on repatriation of profits by foreign investors galled pro-free market businesses and politicians in the region.<sup>21</sup> The lawsuit argued that the Colombian Constitution prohibited implementing the investment code by presidential decree. Applying the logic of its earlier ruling, the Supreme Court held that the code could only be implemented by the parliament.

The Colombian rulings made clear the cost of *not* having an ECJ-style court; namely, that Andean secondary legislation might be invalidated by national judges. Proponents of an Andean Tribunal regularly invoked the two Colombian rulings when advocating for the creation of a supranational judicial review mechanism (Orrego Vicuña 1972, Orrego Vicuña 1974, García Amador 1978, p. 172). Moreover, the *Junta* itself referred to the Colombian rulings when discussing the benefits of revising the Andean legal system.<sup>22</sup> In 1972, six months after the second Colombian ruling, the Commission announced its support for the establishment of an Andean Tribunal. The Commission directed the *Junta* to

<sup>16</sup> See Declaración de Bogotá, 16 August, 1966 and Declaración de los Presidentes de América, 14 April, 1967.

<sup>17</sup> In Colombia, Decree No. 1245 of 8 August 1969; in Chile, Decree No. 428 of 30 July 1969; in Peru, Decree No. 17.851 of 14 October 1969; in Ecuador, Decree No. 1932, 24 October 1969; and Bolivia Decree No. 08985, 6 November 1969.

<sup>18</sup> Colombian Supreme Court, ruling of 26 July 1971, published in *Derecho de la Integración* No. 10, 160-180.

<sup>19</sup> See "teoría del acto complejo", *Op Cit.* Colombian Supreme Court ruling of 26 July 1971, at 165.

<sup>20</sup> *Op Cit.* Colombian Supreme Court ruling of 26 July 1971, at 166. For a discussion of this point, see: (Orrego Vicuña 1972, p. 52) at 49. This same legal arguments were used in a legislative debate in Chile, where local legislative actors sought to undermine the Andean investment code that had been implemented via presidential decree.

<sup>21</sup> Thomas "The Colombian Supreme Court Decision" at 116, note 21. Venezuela delayed joining the Andean Pact until 1973 because the code was more stringent than local investment rules, and Chile withdrew from the Pact in 1976 despite the member states' begrudging assent to that country's request to raise the percentage of profits that could be repatriated. Scott Horton, *Peru and Ancom: A Study in the Disintegration of a Common Market*, 17 *Tex. J. Int'l L.* 39, 49 (1982). (Hojman 1981, p. 46-9)

<sup>22</sup> See (JUNAC 1972). Hereafter JUNTAC recommendation to establish a court.

produce a report on the “necessity to create a court” for the region.<sup>23</sup> The question of what type of court remained open, however.

## 2.2. *The Choice of the ECJ Model*

When Andean officials discussed the creation of a supranational court, several potential models were available for their consideration. The officials could have emulated an early regional tribunal, the Central American Court of Justice, which heard ten cases between 1907 and 1917 before its founding treaty expired (Allain 2000, p. 73-88). Or they could have embraced the GATT dispute settlement system, although at the time member states were blocking many cases from proceeding.<sup>24</sup> In addition, emulating the GATT system would not have established the direct effect of Andean rules nor created a mechanism for supranational judicial control of Andean laws. Without such a control, national courts might challenge the authority of community law or interpret Andean rules in inconsistent ways. A third alternative—the ECJ model—was the most obvious fit given the preexisting similarities between other Andean and European institutions. The selection of the ECJ model was virtually guaranteed when the *Junta* asked the Institute for the Integration of Latin America and the Caribbean (INTAL) to evaluate the best model for the Andean Pact.

INTAL is a research center established by the Inter-American Development Bank in 1965 with the mission of promoting and consolidating regional integration.<sup>25</sup> Its network of consultants—many of whom are part-time scholars—provides technical assistance to implement and enforce integration policies. INTAL served as a conveyor belt for the transmission of European ideas into conversations about integration in Latin America. At the time, many INTAL consultants had been educated and trained in European universities, and they continued to attend pro-integration academic events in Europe.<sup>26</sup> A few had even worked with major European integration scholars such as Ernst Haas.<sup>27</sup> Through these connections, INTAL members were socialized to support integration initiatives. And they distributed pro-integration ideas in Latin America through two publications—*Revista Integración Latinoamericana*, *Derecho de la Integración* and *Serie Publicaciones INTAL*.<sup>28</sup>

The INTAL network recommended the European legal model, bundling the creation of an ECJ-style tribunal with foundational ECJ-created doctrines establishing the direct effect and supremacy of community law in national legal orders. By incorporating these legal doctrines into its recommendation for an ECJ-style court, INTAL also implicitly endorsed the ECJ’s view that the Treaty of Rome is a constitutional document that private actors can draw upon to promote regional

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<sup>23</sup> Sexto Período de Sesiones Extraordinarias, Acta Final, 9-18 December, 1971, Lima, Peru. In the same period, another challenge from the Chilean Senate worried Andean governments and officials. That challenge also questioned the legitimacy of Andean secondary laws that did not have formal parliamentary approval. See discussion in (Saldías 2010).

<sup>24</sup> The GATT system entered a period of disuse between 1963 and 1975. For a discussion, see (Hudec 1993, p. 11-15).

<sup>25</sup> For a retrospective made by INTAL in 1981 in regard to its contribution to regional integration in Latin America, see (INTAL 1981).

<sup>26</sup> For example, in March 1971, Felix Peña, head of INTAL’s legal department and Francisco Orrego Vicuña, a Chilean law professor associated to INTAL, participated in a colloquium on the “Legal Aspects of Economic Integration” organized by the Hague Academy of International Law. Also attending this event were ECJ judge Robert Monaco and Eric Stein from the University of Michigan, one of the first American scholar to focus on ECJ doctrine. Cf. Rideau 1973; also the Editorial in *Derecho de la Integración*, No. 9, October 1971 p. 8.

<sup>27</sup> The head of INTAL’s legal department was an assistant to Ernst Haas, who, as explained previously, was a distinguished European theorist of European integration. Information taken from his CV available at <http://www.felixpena.com.ar/index.php?contenido=trayectoria>.

<sup>28</sup> Most of the published articles advocated bolstering the integration process. For example, between 1967 and 1968 *Derecho de la Integración* published translated articles by some of the key actors and promoters of European legal integration, including Maurice Lagrange (avocat general at the ECJ), and Pierre Pescatore (ECJ judge), cf. (Lagrange 1968)(Pescatore 1967).

integration. The unstated inference was that the Cartagena Agreement should be imbued with a similar constitutional status.

INTAL's recommendations were an important influence on the creation of the ATJ.<sup>29</sup> In June 1972, the *Junta* convened a Meeting of Experts that included INTAL consultants, Professor Gerard Olivier (the Assistant Director General of EC Legal Services), and ECJ Judge Pierre Pescatore. Based on this meeting, the *Junta* prepared a draft of a treaty establishing the ATJ. Representatives of the member states discussed the draft treaty in November 1972, and in December a joint *Junta*-INTAL working group presented its proposal to the Commission.<sup>30</sup> The proposal focused on two key requirements: the doctrines of supremacy and direct effect, and a supranational mechanism to review the legality of community acts. Copying the ECJ's preliminary reference procedure achieved both of these goals. It created an Andean judicial body to review the correct interpretation of Andean rules by national judges, and to "reduce unnecessary and sometimes disproportionate political tensions" with those judges—an implicit reference to the Colombian Supreme Court rulings.<sup>31</sup>

Applying the transplants literature reviewed above, we see that the *Junta* and INTAL chose the ECJ model based on a combination of persuasion and socialization. On the one hand, the individuals involved genuinely favored creating a supranational tribunal to address the widely recognized problem of noncompliance with Andean Decisions and to further regional integration (Vargas-Hidalgo 1979, p. 224). But they reached this conclusion after repeated interactions with European officials and judges who may have wanted to spread the ECJ model to other regions.

### *2.3. Emulating Europe: Implementing the Junta's Recommendation for an Andean Tribunal*

Enthusiasm for creating an Andean judicial body seems to have been strongest among the members of the *Junta* and the INTAL network. Political and business leaders, however, were less convinced. In 1975 Elizabeth Ferris interviewed 75 foreign policymakers, technocrats, and private sector representatives in six Andean countries, asking their opinions about various initiatives including the *Junta*'s proposal to create an Andean court. The individuals Ferris interviewed saw little need for a court (Ferris 1979, p. 99-100).

The Andean Junta first presented its proposal for a court, including a draft treaty, in December of 1972. In 1974 and again in 1975, the *Junta* presented statements about the report to meetings of the heads of member states, arguing for the drafting of a treaty to establish a court (García Amador 1978, p. 105-07). The heads of state do not appear to have been overtly hostile to the idea of a tribunal, indeed they authorized the Junta to proceed with drafting a Treaty. The incubation period for action, however, took five and a half years.<sup>32</sup> We found no decisive explanation for the long period of inaction. Perhaps the member states were distracted by the Andean Pact's larger political difficulties, such as Venezuela's accession to the Andean Pact in 1973 and the Pinochet coup in the same year, which ultimately led to Chile's withdrawal from the Pact in 1976. In addition, the Andean investment code continued to be extremely controversial, and one could reasonably ask whether a supranational legal body would have helped to diffuse

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<sup>29</sup> The Junta's final report did consider alternatives, but found problems with the GATT, LAFTA, the Central American Common Market, and the East African Community models. See (JUNAC 1972, p. 144) Also cf. (INTAL 1972) (Paolillo and Ons-Indart 1971).

<sup>30</sup> (García Amador 1978, p. 105).

<sup>31</sup> The report explicitly referenced the Colombian Supreme Court's decisions, and the minority opinion in the 1971 ruling. See JUNTAC recommendation to establish a court (JUNAC 1972, p. 142).

<sup>32</sup> The Treaty was presented for adoption on 8 August 1978.

that issue. Whatever its origin, the result was little progress in attracting foreign investment or building an Andean common market.

The Andean Pact's hibernation in the 1970s underscored that something fundamental needed to change if the member states were to achieve their political or policy goals. Yet even during this troubled period, Europe continued to serve as a model for Andean integration. Europe also faced significant challenges to integration in the 1970s, and in response it adopted several institutional innovations. In 1970 the EC launched the European Political Cooperation initiative to coordinate member states' foreign policies, and in 1974 it formalized the system of Councils of Heads of States to adopt major decisions related to integration. In 1979 the EC replaced a legislative body comprised of national parliamentarians with a system of direct elections to a new European Parliament (Dinan 2004, p. chapters 4 and 5).

When integration advocates succeeded in re-launching the Andean integration project, they tracked these developments in Europe. The re-launch also provided the impetus for creating the ATJ. In 1979 the member states agreed to create an Andean Parliament and a Council of Foreign Ministers (Sánchez 1985). And in 1979 they finally adopted the Treaty Establishing the Tribunal of Justice of the Cartagena Agreement,<sup>33</sup> accepting nearly in toto the text drafted by INTAL in 1972, which the *Junta* had incorporated into its 1975 recommendation.<sup>34</sup>

#### 2.4. Adapting the ECJ Model

The ATJ replicated the ECJ's main design features—a noncompliance procedure that authorized the *Junta* to challenge member state violations of Andean law; a preliminary reference mechanism for national courts to send questions involving the interpretation of Andean law to the ATJ; and a nullification procedure that allowed states and private actors to challenge Andean acts as *ultra vires*. Although the treaty does not refer to the supremacy of community law, supremacy was a key component of the *Junta's* proposal, together with the doctrine of direct effect, which the treaty does expressly mention.<sup>35</sup>

Even if INTAL members were persuaded of the benefits of the ECJ model, the group's proposal also made a number of adaptations of the ECJ's founding charter, modifications that reflected learning from the ECJ's experience. For example, the ATJ Treaty explicitly directed national courts to implement the Tribunal's preliminary rulings interpreting Andean law, a requirement that the Treaty of Rome does not mention but that had become part of ECJ doctrine.<sup>36</sup> The treaty also includes more detail about the timing of judicial proceedings and the length of the judges' terms in office.<sup>37</sup>

Other alterations of the ECJ model seem designed to protect national sovereignty. As noted above, the ATJ noncompliance procedure empowered the *Junta* to challenge member state violations of Andean law. But unlike in Europe, only states, not private actors, could complain to the *Junta* about such violations. In addition,

<sup>33</sup> See Treaty Establishing the Court of Justice of the Cartagena Agreement, 18 *International Legal Materials* 1203 (1979). Hereinafter "Original Treaty Establishing the ATJ."

<sup>34</sup> The only difference concerns the nullification procedure. The *Junta's* draft allowed individuals to file nullification suits as long as the infringing act was applicable to them. The final version required that the suing individuals show that the infringement caused harm to them. Compare art. 19 Treaty Establishing the ACJ with Art 14, "Bases de un tratado para la creación del tribunal de justicia del Acuerdo de Cartagena", in JUNAC 1973, at 148. Andean Commission 1972: Décimo Período de Sesiones Extraordinarias de la Comisión, COM/XE-acta final.

<sup>35</sup> JUNAC 1973, at 139 and 148.

<sup>36</sup> Article 31 of the Original Treaty Establishing the ATJ. Federico Mancini and David Keeling discuss how the ECJ's CILFIT doctrine tries to limit the discretion of national judges with respect to referring cases and implementing ECJ rulings. (Mancini and Keeling 1992).

<sup>37</sup> For example, article 23 requires the Secretariat to respond within two months. The terms of the ATJ's offices are slightly shorter and there are small differences in procedure. For a comparison between the ATJ and the ECJ's founding documents, see: (Keener 1987).

the absence of a supranational procedure to challenge “omissions” by Andean officials meant that private actors could not contest the *Junta’s* refusal to pursue a noncompliance complaint. Observer at the time suggested that the lack of an omissions procedure was part of a tacit “gentlemen’s agreement” among member states to prevent individuals from seizing the Tribunal in such cases,<sup>38</sup> which might be especially sensitive politically. These concerns may have been informed by the experiences of the ECJ, which had adjudicated complaints raised by private parties that member states would have preferred to ignore.<sup>39</sup>

Although barred from pursuing noncompliance complaints at the supranational level, private actors could still file suits in national courts. In principle, national judges would then refer questions of Andean law to the Tribunal. However, the ATJ Treaty suggested that the Tribunal should exercise restraint in responding to such references. Article 30 directed the ATJ to “restrict its interpretation to defining the content and scope of the norms of the juridical structure of the Cartagena Agreement. The [Tribunal] may neither interpret the contents and scope of national law, nor judge the facts in dispute.”<sup>40</sup> This language plausibly reflects an awareness of the ECJ’s well-known practice of broadly interpreting questions posed by national courts, analyzing the facts of the case (a task nominally reserved to national judges), and suggesting pro-integration interpretations of domestic rules (Mancini 1989, p. 606).<sup>41</sup>

The ATJ faithfully adhered to these limitations on its authority. The first noncompliance proceeding at the ATJ involved a private litigant who attempted to file suit directly with the ATJ rather than with a national court. The Tribunal dismissed the suit, citing the treaty provision barring private actors from raising noncompliance cases.<sup>42</sup> When the same legal issue later arose in preliminary references involving challenges to a Colombian tariff on Venezuelan aluminum imports, the ATJ adhered to its limited role of interpreting Andean law in the abstract and not addressing the facts of the case.<sup>43</sup>

One should not, however, overstate these adaptations of the ECJ model. The architects of the Andean legal system anticipated that private actors would challenge noncompliance with Andean rules in national courts.<sup>44</sup> Moreover, the drafters adopted an innovation that appears intended to *enhance* state adherence to Andean rules. Unlike the EC, which did not then include a procedure for penalizing noncompliance with ECJ rulings, the ATJ Treaty adopted a GATT-like system that authorized retaliatory trade sanctions if a state refused to follow an ATJ judgment against it. This addition suggests that states sought to create a supranational legal system capable of inducing respect for Andean rules.<sup>45</sup>

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<sup>38</sup> On 16 July 1984 Manuel José Cárdenas, columnist of the Colombian newspaper *El Tiempo*, wrote: “La solución estaba, por lo tanto, en presentar las demandas [de incumplimiento] correspondientes. Pero como ésta acción está reservada a los gobiernos y éstos acordaron un pacto de caballeros de no presentar ninguna demanda hasta que no se modifique el Acuerdo de Cartagena, la acción correctiva del Tribunal fue esterilizada totalmente”, cited in (Hurtado Larrea 1985).

<sup>39</sup> For example, German officials were upset that ECJ questioning of turnover equalization taxes ended up inundating German courts with legal challenges. The French became upset at the ECJ’s *Charmasson* decision, which found that France had ceded its authority to make trade arrangements. See (Alter 2001, p. 80-5, 151-3)

<sup>40</sup> See Original Treaty establishing the ATJ, *supra*.

<sup>41</sup> The Benelux Court—another ECJ copy—was also authorized to respond only to the questions posed. Treaty Establishing the Benelux Court, 31 March 1965, Art. 6; modified by protocols of 10 June 1981 and 23 November 1984. Available at <http://www.courbeneluxhof.be/fr/basisdocumenten.asp> last visited July 17, 2011.

<sup>42</sup> ATJ decision 1-AI-87.

<sup>43</sup> We discuss these cases later, when we explain how the ATJ did not follow the ECJ’s approach in *Van Gend en Loos*. See the discussion of 1-AI-1987 and 1-IP-90.

<sup>44</sup> In rejecting the private litigant’s noncompliance suit in 1-AI-87, the ATJ suggested that private litigants should instead raise a challenge in a national court.

<sup>45</sup> Article 25 of the original Treaty Creating a Court of Justice for the Cartagena Agreement. (Article 27 of the Revised ATJ treaty maintains this sanctioning mechanism).

In sum, the design of the ATJ on paper was a close copy of its European cousin. When the Tribunal began operations in 1984, however, it faced a slew of practical challenges that the ECJ had not experienced. Most notably, the funds that member states had pledged to the ATJ were delayed, the Tribunal lacked a permanent building to house its operations, and the *Junta*, member states, and national courts filed only a handful of cases.<sup>46</sup> The paucity of substantive work was partly an artifact of the political stalemate that impeded the creation of a common market. In the 1980s, the Andean investment code remained controversial, member countries clung to rules that exempted most products traded within the region (Hojman 1981), and governments were preoccupied by economic and political crises related to high levels of foreign debt.

By the early 1990s, however, the member states once again sought to reinvigorate Andean integration (O'Keefe 1996, p. 811-18), beginning in 1991 by laying the groundwork for a common external tariff.<sup>47</sup> Over the next five years, they amended the Cartagena Agreement, replaced the import-substitution policy with a free trade model, and rechristened the new integration project as the Andean Community (O'Keefe 1996). In 1997 member states also replaced the mostly ineffectual *Junta* with a General Secretariat, increased the size of its budget, and appointed a cadre of young lawyers eager to use the Secretariat's enhanced resources to promote regional integration.<sup>48</sup>

Reforming the Andean judicial system was part of this wider institutional overhaul. The reforms reflected what Andean leaders had learned about that system over the previous decade. Notwithstanding the ATJ treaty's unambiguous text, member states often resisted the idea that the *Junta* could file noncompliance suits before the Tribunal. In addition, private litigants rarely used the preliminary reference mechanism to challenge national policies that violated community rules. The reforms of the Andean legal system were intended to address these shortcomings.<sup>49</sup>

The Cochabamba Protocol, adopted in 1996, brought the Tribunal even closer to the ECJ model.<sup>50</sup> The Protocol repealed the ban on private actors bringing violations of Andean law to the General Secretariat's attention.<sup>51</sup> The Protocol also recognized that private litigants either were not raising challenges to state noncompliance in national courts, or that national judges were not referring cases to the ATJ. Going beyond the ECJ's noncompliance procedure, member states authorized private

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<sup>46</sup> During this decade, national courts filed only thirty-two preliminary references requests, private parties filed only three nullification complaints, and national executives refrained from filing any noncompliance suits. ATJ judges spent most of their time locating a permanent building for the court and resolving labor disputes with staff members. Interview with Ugarte del Pino, Peruvian Judge of the ATJ, 1990-1995, Lima, Peru, June 22, 2007.

<sup>47</sup> In December of 1991 Andean Presidents approved the Act of Barhona, which ordered the creation of a four tiered common external tariff. Decision 370, adopted on 26 November 1994, implemented this policy.

<sup>48</sup> Interviews with Monica Rosell, former Legal Secretary of the ATJ and Attorney in the Legal Advisor's Office of the Secretariat General, Quito, Ecuador, Mar. 17, 2005 & Chicago, IL Apr. 1, 2007 [hereafter Interviews with Monica Rosell].

<sup>49</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, as amended by the Protocol of Cochabamba (May 28, 1996), [www.comunidadandina.org/ingles/treaties/trea/ande\\_trea2.htm](http://www.comunidadandina.org/ingles/treaties/trea/ande_trea2.htm), art. 25 [hereinafter Revised ATJ Treaty]. The General Secretariat advocated these reforms so that it could credibly argue that its own failure to initiate a noncompliance suit would trigger private actors to file their own noncompliance actions. Interview with Alfonso Vidales Olviedo, Former head of the Secretariat General Legal Advisor's office 22 June 2007, Lima Peru.

<sup>50</sup> Differences persisted, however, especially in light of changes to the European legal system in 1989, when the ECJ gained a Tribunal of First Instance and a system to sanction states that ignored ECJ rulings. The ECJ also created doctrines that allowed national courts to sanction states that failed to implement community rules in a timely fashion. The ATJ has not followed the ECJ in creating decentralized enforcement mechanisms. On expansions to the European legal system, see: (Tallberg 2003, p. 72-82).

<sup>51</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, as amended by the Protocol of Cochabamba (May 28, 1996), [www.comunidadandina.org/ingles/treaties/trea/ande\\_trea2.htm](http://www.comunidadandina.org/ingles/treaties/trea/ande_trea2.htm), art. 25 [hereinafter Revised ATJ Treaty].



actors to appeal directly to the ATJ if they disagreed with the Secretariat's disposition of a complaint. Another reform facilitated access to the nullification procedure by eliminating the requirement that private litigants show direct injury in order to challenge Andean acts.<sup>52</sup> The member states also added an "omissions" procedure so that litigants could challenge the failure to act of any Andean body. Lastly, the Protocol relaxed restrictions on preliminary references by indicating that ATJ judges could now address how Andean rules applied to the facts of cases when necessary for their rulings.<sup>53</sup> The end result of these reforms was an Andean legal system that, much like the EC, provided private parties with multiple avenues to challenge state noncompliance.

The Cochabamba reforms also reflect learning by Andean actors. The individuals who created the ATJ had incorporated ECJ doctrines on the direct effect and supremacy of community law and the requirement that national judges accept supranational rulings. But they adapted the model to protect national sovereignty, authorizing private actors to raise cases only in national courts but not via the supranational noncompliance procedure. The next generation of Andean leaders realized that this adaptation had in fact undermined the system's ability to induce compliance with Andean rules. Their solution was to return to the institutional features of the EC legal system that the founders had originally rejected, and to even enhance these features by allowing private actors to bring noncompliance cases directly to the ATJ.

Table 1 summarizes the foregoing discussion. It compares the design of the two supranational courts and identifies key similarities and differences in the revised Andean and European legal systems.<sup>54</sup>

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<sup>52</sup> Revised ATJ Treaty art. 19, adding instead, that the challenged act should affect the individual's "legitimate interests."

<sup>53</sup> *Id.* art. 34 (amending ATJ Treaty to authorize the ATJ to "refer to th[e] facts [in dispute] when essential for the requested interpretation"). The Cochabamba Protocol also authorizes the ATJ to hear three other types of cases: complaints against a Community body that "abstain[s] from carrying out an activity for which it is expressly responsible"; arbitrations; and Community labor disputes. *Id.* arts. 37-40. The ATJ has only rarely exercised these functions.

<sup>54</sup> There are also smaller differences. For example, the Andean Community prohibits states from challenging decisions they voted for to prevent new political leaders from challenging agreements signed by previous governments. The Andean Tribunal treaty has slightly different time limits for cases to proceed. The ATJ's court treaty is also more specific about the conditions under which ATJ judges can be removed. It is not clear if any of the envisioned scenarios for removal have occurred. Thus, it is hard to know how these differences matter in practice.

Table 1: The Design of the Revised ECJ and ATJ Compared

Role	ECJ	ATJ	Most significant differences
<p><b>Judicial Review Mechanisms</b></p> <p>Both the ECJ and ATJ can hear challenges to the validity of community rules, to actions and omissions of the Commission/ General Secretariat and to the national application of community rules.</p>	<p><u>Direct challenges.</u> Community institutions (the Commission, the Council, more recently the Parliament) and member states can challenge community policies, decisions and non-action of the Commission before the ECJ and the Tribunal of First Instance. Private litigants can raise challenges against rules and decisions that directly affect them, and they can challenge a community institution's failure to act.</p> <p><u>Challenges raised in national courts.</u> Private litigants can raise in national courts challenges to community rules, Commission actions, and national application of community rules.</p>	<p><u>Direct challenges (Nullification actions).</u> Community institutions (the Commission, the General Secretariat), and member states can challenge community policies in front of the ATJ. Private litigants can raise challenges against rules that directly affect them, and they can challenge the omissions of Community actors.</p> <p><u>Challenges raised in national courts.</u> Private litigants can raise in national courts challenges to community rules, Commission and General Secretariat actions, and national application of community rules.</p>	<p>There is no parliamentary access to challenge Community acts, probably because the envisioned Andean Parliament was delayed.</p>
<p><b>Enforcement</b></p> <p>Both courts can rule on state violations of community rules.</p>	<p><u>Infringement Process.</u> The Commission investigates noncompliance complaints and files infringement suits. Member states can bring non-compliance charges to the ECJ directly.</p> <p><u>Challenges raised in national courts.</u> Private actors may not raise infringement suits, but ECJ doctrine (<i>Van Gend en Loos</i>) allows litigants to challenge state noncompliance in national courts.</p> <p><u>Sanctions:</u> Initially, the ECJ can declare that a state has "failed to fulfill its obligation." Since 1991, the Commission can initiate a new lawsuit and the ECJ can authorize fines against states that do not comply with ECJ rulings. ECJ doctrine (<i>Francovich</i>) also allows national courts to impose fines when states fail to implement community rules.</p>	<p><u>Noncompliance Procedure.</u> The General Secretariat investigates noncompliance complaints and files noncompliance suits. Member states may bring noncompliance charges to the ATJ directly. Cochabamba reforms allow private actors to bring noncompliance charges to the SG and then to the ATJ.</p> <p><u>Challenges Raised in National Courts.</u> Where domestic statutes allow, private actors can raise noncompliance suits in domestic courts.</p> <p><u>Sanctions:</u> The ATJ can authorize a prevailing member states to restrict or suspend community benefits received by a non-complying defendant state.</p>	<p>Cochabamba Protocol reforms allow private actors to appeal General Secretariat actions in noncompliance cases to the ATJ. Also, where authorized by domestic law, private actors can raise noncompliance suits in national courts. However, interviews suggest that the authorization needed to activate this provision was never given. In contrast, in Europe private litigants regularly raise noncompliance complaints in national courts.</p> <p><u>Sanctions:</u> The ATJ can authorize another state to suspend benefits in response to non-compliance. Since 1991 the ECJ can authorize fines for states that ignore its rulings.</p>

Members of INTAL and the *Junta* were unquestionably influenced by Europe's experience and by EC officials. INTAL invited European advisors to offer suggestions on draft treaties. Many national and Andean officials studied in Europe, and Andean judges regularly consulted EC legislation and ECJ case law. The EC also aided its Andean counterpart in other ways. We spoke to a member of the *Comisión Andina de Juristas*, which undertook a number of initiatives to bolster Andean integration. In 2000, the *Corporación Andina de Fomento*, a banking organization that supports projects and developments in the region, hired the *Comisión* to help increase local awareness of the ATJ. The project helped to improve the ATJ's dissemination of legal rulings, and it copied the ECJ's outreach efforts, arranging meetings with national judges to increase their awareness of the Andean legal system.<sup>55</sup> When funding for the *Comisión's* project ran short, the Spanish Government and the EC provided additional funds. The *Comisión* also drafted proposals to create a social agenda for the Andean Community to build closer connections to the public, drawing inspiration from EC programs. The EC also crafted an Association Agreement with the Andean Community to help bolster Andean integration efforts.<sup>56</sup> These examples, which we discovered in our research, are likely only a small sample of the ways that the EC helped to promote the Andean Community.

### 3. Charting its Own Course: ATJ Lawmaking 1984-2007

The previous section demonstrated how the ATJ emulates the design of the ECJ. This section considers the next logical issue—whether the two courts operate in similar ways, as neofunctionalist theory expects.<sup>57</sup> As we explain below, the ATJ exhibited an early willingness to copy the ECJ's foundational doctrines even when they lacked an explicit textual basis in Andean law. When it came to applying these doctrines, however, the Tribunal diverged from its European predecessor in a number of significant respects. The ATJ exercised its power to assess the validity of Andean rules and to find states in noncompliance with unambiguous Andean laws, even where it might expect states to ignore its rulings. But the Tribunal generally demurred from litigant requests to construe Andean law expansively or to adopt unwritten legal obligations that might have advanced integration, especially when it feared that national actors would object.

#### 3.1. Importing Key ECJ Doctrines

Early ATJ decisions embraced key ECJ doctrines. When the Tribunal issued its first preliminary ruling in 1987, it used the opportunity to explain how the Andean legal system worked. The case did not involve the supremacy of Andean law. But the ATJ nonetheless noted that member states had declared the "full validity" of the following legal principles:

- a) the legal system of the Cartagena Agreement has its own identity and autonomy, constitutes a common law and is part of the national legal systems, b) the legal system of the Agreement prevails within the framework of its competences, over the national norms, without unilateral acts or measures from the Member Countries being able to oppose this legal system, c) the Decisions

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<sup>55</sup> For example, there was a meeting with Peruvian judges in 2003 to convince them to refer more cases to the ATJ. See *El Principio de Cooperación Judicial Entre el Tribunal Andino y los Tribunales Nacionales en el Marco de la Comunidad Andina* (Lima, Peru, Nov. 28, 2003), <http://www.cajpe.org.pe/RIJ/Memorias/principio1.htm> (listing attendees and conference program). There were also meetings with Bolivian and Venezuelan judges. Phone interviews with the Asesor jurídico at the Comisión Andina de Juristas in 2005 and 2006. 20 May 2008 and 8 December 2008.

<sup>56</sup> Phone interviews with the Asesor jurídico at the Comisión Andina de Juristas in 2005 and 2006. 20 May 2008 and 8 December 2008. A reference to the training session is found at: <http://www.comunidadandina.org/prensa/notas/np4-12-08.htm>

<sup>57</sup> This section adapts material previously published in (Alter and Helfer 2011) and (Alter and Helfer 2010).

implying obligations for the Member Countries come into effect on the date indicated.<sup>58</sup>

The ATJ thus confirmed the founders' belief that transplanting the ECJ model also encompassed copying two foundational doctrines of European law—the supremacy of community rules and their direct effect within national legal orders.

In its second preliminary ruling, the ATJ incorporated additional ECJ doctrines. The case raised the question of the status of national laws that conflicted with Andean rules but that nevertheless remained on the books. The ATJ reasoned as follows:

As far as the effect of the norms of integration on national norms, the doctrine and jurisprudence indicate that, in the case of conflict, the internal rule will be superseded by the community one, which will be applied preferentially, since the competence in such a case corresponds to the community. In other words, the internal norm becomes inapplicable, to the benefit of the community norm. The [ECJ] has repeatedly given this indication (see principally the *Costa/ENEL* Judgments of June 15, 1964, and the *Simmenthal* Judgment of March 9, 1978) in agreement on this point with the spirit of the norms of the Andean integration. This effect of supersession of the national norm as a result of the application of preference, is especially clear when the later law – which must have priority over the prior one, in accordance with universal principles of law – is precisely the community norm.

...

The [ECJ], in the previously cited judgments, has affirmed the absolute preeminence of community law over internal law, an argument that is also applicable to the judicial system of the Andean integration, in accordance with what was previously indicated.<sup>59</sup>

Taken together, these two early rulings revealed that the ATJ shared with the ECJ the fundamental premise that community law is different from other types of international law.<sup>60</sup> The two rulings also appeared to set the stage for the Tribunal to follow in the audacious footsteps of its European predecessor. As we explain below, however, the ATJ's jurisprudence later diverged from ECJ doctrine in a number of important respects.

### *3.2. Deviating By Choice: The Jurisprudence of the ATJ*

Over its nearly twenty-five year existence, the ATJ has been presented with several opportunities to emulate the ECJ's efforts to promote integration through law. It has responded by charting a course away from the ECJ model. We discuss four examples of divergence and suggest that they were in part a function of weak local demand for Andean integration by governments and private actors.

#### *3.2.1. Are Community Treaties Constitutional Documents?*

The best known and most audacious of the ECJ's achievements is its transformation of the Treaty of Rome into a supranational constitution for Europe.<sup>61</sup> The ATJ has not followed the ECJ's bold strategy. Instead, it has allowed member states to amend the Andean Community's founding treaty—the Cartagena Agreement—with relative ease and thereby to control the pace and scope of Andean integration.

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<sup>58</sup> 1-IP-87 p.3

<sup>59</sup> 1-IP-88 point 2, p. 2-3.

<sup>60</sup> The ATJ reiterated this point in a later decision, in which it held that community law creates a "direct application effect" which transforms states and citizens into subjects of a new system in which they both possess rights and obligations. This reality distinguishes community law from traditional public international law. 1-IP-96: section III.

<sup>61</sup> Proponents of this claim note how the ECJ made the Treaty of Rome directly effective within national legal orders, and supreme over national law. They also cite the ECJ's human rights jurisprudence (Stein 1981, Weiler 1991).

Two decisions from the early 1990s illustrate this divergence.<sup>62</sup> The cases were closely analogous to the famous *Van Gend en Loos* case, in which the ECJ proclaimed the direct effect of the Treaty of Rome's free trade rules within national legal orders.<sup>63</sup> As in *Van Gend en Loos*, the plaintiffs claimed that the Cartagena Agreement imposed immediate constraints on member state actions and thus prohibited Colombia from imposing new duties on imports from Venezuela. Unlike in Europe, however, Andean governments had previously adopted a Free Trade Program that permitted states to adopt broad exemptions from regional free trade rules. The plaintiff nevertheless argued that the Cartagena Agreement should be interpreted as freezing tariffs for exempted products. Colombia countered that the Agreement must be interpreted in conjunction with the Free Trade Program, which, it argued, had the effect of revising the treaty (Saldías 2007, p. 12). The ATJ agreed with the government, reasoning that the Program afforded member states free reign to exempt goods notwithstanding the eventual adoption of broader free trade rules envisioned by the treaty.<sup>64</sup>

In a later case, the ATJ clarified its views regarding how member states could amend the Cartagena Agreement. The ruling involved a challenge to a Decision authorizing Peru—then operating under a state of emergency—to derogate from certain provisions of Andean law.<sup>65</sup> The *Junta* filed suit to nullify the Decision in November 1996, when Andean governments were actively discussing the emergency. A few months later, Andean governments adopted the Sucre Protocol, one provision of which addressed Peru's situation.<sup>66</sup> But the ATJ still had the *Junta's* nullification suit on its docket, which it refused to dismiss.<sup>67</sup> In its ruling on the merits, the Tribunal found that the Decision granting a derogation to Peru violated the Cartagena Agreement, but that its illegality had been "purged" by the Sucre Protocol. In other words, the ATJ did not need to nullify the Decision because a valid law had already superseded it. The Tribunal also distinguished between Decisions—which are secondary legislation adopted by member states—and Protocols which are treaty amendments agreed to during a "conference of plenipotentiaries" (*reunion de plenipotenciarios*).<sup>68</sup> This distinction suggests that the procedure for adopting Protocols is more onerous than that for adopting Decisions. Formally speaking, the process of amending the Cartagena Agreement is the same as that for amending the EC's founding charter: the heads of member states must meet to adopt the amendments, which must then be ratified by each state.<sup>69</sup> In reality, however, convening a *reunion de plenipotenciarios* does not appear to be very difficult. There are fewer member states in the Andean

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<sup>62</sup> See 1-IP-90 and 3-IP-93. These cases were later iterations of the 1987 complaint that the ATJ rejected because private actors were at the time barred from raising noncompliance cases. See 1-AI-1987.

<sup>63</sup> *Van Gend en Loos* decision ECJ 26/62 [1963] ECR 1, 12.

<sup>64</sup> 1-IP-90: conclusion point 1.

<sup>65</sup> The 1990s were a time of significant unrest in Peru. The most noteworthy event was the *autogolpe* (self-coup) in which President Alberto Fujimori, with the support of the military, suspended the constitution, dissolved the Congress, and purged the judiciary.

<sup>66</sup> The Sucre Protocol of July 30, 1997 amended a number of provisions of the Cartagena Agreement. It was much like the European Union's Single European Act that re-launched European integration by advancing the Treaty of Rome's longstanding goal of developing a common market. The Protocol contained a "transitory provisional chapter" stating that the Free Trade Area would become operational by the end of 2005, and it allowed Peru to negotiate with the Commission its entry into the common external tariff system. See: [http://www.comunidadandina.org/INGLES/normativa/ande\\_trieb4.htm](http://www.comunidadandina.org/INGLES/normativa/ande_trieb4.htm). For a summary of the Protocol's key achievements, see <http://www.comunidadandina.org/INGLES/press/press/np14-4-03b.htm>.

<sup>67</sup> The Tribunal reasoned that Decisions were "public acts" and that there was a general interest in ensuring the validity of such acts notwithstanding the *Junta's* change of mind. Point 1.4.1 of ATJ ruling 1-AN-1996.

<sup>68</sup> Points 2.4 & 2.5 of ATJ ruling 1-AN-1996.

<sup>69</sup> It isn't entirely clear what qualifies as a *reunion de plenipotenciarios*. Would a meeting of heads of states suffice? One difficulty in answering this question is that 'Decisions' are the formal label attached to all Andean laws, and it often isn't clear whether a 'Decision' was adopted at a *reunion de plenipotenciarios*, or in a Commission meeting.

Community than in the EC, no evidence of a reluctance to convene intergovernmental conferences, and no larger *acquis* of normative commitments that national governments view as inviolable. In addition, the existence of powerful Executives means that domestic ratification of treaty amendments is usually assured.

### 3.2.2. Does the Community Possess Implied Powers to Preempt National Laws?

Another question that both the ATJ and ECJ faced was whether member states could adopt national legislation in the absence of community rules. The founding treaties, which primarily focused on creating supranational institutions and setting collective goals, did not answer this question. As compared to the ECJ, the ATJ has given governments significantly greater leeway to adopt national laws in areas of community competence and has refused to imply powers for Andean institutions.

The ECJ addressed the issue of implied powers in the *ERTA* decision.<sup>70</sup> As Joseph Weiler has explained, the ECJ conferred on EC institutions the authority to adopt treaties binding on the member states—a power not mentioned in the Treaty of Rome. To achieve this result, the court “sidestep[ped] the presumptive rule of interpretation typical in international law, that treaties must be interpreted in a manner that minimises encroachment on state sovereignty.” Instead, it “favoured a teleological, purposive rule drawn from the book of constitutional interpretation” (Weiler 1991, p. 2416). The ECJ later barred states from enacting any national legislation on issues within the community’s exclusive competence. Weiler aptly summarized the consequences of the ECJ’s doctrinal moves:

In a number of fields, most importantly in common commercial policy, the [ECJ] held that the powers of the Community were exclusive. Member States were precluded from taking any action per se, whether or not their action conflicted with a positive measure of Community law. In other fields, the exclusivity was not an a priori notion. Instead, only positive Community legislation in these fields triggered a preemptive effect, barring Member States from any action, whether or not in actual conflict with Community law, according to specific criteria developed by the court. Exclusivity and pre-emption not only constitute an additional constitutional layer on those already mentioned but also have had a profound effect on Community decision making. Where a field has been pre-empted or is exclusive and action is needed, the Member States are pushed to act jointly. (Weiler 1991, p. 2416)

The ATJ, although aware of the ECJ’s experience, chose a different path—the principle of *complemento indispensable*. According to this doctrine, first espoused in a 1988 ruling, member states may enact domestic laws necessary to implement a community rule provided that those laws do not obstruct or nullify the community rule.<sup>71</sup> In a 1990 decision, the ATJ further cabined the preemptive force of Andean law. It stressed that integration is a gradual, incremental process that limits the extent to which community rules preempt national authority even in areas, such as intellectual property,<sup>72</sup> where Andean law clearly governs: “[I]t seems logical that many of these diverse issues, even if they have to be a matter of common regulation in the beginning, are still within the competence of the national legislator for an indefinite time until they are effectively covered by Community norms.”<sup>73</sup>

<sup>70</sup> Case 22/70, *Commission v. Council (ERTA)* [1971] ECR 263.

<sup>71</sup> ATJ decision 2-IP-88: point 3.

<sup>72</sup> The ATJ has been given greater preemptive force to Andean intellectual property rules than to other areas of Andean law. The Tribunal has relied on the extensive and detailed secondary legislation on patents, trademarks, and copyrights as an indication that the member states had “sovereignly transferred” their “exclusive authority” over intellectual property issues to the community level. See 1-IP-96: section III (holding that, in the area of intellectual property, member states cannot deviate from “the common interests” of the community except by acting through Andean institutions).

<sup>73</sup> 2-IP-90: see point 1.

### 3.2.3. How Much Deference is Appropriate When National Judges Apply Community Law?

Both supranational tribunals have considered how to define their relationships with national judges at the boundary between community law and domestic law. In *Simmenthal*, the ECJ articulated a doctrine that includes a mandatory obligation for “every national court [to] apply Community law in its entirety and . . . accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”<sup>74</sup> In subsequent cases, the ECJ set stringent limitations on national judges’ ability to interpret EC law without first seeking the court’s guidance.<sup>75</sup>

Although the ATJ referred to the *Simmenthal* decision in early preliminary rulings,<sup>76</sup> it later refused to endorse the full implications of the case and its progeny. The key dispute involved various challenges to municipal alcohol licenses in Colombia. In one suit, opponents argued before the Colombian Constitutional Court that the licenses violated Andean law.<sup>77</sup> The court rejected the suit, concluding that community law did not supplant Colombian law. Unlike human rights treaties, which have quasi-constitutional status in Colombia,<sup>78</sup> Andean law was, according to the court, equivalent to domestic legislation. Because such laws “and the Constitution do not share the same hierarchy, nor are [they] an intermediate legal source between the Constitution and ordinary domestic laws, . . . contradictions between a domestic law and Andean community law will not have as a consequence the non-execution of the [domestic] law.” The Colombian Court adopted somewhat abstruse reasoning, stating that community law has “primacy” over conflicting national law, but suggesting that primacy means that community law “displaces but does not abrogate or render non-executable” conflicting national legislation.<sup>79</sup>

A later iteration of the dispute involved a preliminary reference from another Colombian court, the Consejo de Estado, which arose after the ATJ upheld a separate noncompliance challenge to the licenses by two other member states. Had the Tribunal followed *Simmenthal*, it would have directed the national judges to invalidate the licenses as contrary to Andean law. Instead, the ATJ merely repeated its finding from the earlier noncompliance suit without indicating whether the Consejo de Estado was required to give effect to that finding.

This deference is consistent with the ATJ’s broader understanding of the division of authority between itself and domestic courts. Our review of all preliminary rulings through 2007 disclosed only one case, decided in 1998, where the ATJ considered how its interpretation of Andean law might apply to the facts presented.<sup>80</sup> In all

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<sup>74</sup> *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)*, ECJ Case 106/77 (1978) ECR 629, [1978] CMLR 263. Quote from CMLR p. 283.

<sup>75</sup> *SRL CILFIT v. Ministry of Health (I)*, ECJ case 283/81, [1982] ECR 3415. For an explanation of how the ECJ used this ruling to constrain national judges, see (Mancini and Keeling 1992).

<sup>76</sup> See discussion of 1-IP-88, *supra*.

<sup>77</sup> The licenses were also successfully challenged in an ATJ noncompliance suit. See 3-AI-97.

<sup>78</sup> The Constitutional Court ruling notes that international human rights agreements ratified by Colombia are part of a “bloque de constitucionalidad” which gives them a status superior to than national law. Article 93 of Colombia’s 1993 Constitution states: “International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically.” Colombian Constitutional Court, Sentencia C-256/98 of 27 May 1998, Section 3.1.

<sup>79</sup> *Ibid.* Section 3.1.

<sup>80</sup> The 1998 case concerned Venezuela’s implementation of a common Andean policy that aimed to strengthen the competitiveness of the Andean shipping industry. The ATJ found the facts provided to be insufficient, thus it added to the information provided by the Venezuelan court, chronicling *Naviera Pacifico*’s efforts to get the Venezuelan government to create domestic incentives that might help it weather economic hard times, and to exclude the company *NORSUL* from transporting cargo from the route assigned to *Naviera Pacifico* since the Brazilian policies excluded shipping companies from the Andean Region. Although the ATJ did not direct the Venezuelan court to grant subsidies, the clear implication was that Venezuela must exclude access to ships from countries that do not grant reciprocal access to ships from other Andean Community member states. The application of these principles to the facts at hand was thus obvious. See 19-IP-98.

other preliminary rulings, the ATJ explicated the meaning of Andean law in the abstract without suggesting how national judges should resolve the dispute. This deferential approach has continued even after the 1996 Cochabamba Protocol, discussed above, in which member states indicated that the ATJ could consider the facts of preliminary references and thus, implicitly, guide domestic courts in the application of Andean law.<sup>81</sup>

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When ATJ judges considered each of the three legal issues discussed above, they were unquestionably aware of the analogous ECJ precedents interpreting EC law. They nonetheless chose to diverge from the path that their European colleagues had previously trod. To be sure, the ATJ was not required to follow EC doctrine. Although both communities share the goal of promoting regional integration, the EC is a distinct legal system and, as such, ECJ rulings are at most persuasive authority for interpreting Andean law. Nevertheless, given the very similar design of the two supranational tribunals and the repeated references to ECJ doctrine by the drafters of the ATJ Treaty, one might have expected an Andean “copy” of a European “model” to adhere more closely to the doctrines of its parent.<sup>82</sup>

What, then, explains the distinctive evolution of ATJ jurisprudence? Why, for example, did the ATJ allow member states broad leeway to circumvent the Cartagena Agreement’s core objectives? The cases themselves do not answer this question, but the broader political context into which a supranational tribunal was transplanted suggests a number of plausible explanations. One possibility is that many Andean Pact programs from the 1960s and 1970s predated the ATJ’s existence. It would have been too controversial for the Tribunal to overturn these longstanding policies.

A second possibility relates to the basic premise of the region’s early integration agenda. As previously discussed, the Andean Pact’s import substitution policy and regional industrial programs depended heavily on foreign investment, which never materialized. The lack of progress regarding Andean industrial development created a conundrum: should a state be held to the community’s market liberalization goals if it had not received the *quid pro quo* of industrial development assistance? Andean law resolved this problem by creating a Free Trade Program that allowed member states to exempt politically sensitive products (Hojman 1981). This resolution was in tension with the Cartagena Agreement, which prohibited imposing new trade barriers and required the progressive removal of those barriers. But it was a plausible political compromise, one that was arguably necessary to keep the troubled integration project afloat, and one that the ATJ may have been unwilling to undermine without a clear textual basis in the treaty.

A third possibility is that the judges’ interpretation of Andean law reflects a belief that the Tribunal lacks the deep political support needed to promote legal integration more aggressively. Since member states can easily amend the Cartagena Agreement, the ATJ may have been reticent to interpret the treaty as a constitutional charter that limits national power and discretion, as the ECJ has done for the Treaty of Rome. Also unlike in Europe, national judges in the Andes have generally refrained from setting aside national laws that conflict with community law, leading the ATJ to back-pedal from its early embrace of the ECJ’s *Simmenthal* doctrine. However, in those few areas where greater legal and political support for integration exists—in particular, intellectual property law—the Tribunal has been willing to be bolder, especially when the General Secretariat or member states as a group have expressed support for its efforts.

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<sup>81</sup> See the discussion of the Cochabamba changes regarding preliminary ruling cases, *supra*.

<sup>82</sup> For one issue—the primacy of community law over other international agreements such as the WTO—the ATJ has been more willing than the ECJ to extend its authority. Over time, however, the ECJ has interpreted EC rules so as to constrain member states from undermining those rules through multilateral treaties (Alter and Helfer 2011).



#### 4. Supranational Transplants: Lessons from the Andean Tribunal of Justice

A critical issue that emerges from the literature on legal transplants, reviewed above, is the existence and extent of local demand for transplanted laws and institutions. Neofunctionalist theory assumes that private litigants who stand to benefit from regional integration will raise legal claims before supranational bodies and thereby help to develop community rules. Adopting a different perspective, studies of the export of ideas offer a range of reasons why local actors may either embrace or reject transplants. Laws and institutions copied in response to coercive external pressure or unreflective mimicry are likely to be resisted or remain unused. In contrast, transplants that local actors adopt voluntarily, and transplants that are adapted to local needs, are more likely to be effective.

This article has applied these theories to analyze the transplant of EC laws and institutions to South America. When Andean governments first established the Andean Pact, they copied the European model but chose not to replicate its judicial system. More than a decade later, governments added a supranational tribunal based on the ECJ. The initial impetus to create the ATJ came from challenges to Andean integration in Chile and Colombia. Andean officials responded to these challenges by tasking a pro-integration network of experts to propose the best legal system for the Andean Pact. The actors who recommended the creation of an ECJ-style Tribunal had been either socialized or persuaded by the ECJ's mostly successful experience. But they nonetheless adapted the ECJ model to take account that the governments that would act on their recommendation were concerned about national sovereignty and ambivalent about adding a court. It then took five years for member states to adopt the *Junta's* proposal, and another three years for them to agree to create a supranational court, which they did as part of a package of reforms intended to re-launch Andean integration.

The copying of the ECJ went beyond the formal design features such judicial access rules, types of cases, and referrals from national courts. Andean leaders also incorporated the direct effect and supremacy doctrines of EC law, which the ATJ confirmed in its early rulings that seemingly embraced the pro-integrative path set by the ECJ. In later cases, however, the ATJ has charted its own course. Although litigants presented the ATJ with a number of opportunities to expand the reach of community law, to promote Andean integration, or to enhance its own powers, the Tribunal responded far more cautiously than the ECJ. In particular, it declined to transform the Cartagena Agreement into a constitution for the Andean Community, it refused to imply powers for Andean authorities, and it refrained from requiring national judges to give effect to its rulings. The ATJ thus refused to follow the ECJ's experience as an expansionist lawmaker. But it has asserted its delegated authority even when doing so involved ruling against member states, and even when it knew that that states might not comply with its rulings (Alter and Helfer 2010, p. 577-9).

How, then, did the existence of the ECJ shape the ATJ's founding and its subsequent doctrinal trajectory? Andean leaders, aware of the ECJ's well-known activism, included safeguards in the original ATJ Treaty to limit the ability of private actors to challenge national laws. Perhaps most importantly, private actors were barred from filing noncompliance suits with the *Junta* or the Tribunal. Instead, they were limited to requesting national judges—most of whom were unaware of or unsympathetic to Andean law—to refer cases to the ATJ. Only a handful of such referrals were ever made outside of the exceptional area of intellectual property. And in those cases that reached the Tribunal, the ATJ Treaty limited the judges from applying Andean laws to the facts and thus giving guidance to national courts.

The member states relaxed these structural constraints in 1996 when they adopted a package of institutional reforms that expanded the court's docket. These adaptations suggest lesson drawing, both from the ATJ's first twelve years and from the EC legal system. But despite these changes intended to increase the effectiveness of the Andean legal system, the ATJ has continued to issue mostly

narrow, technical rulings and avoid the expansionist lawmaking of its jurisdictional cousin. This may be because national judges have remained unpersuaded that the supremacy of Andean law requires them to revise existing practices and set aside conflicting national rules.

One reason for this circumspect approach is that the ATJ has confronted the same core challenge that all supranational transplants face: how to enlist the support of key interlocutors and compliance constituencies within the member states. In Europe, the ECJ cultivated national judges as key allies in promoting legal integration. In copying the ECJ's preliminary ruling system, and in authorizing private litigants to bring suit invoking Andean rules in domestic courts, Andean officials opened the door for the ATJ to forge its own alliances with domestic judges. But those judges have declined to become the Tribunal's active partners. As we explain elsewhere, once the initial barriers to referrals were surmounted, national judges have been willing to refer cases when Andean rules unambiguously require them to do so (Helfer and Alter 2009, p. 900-11). But they do not work in tandem with the ATJ to develop community law. They do not send provocative questions to the Tribunal, and they have displayed little appetite for defying governments by setting aside domestic laws or decrees that conflict with Andean law.

The ATJ has, however, forged a different set of alliances—with domestic intellectual property agencies. These agencies apply Andean Decisions to determine whether to register the thousands of applications for trademarks and patents that they receive from private firms and the attorneys who represent them. The agencies were thus logical interlocutors for ATJ judges. Agency officials repeatedly sought the Tribunal's guidance to clarify ambiguities and lacunae in Andean law, and they have they habitually applied those rulings even when doing so challenges national executive or legislative decisions. Over time, the ATJ and the agencies developed a symbiotic relationship that helped to establish intellectual property as a distinctive "island of effective international adjudication" in the Andean Community legal system (Helfer *et al.* 2009).

These findings have important implications for neofunctionalist theory, including its recent revival as a theory of legal integration. Neofunctionalism predicts an alignment between the demands of private litigants and the interests of supranational judges to promote integration. Our study indicates that it is insufficient for litigants to challenge domestic rules; a supranational court must provide a hospitable venue for using community law to dismantle conflicting national policies. The ATJ's refusal to interpret Andean law purposively to help litigants further their economic interests created a vicious circle that inhibited the filing of additional cases and diminished the domestic influence of Andean law.<sup>83</sup> The only exception to this pattern is in the area of intellectual property, where the ATJ enjoys the support of a specialized advocacy network whose branches extend both within the state (the administrative agencies that apply Andean laws when reviewing patent and trademark applications) and outside of it (the private firms that utilize intellectual property and the attorneys that defend their interests).

In sum, the ATJ's experience suggests—contrary to the expectations of neofunctionalist theory—that transplanting supranational laws and legal institutions is insufficient in itself to stimulate domestic demand for those laws and institutions, even where a handful of entrepreneurial litigants present a supranational court with opportunities to embed the transplants, and even where at least some supranational judges seem inspired to promote Andean legal integration (Alter 2009, p. 63-91).

At the level of legal doctrine, the ATJ's selective emulation of the ECJ jurisprudence offers insights for ideational diffusion theory. The ECJ is widely viewed as

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<sup>83</sup> This is also true for the ECJ, where ECJ rulings can either increase or decrease litigation on specific issues. See: (Alter 2000, p. 512-5).

authoritative by judicial and legal communities around the world. This exalted stature offered a ready blueprint for Andean judges: slavishly follow the ECJ's doctrinal innovations and defend that decision by referencing the many design similarities that the two courts share. But the ATJ declined to chart this course, suggesting that socialization is not the mechanism through which the ECJ model diffuses. Instead, the Tribunal's *a la carte* approach suggests lesson-drawing—a form of mimicry in which the judges recognized that legal doctrines that served salutary functions in Europe might not work well in the Andes where the pace and scope of integration were far more modest. Adapted mimicry, as opposed to blind mimicry, gave ATJ judges discretion to pick and choose which EC legal doctrines were germane to the Andean Community context and consonant with local political realities.<sup>84</sup>

Several legal scholars have argued that the European experience is *sui generis* in ways that preclude the ECJ from serving as a guide for other international courts and tribunals (Alvarez 2003, p. 225-7, Posner and Yoo 2005, p. 55-7). The extent to which the ATJ has selectively copied from the ECJ reveals, however, that a supranational court can be a model in *some* respects but not in others. In particular, the ATJ's refusal to emulate the ECJ's penchant for expansionist lawmaking suggests that transplanting key design features and legal doctrines does not necessarily result in transplanting judicial activism in the interpretation of key legal texts (Alter and Helfer 2010).

There are several reasons to expect that the ECJ will remain an influential model for other international courts and tribunals. The ECJ has developed extensive and well-reasoned legal doctrines that have benefitted from a large and stable secretariat, a cadre of professional clerks (known as *referendaires*), and an active and ongoing dialogue with critics including law faculty and national high court judges. ECJ rulings are also translated into multiple languages and posted on the internet, making it easy for judges around the world to access and review them.

The ECJ will also continue to serve as a model because the European Union is interested in spreading supranational courts to other regions and in helping them flourish. Europe provides free consultations, encourages judicial networks, and gives in-kind and financial support to resource-starved governments and supranational judges. European universities also invite students from around the world to study the European integration system, generating pro-integration scholarship by local actors. The EC provides these forms of aid without overt strings attached because it believes its model is worth emulating (Alter 2011b, Lenz 2011 (forthcoming)).

Over time, however, ECJ transplants may find that they have more in common with each other than with their parent. The ATJ—which has close to thirty years of experience operating in a developing country context—may in fact be a more suitable guide for more recent ECJ copies to consult and emulate. The next question to consider is how other supranational tribunals based on the European model differ from the ECJ. Because judges on international tribunals, and scholars writing about these tribunals, often invoke similar ECJ rulings, one can easily be misled into assuming that legal systems and judicial practices are more alike than they in fact are (Nyman Metcalf and Papageorgiou 2005, p. 86-92, O'Brien and Morano-Foadi 2009, van der Mei 2009). The comparisons in this article demonstrate that scholars must consider both similarities and differences and pay careful attention to how legal transplants actually operate in practice.

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<sup>84</sup> The ECJ also relies on persuasion to influence public and private actors to follow its lead. We explore how the ECJ's environment differed in (Alter and Helfer 2010).

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