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Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice†

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 nearly a dozen 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 study of supranational transplants and theories of supranational legal integration more generally.

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).

From its inception, the EC included a court of justice, but early replications of European integration did not.¹ Although these re-

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1. See *infra* note 14. 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 to coordinate regulations in areas not covered by the EC. In 1965 member states adopted the treaty

gional 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.²

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,³ but it refrained from applying those rulings in ways that provoked controversy. As a result, ECJ case law was of greater doctrinal than political significance.⁴

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 to help overcome political blockages and build integration through law.⁵ Observers also credited the ECJ's alliance with national courts with increasing member states' respect for EC rules and with coordinating interpretations of common EC rules across borders.⁶ When critics began to question the EC's political accountability and democratic legitimacy, proponents of integration 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.⁷ And the court's review of the validity of EC legislation further bolstered the accountability of

establishing a Benelux Court of Justice, although the court was not created until 1975. Today, the court is an adjunct to the ECJ. It reviews Benelux rules in areas not regulated by the EC.

2. For an analysis of the problems of early integration efforts, see Joseph S. Nye, *Comparing Common Markets: A Revised Neofunctionalist Model*, 24 INTERNATIONAL ORGANIZATION 796 (1971); WALTER MATTLI, *THE LOGIC OF REGIONAL INTEGRATION* (1999); Philippe Schmitter, *A Revised Theory of European Integration*, 24 INTERNATIONAL ORGANIZATION 836 (1970).

3. Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1(1981). 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. Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2424-31 (1991).

4. Karen J. Alter, *Who Are the Masters of the Treaty?: European Governments and the European Court of Justice*, 52 INTERNATIONAL ORGANIZATION 125, 130-32 (1998).

5. Weiler, *supra* note 3; ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004); RACHEL CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007); MIGUEL POIARES MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION: A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY* (1998).

6. See Weiler, *supra* note 3, at 2412-31; see also Alter, *supra* note 4.

7. KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* 87-117 (2001).

European institutions, even if some claimed that the ECJ was biased in favor of community over state interests.⁸

The ECJ's increasingly important role 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.⁹ In 1969, five countries on the western edge of South America¹⁰ imported from Europe the idea of building a regional common market. The Andean Pact adopted community legislation that was 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 Tribunal received few cases. Over time, however, its docket has grown to the point that the ATJ is the third most active international court today (after the ECJ and the European Court of Human Rights).¹¹

In the 1990s, the end of the Cold War, the rise of the Washington Consensus,¹² and the creation of the World Trade Organization spawned a new wave of regional integration. This wave incorporated supranational judicial institutions that had proven so important to

8. Trevor Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Union*, 112 LAW QUARTERLY REV. 95 (1996).

9. See *infra* note 14.

10. The composition of the Andean integration project has shifted over time. The five founding members of the Andean Pact in 1969 were Bolivia, Chile, Colombia, Ecuador, and Peru. Venezuela joined the group as a sixth member in 1973. Chile withdrew in 1976 after the coup by Augusto Pinochet. In 2006, Venezuela withdrew from the Andean Community and Chile rejoined the group as an associate member.

11. The number of legally binding decisions in contentious cases issued by international courts through 2011 include: ECJ (18,511), European Court of Human Rights (14,940), ATJ (2,197), GATT/WTO (401, including GATT and WTO panel rulings and Appellate Body decisions); Organization for the Harmonization of African Law (569); and Inter-American Court of Human Rights (238). See KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW COURTS, POLITICS, RIGHTS* (forthcoming 2013). For earlier statistics, see Karen J. Alter, *The New International Courts: A Bird's Eye View*, (2010), available at <http://www.cics.northwestern.edu/publications/workingpapers/buffett.html>. In comparison, a recent review of the ICJ's docket using a more expansive measure finds that "the ICJ has heard 124 contentious cases and has considered [26] requests for advisory opinions." This source also notes, however, that "these figures likely overstate the number of true cases . . . by approximately 15 percent" due to "multiple filings in single disputes and . . . filings that were not accepted." Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 805 & n.105 (2012).

12. 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 U.S. 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 John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED* (John Williamson ed., 1990).

advancing integration in Europe.¹³ There are now ten operational 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 of community law to the supranational court.¹⁴

Transplanting European laws and legal institutions to other areas around the world is hardly a new phenomenon. Many legal systems incorporate transplants from France, Britain, Germany, Spain, and the Scandinavian countries.¹⁵ 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 ATJ preliminary rulings to develop insights about how the ECJ's experience did and did not influence the development of Andean legal doctrine and the political space within which the ATJ

13. Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Karen J. Alter, *The Evolving International Judiciary*, 7 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 387 (2011).

14. Ten international courts copy both design features from the ECJ, albeit with some variations: the Benelux Court, the Andean Tribunal of Justice, the European Free Trade Area Court, the West African Economic and Monetary Union Court, the Common Market for East African States Court, the Central African Monetary Community Court, the East African Community Court, the Caribbean Court of Justice, the 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 restructure the Caribbean Court of Justice and the Economic Court of the Commonwealth of Independent States into ECJ-style international courts. And the proposed but not yet created Court of the African Mahgreb is modeled on the ECJ. For additional information, see Karen J. Alter, *The Global Spread of European Style International Courts*, 35 WEST EUROPEAN POLITICS 135 (2012).

15. See, e.g., Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 163-67 (2003); WADE JACOBY, *IMITATION AND POLITICS: REDESIGNING MODERN GERMANY* (2000).

operates. Section IV investigates what the ATJ's experience tells us about supranational courts and regional integration efforts more generally.

Our analysis reveals several key findings: First, that mimicry is the principal mode through which the ECJ model is diffused. Second, that copying the ECJ is selective rather than wholesale, which suggests that adapting a court to local legal and political contexts may be necessary for successful transplantation. Third, that copying brings many benefits in the form of expertise and material assistance from exporting countries. Fourth, that importing a supranational judicial institution does not necessarily copy the institution's politics. Specifically, we find that states can import an ECJ-style court without replicating its penchant for judicial activism.

I. 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.¹⁶ 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 design and operation of the ATJ.

A. *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.¹⁷ 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.

16. The literature is vast. According to one study, over 400 articles on policy diffusion were published between 1998 and 2008 in the discipline of political science alone. For stock taking on this literature, see ERIN GRAHAM ET AL., *THE DIFFUSION OF POLICY DIFFUSION RESEARCH* (2008); Wade Jacoby, *Inspiration, Coalition and Substitution: External Influences on PostCommunist Transformations*, 58 *WORLD POLITICS* 632 (2006).

17. David Nelken, *Towards a Sociology of Legal Adaptation*, in *ADAPTING LEGAL CULTURES* (Johannes Feest & David Nelken eds., 2001).

Scholars who study transplants recognize that the transplant analogy is flawed in another way.¹⁸ Nearly all contemporary legal systems consist of some amalgam of indigenously generated laws, imported legal traditions, and laws 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 nineteenth century, European governments transplanted their institutions to help "civilize" the populations they colonized.¹⁹ Following World War II, the United States transplanted its own institutions around the world, including constitutional review, elections, and business associations.²⁰ The end of the Cold War ushered in a period of economic liberalism and a renewed enthusiasm for legal transplants by international institutions.²¹ 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.²²

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, 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.²³

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

18. Pierre Legrand, *What "Legal Transplants?,"* in ADAPTING LEGAL CULTURES, *id.*

19. Napoleon is said to have regarded his expanding Civil Code as the only accomplishment that would outlive him. See EMMANUEL-AUGUSTE-DIEUDONNÉ COMTE DE LAS CASES, MÉMORIAL DE SAINTE HÉLÈNE: JOURNAL OF THE PRIVATE LIFE AND CONVERSATIONS OF THE EMPEROR NAPOLEON AT SAINT HELENA (M.C. Carey, I. Lea, & A. Small. 1823).

20. JACOBY, *supra* note 15.

21. Berkowitz et al., *supra* note 15, at 163-67.

22. Rafael La Porta et al., *Legal Determinants of External Finance*, 52 THE JOURNAL OF FINANCE 20 (1997); Rafael La Porta et al., *Law and Finance*, 106 JOURNAL OF POLITICAL ECONOMY 1113 (1998). These studies suggested that common law systems generated better economic outcomes as compared to civil law systems.

23. Alan Watson, *Legal Transplants and Law Reform*, 92 LAW QUARTERLY REV. 79 (1976). Watson finds that transplants are more likely to be embraced by legal systems that share similar roots and traditions.

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.”²⁴ 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 often 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. 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.²⁵

These insights apply to supranational transplants in distinctive ways. For example, the finding about legal families helps to explain why common market legal systems are especially likely to emulate the ECJ. Architects of these 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), later subsumed by the World Trade Organization (WTO), and the EC’s supranational judicial system.

The WTO model relies on states to file complaints, which are reviewed by ad hoc panels whose decisions can be appealed to a standing appellate body. The WTO also uses a system of reciprocal sanctions to enforce these decisions. Complaining states that prove violations of WTO obligations can raise tariffs on imports from violating countries as a form of compensation and to induce their 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 adopt legal rules that are directly applicable in domestic legal orders.

24. Berkowitz et al., *supra* note 15, at 171. Others have found that the same holds regarding transplanted political institutions. See, e.g., JACOBY, *supra* note 15.

25. Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES IN LAW 723, 737 (2009). 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. Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 621 (2010).

2. *A preliminary ruling mechanism.* National judges can refer to the supranational court questions of interpretation regarding community rules.
3. *Challenges to the validity of decisions and actions of supranational institutions.* Both private actors and states can challenge the validity of supranational legal rules, and private actors can challenge administrative decisions that directly affect them.²⁶
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. They can also selectively choose features from both the ECJ and WTO models.²⁷ Most ECJ emulators in fact copy at least three of these features, albeit with some variations.²⁸ 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 ECJ 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 literature on the diffusion of European ideas.

B. Insights from the Literature on Neofunctionalist Theory and Supranational Integration

The success of European integration led early supporters to develop neofunctionalism, an institution-based political process theory, to predict the evolution of all regional integration projects. 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

26. Initially, private litigants could file complaints with the ECJ to challenge decisions of the EC Commission. Today, such suits are heard by the General Court, which was previously known as the Tribunal of First Instance.

27. The notion that importers "order from a menu" comes from WADE JACOBY, *THE ENLARGEMENT OF THE EUROPEAN UNION AND NATO: ORDERING FROM THE MENU IN CENTRAL EUROPE* (2004).

28. For example, some ECJ emulators have adapted the ECJ model to protect national sovereignty or to increase international oversight of domestic actors. See Alter, *supra* note 14.

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 neofunctionalist scholars nonetheless expected regional integration processes to develop elsewhere in the world and yield similar economic and political outcomes.²⁹

By the 1970s, however, neofunctionalists had thoroughly repudiated the theory and candidly acknowledged its many shortcomings. First, the theory failed to 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 slowed forward momentum. The sharp discrepancies between theoretical predictions and empirical reality led Haas to declare neofunctionalism to be "obsolescent."³⁰ Ever since, most political scientists have shied away from invoking the theory.³¹

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 evolves.³² Slaughter and Mattli observed that the structure of the European 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 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 also argued that law could more easily be shielded from political opposition, and they observed that the ECJ frequently sought to "upgrade the common interest" by linking individual cases to larger community objectives. In short, the expansion and penetration of supranational law into national legal orders followed the political dynamics Haas expected: alliances between supranational and subnational actors, spillovers, and the enhancement of common interests.

29. Ernst Haas, *International Integration: The European and the Universal Process*, 15 INTERNATIONAL ORGANIZATION 366 (1961); Ernst Haas, *The Study of Regional Integration*, 24 INTERNATIONAL ORGANIZATION 607 (1970).

30. ERNST HAAS, *THE OBSOLESCENCE OF REGIONAL INTEGRATION THEORY* (1975).

31. For a discussion of the rise and fall of neofunctionalist theory, see James Caporaso & John Keeler, *The European Union and Regional Integration Theory*, in *THE STATE OF THE EUROPEAN UNION* (Carolyn Rhodes & Sonia Mazey eds., 1995). A new introduction added to Haas' re-released *Beyond the Nation State* explores how Haas' neofunctionalist theory inspired contemporary political science theories. See ERNST B. HAAS, *BEYOND THE NATION STATE FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (2008).

32. Anne-Marie Burley & Walter Mattli, *Europe before the Court*, 47 INTERNATIONAL ORGANIZATION 41 (1993).

Alec Stone Sweet later extended these insights, linking 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 of a legal system open to self-interested actors. Where these conditions exist, economic self-interest leads litigants to invoke international economic law before supranational 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 expansion of the law. Stone Sweet's theory does not require embracing the teleology advanced by Haas; it accepts that politicians can revise legal rules and thereby redirect the integration trajectory. But the theory suggests that such interventions will be rare and that courts will, over time, expand the scope and reach of the law.³³

Stone Sweet views law, trade, and litigation as creating virtuous circles of law generation. But the relationship among these three elements is underspecified. 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.³⁴ The issue of whether bottom-up demand or top-down policy choices drive legal integration 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, to signal a credible commitment by governments, or to give domestic actors a stake in implementing or enforcing legal rules. To the contrary, the transplanted nature of foreign laws and institutions—especially

33. Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 *COMPARATIVE POLITICAL STUDIES* 147 (1999). Stone Sweet further developed his theory in ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004) [hereinafter STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE*] and later focused on the Commission's role as part of the neofunctionalist legal dynamic. See Alec Stone Sweet, *How the European Legal System Works and Does Not Work* (Social Science Research Network, 2010).

34. Stone Sweet's work includes a number of caveats, i.e., factors that limit judicial discretion. STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE*, *supra* note 33, 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. *Id.* at 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. Jean-Yves Pitarakis & George Tridimas, *Joint Dynamics of Legal and Economic Integration in the European Union*, 16 *EUROPEAN JOURNAL OF LAW AND ECONOMICS* 357 (2003); Judith H. Goldstein et al., *Institutions in International Relations: Understanding the Effects of GATT and WTO on World Trade*, 31 *INTERNATIONAL ORGANIZATION* 37 (2007).

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 theory: how to create local demand for transplanted institutions and laws. Neofunctionalism cannot answer this question because it is premised on the same contested assumptions 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. Yet self-interest remains the underspecified engine of the theoretical apparatus. It is far from clear, however, why local litigants, scholars, and judges would embrace transplanted rules, let alone view their respective self-interests as aligning with regional integration initiatives.

C. *Insights from the Literature on the Diffusion of European Ideas*

Supranational transplants also provide evidence to assess theories of how ideas, policies, and institutions diffuse across borders. Scholars who advance such theories are interested in the mechanisms of diffusion and the resulting transformation of politics and identities. Tanja Börzel and Thomas Risse identify five such mechanisms: (1) exporters of ideas 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 using normative pressure such that local actors internalize a foreign 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 or by *mimicking* foreign models to reap benefits or send signals to external and internal actors.³⁵

Risse and Börzel are primarily interested in the mechanisms of diffusing European Union ideas. They also suggest, however, that each mechanism shapes the extent to which a foreign import becomes domestically entrenched.³⁶ For example, Börzel and Risse expect per-

35. THE TRANSFORMATIVE POWER OF EUROPE: THE EUROPEAN UNION AND THE DIFFUSION OF IDEAS (Tanja A. Börzel & Thomas Risse eds., 2009).

36. The mechanisms are also relevant to testing the claims of neofunctionalist theory. For example, if mimicry were the dominant mode of transplantation, it would

suasion and socialization to have the greatest potential to 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.

The legal transplants literature offers insights that help to refine these expectations. Berkowitz, Pistor, and Richard argue that the way in which local recipients receive 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 or other initial conditions.”³⁷ In other words, blind mimicry, or copying inspired by coercion and inducement, is likely to generate a “transplant effect” in which local actors resist transplanted ideas and institutions.³⁸ In contrast, the existence of local adaptations may indicate that importers are considering local needs and making adjustments that increase the likelihood of the transplant’s success.

There is no evidence that EC officials used coercion or inducements to influence other regional integration projects to adopt a supranational court. This leaves three potential mechanisms of diffusion—socialization, persuasion, and emulation. If a community legal system is a product of socialization of local elites, then we should observe a higher incidence of emulation among those actors who have more contact with their European counterparts. The question then becomes whether this socialization penetrates the local context, or 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 exports in promoting integration through law. To the extent that local actors are also persuaded, we might not observe a transplant effect. Finally, emulation 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 its associated adaptations, in contrast, are more likely to lead to successful engrafting of the transplant.

cast doubt on whether there is any inherent logic of integration that arises when other regions copy the European model.

37. Berkowitz et al., *supra* note 15, at 179.

38. *Id.* at 170-72.

II. COPYING THE ECJ: CREATING THE ANDEAN TRIBUNAL OF JUSTICE

This section describes the transplantation of the European integration model to the Andes. In 1969 Chile, Bolivia, Colombia, Ecuador, and Peru agreed to create a common market to spur regional economic growth.³⁹ 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 with other nations, and induce investors to keep profits in the region.⁴⁰ The Andean leaders adopted the European integration model, but used it to achieve different substantive goals. Whereas Europe initially focused on market liberalization and support for the agriculture, coal and steel industries, Andean governments promoted a policy of import substitution, which sought to lessen dependency on foreign markets, build manufacturing sectors to take advantage of local capabilities, and diminish economic disparities across the region.⁴¹

The Andean Pact's founding treaty, the Cartagena Agreement,⁴² largely copied the EC's institutions. It established a supranational governance structure that included a "Commission" of national executives to adopt Andean secondary legislation (referred to in Spanish as "*Decisions*") and a regional administrative body (the "*Junta*") that supervised their implementation.⁴³ The original Andean Pact did not include a court, and *Decisions* did not have direct domestic effect.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 treaties—were wary of "legalism" and feared that formal adjudication mechanisms would engender litigation by politically

39. The 1966 Bogota Agreement that launched the Andean integration project envisioned broader integration, building a regional infrastructure and coordinating monetary policy so that the entire region would be one large common market. F.V. GARCÍA AMADOR, *THE ANDEAN LEGAL ORDER: A NEW COMMUNITY LAW* 2 (1978).

40. William P. Avery & James D. Cochrane, *Innovation in Latin American Regionalism: The Andean Common Market*, 27 *INTERNATIONAL ORGANIZATION* 181, 198-99 (1973).

41. Scott Horton, *Peru and Ancom: A Study in the Disintegration of a Common Market*, 17 *TEX. INT'L L.J.* 39, 40-41 (1982). The philosophy underpinning the Andean approach followed closely the approach of Raúl Prebisch. See RAÚL PREBISCH AND INTER-AMERICAN DEVELOPMENT BANK, *CHANGE AND DEVELOPMENT—LATIN AMERICA'S GREAT TASK*; REPORT SUBMITTED TO THE INTER-AMERICAN DEVELOPMENT BANK (1971).

42. Andean Subregional Integration Agreement, May 26, 1969, 8 *I.L.M.* 910 [Cartagena Agreement].

43. 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 THOMAS ANDREW O'KEEFE, *LATIN AMERICAN TRADE AGREEMENTS* (1997); Miguel S. Wionczek, *The Rise and the Decline of Latin America Economic Integration*, 9 *JOURNAL OF COMMON MARKET STUDIES* 49, 59-61 (1970).

44. Horton, *supra* note 41, at 44.

conservative lawyers.⁴⁵ Why, then, did Andean governments eventually decide to create the ATJ?

A. *The Decision to Create the Andean Tribunal of Justice*

From the Andean Pact's inception, governments believed that they possessed the authority to implement the Cartagena Agreement via presidential decrees,⁴⁶ and they used such decrees to bring the treaty into force.⁴⁷ This route had the advantage of avoiding national parliaments, in which fractious political parties might attempt to block or revise implementing legislation.⁴⁸ But the approach also engendered 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 ultimately failed. But the manner in which domestic actors responded to these challenges suggested that Andean *Decisions* would not be given domestic effect—a prospect that acted as a catalyst to create a supranational court.

Business elites filed a key lawsuit in Colombia. In 1971, that country's Supreme Court dismissed the suit,⁴⁹ invoking a longstanding doctrine that disallows invalidation on procedural grounds of treaties adopted in good faith.⁵⁰ But the ruling applied only to the Cartagena Agreement itself, implicitly suggesting that Andean *Decisions* needed parliamentary approval to be valid in Colombia.⁵¹ The court's ruling 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 hear challenges to that legislation.⁵²

45. David Padilla, *The Judicial Resolution of Legal Disputes in the Integration Movements of the Hemisphere*, 11 *LAWYERS OF THE AMERICAS* 75, 91 (1979).

46. See Declaración de Bogotá, 16 August, 1966 and Declaración de los Presidentes de América, 14 April 1967.

47. 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.

48. Avery & Cochraine, *supra* note 40, at 198. Larry W. Thomas, *The Colombian Supreme Decision on the Andean Foreign Investment Code and Its Implications for the Law of Treaties*, 8 *JOURNAL OF INTERNATIONAL LAW AND ECONOMICS* 113, 117 (1973).

49. Colombian Supreme Court, ruling of July 26, 1971, published in *Derecho de la Integración* No. 10, at 160-80.

50. *Id.* at 165 (section discussing *Teoría del Acto Complejo*).

51. *Id.* at 166. For a discussion of this point, see Francisco Orrego Vicuña, *La incorporación del ordenamiento jurídico subregional al derecho interno: Análisis de la práctica y jurisprudencia de Colombia*, *DERECHO DE LA INTEGRACIÓN* 52 (1972). The same legal arguments were used in a legislative debate in Chile, where legislators sought to undermine the Andean investment code that had been implemented via presidential decree.

52. Dissenting opinion of Judge Luis Sarmiento Buitrago, Colombian Supreme Court, ruling of July 26, 1971, *supra* note 49, at 177.

One year later, businesses opposed to the Andean Pact filed a second suit in the Colombian Supreme Court. This time, they challenged the Andean investment code, a centerpiece of the integration process and a lightning rod of contestation.⁵³ The code's strict limits on repatriation of profits galled pro-free market businesses and politicians in the region.⁵⁴ 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 agreed, holding that the code could only be implemented by the parliament.

The Colombian rulings made clear the cost of *not* having a supranational court. The heart of the problem was that political leaders had agreed to a controversial Andean law limiting the repatriation of profits by foreign investors, which they implemented by means of presidential decrees. If national courts could render these decrees invalid, Andean rules and the Andean integration process could be undermined by rearguard domestic litigation. The solution the leaders later adopted—making Andean rules supreme and directly applicable, but also reviewable by an Andean tribunal—was intended to avoid this problem by providing a designated judicial venue for challenging Andean laws, thereby helping national executives achieve their collective goals despite political opposition at home.

Proponents of an Andean tribunal regularly invoked the two Colombian rulings when advocating for the creation of a supranational judicial review mechanism.⁵⁵ The *Junta* itself also referred to the Colombian rulings when discussing the benefits of revising the Andean legal system.⁵⁶ In 1972, six months after the second Colombian ruling, the Commission announced its support for a tribunal. The Commission directed the *Junta* to produce a report on the “necessity to create a court” for the region.⁵⁷ The question of what type of court remained open, however.

53. Thomas Andrew O'Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INTERNATIONAL LAWYER 811 (1996).

54. Thomas, *supra* note 48, at 116. 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. Horton, *supra* note 41, at 49. David E. Hojman, *The Andean Pact: Failure of a Model of Integration?*, 20 JOURNAL OF COMMON MARKET STUDIES 139, 146-49 (1981).

55. See, e.g., AMADOR, *supra* note 39, at 172; Orrego Vicuña, *supra* note 51; Francisco Orrego Vicuña, *La creación de un tribunal de justicia en el Grupo Andino*, 15 DERECHO DE LA INTEGRACIÓN (1974).

56. See JUNTA DEL ACUERDO DE CARTAGENA JUNAC, INFORME DE LA JUNTA SOBRE EL ESTABLECIMIENTO DE ÓRGANO JURISDICCIONAL DEL ACUERDO DE CARTAGENA (Grupo Andino ed., 1972) [JUNAC Recommendation].

57. 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 Osvaldo

B. *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.⁵⁸ Or they could have embraced the GATT dispute settlement system, although at the time member states could block cases from proceeding.⁵⁹ In addition, emulating the GATT would not have established the direct effect of Andean *Decisions* nor created a mechanism for supranational judicial review of Andean institutions and their decisions. Without such review, 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.⁶⁰ 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.⁶¹ A few had even worked with major European integration scholars such

Saldias, *Networks, Courts and Regional Integration: Explaining the Establishment of the Andean Court of Justice*, Working Paper of the KFG (2010).

58. JEAN ALLAIN, *A CENTURY OF INTERNATIONAL ADJUDICATION: THE RULE OF LAW AND ITS LIMITS* 73-88 (2000).

59. The GATT system entered a period of relative disuse between 1963 and 1975. See ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: EVOLUTION OF THE MODERN GATT SYSTEM* 11-15 (1993).

60. For a retrospective made by INTAL in 1981 in regard to its contribution to regional integration in Latin America, see INTAL, *El Intal y La Integración Latinoamericana Durante 1980*, 54 *INTEGRACIÓN LATINOAMERICANA* (1981).

61. 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 scholars to analyze ECJ doctrine. Cf. Rideau, J. (ed.) 1973: *Les Aspects juridiques de l'intégration économique*. Académie de droit international de La Haye, Colloque 1971, Sijthoff, Leiden.; see also *Editorial* in *Derecho de la Integración*, No. 9, Octubre 1971 at 8.

as Ernst Haas.⁶² Through these connections, INTAL members were arguably socialized to support integration initiatives. And they distributed pro-integration ideas in Latin American through three publications—*Revista Integración Latinoamericana*, *Derecho de la Integración*, and *Serie Publicaciones INTAL*.⁶³

The INTAL network recommended bundling the creation of an ECJ-style tribunal with foundational ECJ 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 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.⁶⁴ 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. Following this meeting, the *Junta* prepared a draft of a treaty establishing the ATJ. Member state representatives discussed the draft in November 1972, and in December a joint *Junta*-INTAL working group presented a proposal to the Commission.⁶⁵ 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 Andean rules, to ensure their uniform interpretation by national judges, and to "reduce unnecessary and

62. The head of INTAL's legal department, Felix Peña, was an assistant to Ernst Haas. See <http://www.felixpena.com.ar/index.php?contenido=trayectoria>.

63. 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 promoters of European legal integration, including Maurice Lagrange (Avocate General at the ECJ) and Pierre Pescatore (ECJ Judge). See Maurice Lagrange, *La Interpretación Unitaria Del Derecho De Las Comunidades Europeas: Aspectos De Interpretación Prejudicial.*, 3 DERECHO DE LA INTEGRACIÓN (1968); Pierre Pescatore, *Distribución De Competencia Y De Poderes Entre Los Estados Miembros De Las Comunidades Europeas: Estudio De Las Relaciones Entre Las Comunidades Y Los Estados Miembros*, 1 DERECHO DE LA INTEGRACIÓN (1967).

64. 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 Recommendation, *supra* note 56, at 144; INTAL, *Estudio Sobre Procedimientos Para Solucionar Conflictos*, 11 DERECHO DE LA INTEGRACIÓN (1972); Felipe Paolillo & Carlos Ons-Indart, *Estudios De Los Procedimientos De Hecho Utilizados Para La Solución De Conflictos En La Alalca*, 9 DERECHO DE LA INTEGRACIÓN (1971).

65. AMADOR, *supra* note 39, at 105.

sometimes disproportionate political tensions" with those judges—an implicit reference to the Colombian Supreme Court rulings.⁶⁶

Applying the transplants literature reviewed above, one can say that the *Junta* and INTAL chose the ECJ model based on a combination of persuasion and socialization. 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.⁶⁷ 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.

C. *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 were less convinced. In 1975 Elizabeth Ferris interviewed seventy-five 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. Those interviewed by Ferris saw little need for a supranational court.⁶⁸

As noted above, the Andean *Junta* first presented the proposal for a court in December of 1972. In 1974 and again in 1975, the *Junta* presented statements about the proposal to meetings of the heads of the member states, arguing for the drafting of a treaty to establish a court.⁶⁹ The heads of state do not appear to have been overtly hostile to the proposal. To the contrary, they authorized the *Junta* to proceed with drafting a treaty. Still, no definitive action was taken for five and a half years.⁷⁰

We found no conclusive explanation for this lengthy 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

66. The report explicitly referenced the Colombian Supreme Court's decisions, and the minority opinion in the 1971 ruling. See JUNAC Recommendation, *supra* note 56, at 142.

67. See, e.g., Rafael Vargas-Hidalgo, *The Crisis of the Andean Pact: Lessons for Integration among Developing Countries*, 27 JOURNAL OF COMMON MARKET STUDIES 213, 224 (1979).

68. Elizabeth G. Ferris, *National Political Support for Regional Integration: The Andean Pact*, 33 INTERNATIONAL ORGANIZATION 83, 99-100 (1979).

69. AMADOR, *supra* note 39, at 105-07.

70. The treaty was presented for adoption on August 8, 1978.

controversial, and one could reasonably ask whether a supranational legal body would have helped defuse that issue.

The Andean Pact's difficulties in the 1970s underscored that something fundamental needed to change if the member states were to move the integration process forward. Yet even during this troubled period, the EC continued to serve as a model for Andean integration. Europe also faced significant challenges to integration in the 1970s. 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 regional legislative body comprised of national parliamentarians with a system of direct elections to a new European Parliament.⁷¹

When integration advocates later revived the Andean integration project, they tracked these developments. 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.⁷² And in the same year they finally adopted the Treaty Establishing the Tribunal of Justice of the Cartagena Agreement,⁷³ accepting nearly in toto the text drafted by INTAL in 1972, which the *Junta* had incorporated into its 1975 recommendation.⁷⁴

D. 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 Tribunal; and a nullification procedure that allowed states and private actors to challenge the legality of Andean acts.⁷⁵ Although the ATJ Treaty does not refer to the supremacy of

71. DESMOND DINAN, *EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION* chs. 4 & 5 (2004).

72. LUIS CARLOS SÁCHICA, *INTRODUCCIÓN AL DERECHO COMUNITARIO* (Colección de Estudios del Tribunal de Justicia del Acuerdo de Cartagena, 1985).

73. See *Treaty Establishing the Court of Justice of the Cartagena Agreement*, 18 INT'L LEGAL MATERIALS 1203 (1979) [Original ATJ Treaty].

74. The only difference concerned 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 Original ATJ Treaty, Article 19 with *Bases de un tratado para la creación del tribunal de justicia del Acuerdo de Cartagena*, Article 14, in JUNAC Recommendation, *supra* note 56, at 148. Andean Commission 1972: Décimo Período de Sesiones Extraordinarias de la Comisión, COM/XE-acta final.

75. The Original ATJ Treaty authorized states to challenge *Decisions* they had not voted for, and it allowed private litigants to challenge acts that caused them injury. Original ATJ Treaty, *supra* note 73, Articles 17-19.

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.⁷⁶

Although the members of INTAL appear to have been persuaded of the benefits of the ECJ model, the group's proposal also made a number of adaptations to the model, modifications that reflected their 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.⁷⁷ The treaty also includes more detail about the timing of judicial proceedings and the length of the judges' terms in office.⁷⁸

Other alterations of the ECJ model appear 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, 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 suit. An observer of the time suggested that the lack of an omissions procedure was part of a tacit "gentlemen's agreement" among member states to prevent private actors from seizing the Tribunal in such cases,⁷⁹ 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.⁸⁰

76. JUNAC Recommendation, *supra* note 56, at 139 and 148.

77. Article 31 of the Original Treaty Establishing the ATJ. Mancini and 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. Federico Mancini & David Keeling, *From Cilfit to Erta: The Constitutional Challenge Facing the European Court*, 11 YEARBOOK OF EUROPEAN LAW 1 (1992).

78. For example, Article 23 requires the *Junta* 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 E. Barlow Keener, *The Andean Common Market Court of Justice: Its Purpose, Structure, and Future*, 2 EMORY JOURNAL OF INTERNATIONAL DISPUTE RESOLUTION 37 (1987).

79. On July 16, 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 Eduardo Hurtado Larrea, *Los Incumplimientos y La Acción Asignada a La Competencia Del Tribunal*, in *EL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA* (BID-INTAL ed., 1985).

80. For example, German officials were upset that the ECJ's questioning of turnover equalization taxes ended up inundating German courts with legal challenges. The French were unhappy with the ECJ's *Charmasson* decision, which found that France

Although barred from pursuing noncompliance complaints at the supranational level, private actors were free to file suits in national courts. In principle, national judges could then refer questions of Andean law to the Tribunal. However, the ATJ Treaty suggested that the Tribunal should exercise restraint in responding to these 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.”⁸¹ 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.⁸²

The ATJ faithfully adhered to these limitations on its authority. The first noncompliance proceeding involved a private litigant who attempted to file suit directly with the Tribunal rather than with a national court. The ATJ dismissed the suit, citing the treaty provision barring private actors from raising noncompliance cases.⁸³ 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.⁸⁴

One should not, however, overstate these adaptations of the ECJ model. The architects of the Andean legal system expected that private actors would challenge noncompliance with Andean rules in national courts.⁸⁵ Moreover, the drafters adopted an innovation 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.⁸⁶ This addition suggests that states sought to create a supranational legal system capable of inducing respect for

had ceded its authority to make trade arrangements. See ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, *supra* note 7, at 80-85, 151-53.

81. See Original ATJ Treaty, *supra* note 73.

82. Federico Mancini, *The Making of a Constitution for Europe*, 24 COMMON MARKET LAW REVIEW 595, 606 (1989). 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>.

83. ATJ decision 1-AI-87.

84. We discuss these cases later, when we explain how the ATJ did not follow the ECJ’s approach in *Van Gend en Loos* case. See *infra* text accompanying notes 103-106.

85. In rejecting the private litigant’s noncompliance suit in 1-AI-87, the ATJ suggested that private litigants should instead raise such challenges in national courts.

86. Original ATJ Treaty, *supra* note 73, Article 25.

Andean rules. 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.⁸⁷ 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,⁸⁸ and governments were preoccupied by economic and political crises related to high levels of foreign debt.

By the early 1990s, however, the member states sought to reinvigorate the Andean integration project.⁸⁹ They began in 1991 by laying the groundwork for a common external tariff.⁹⁰ 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.⁹¹ In 1997 the 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.⁹²

Reforming the Andean legal 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 opposed the *Junta's* attempts to file noncompliance suits with the Tribunal. In addition, private litigants rarely used the preliminary reference mechanism to challenge national policies contrary to community

87. 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.

88. Hojman, *supra* note 54.

89. O'Keefe, *supra* note 53, at 811, 818 (describing how Andean governments "reformulate[d] the entire philosophical underpinnings of the Andean Pact" and promoted "the adoption of free-market oriented policies by all member states").

90. In December of 1991 Andean Presidents approved the Act of Barahona, which ordered the creation of a four-tiered common external tariff. This policy was implemented by Decision 370, adopted on November 26, 1994.

91. The changes are discussed in O'Keefe, *supra* note 53.

92. 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.

rules. The reforms of the Andean legal system were intended to address these shortcomings.⁹³

The Cochabamba Protocol, adopted in 1996, brought the Tribunal even closer to the ECJ model.⁹⁴ It repealed the ban on private actors filing complaints with the General Secretariat alleging violations of Andean law.⁹⁵ The Protocol also implicitly recognized that private litigants were not raising noncompliance challenges in national courts, or that national judges were not referring those challenges to the ATJ. To remedy the dearth of cases, the Protocol went beyond the ECJ's noncompliance procedure by authorizing private actors to appeal directly to the ATJ if they disagreed with the Secretariat's disposition of a noncompliance complaint against a member state. Another reform facilitated suits seeking to nullify Andean acts by eliminating a requirement that private litigants show direct injury from those acts.⁹⁶ The Protocol also added an "omissions" procedure to enable litigants to challenge an Andean institution's failure to act. 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 doing so was necessary for their rulings.⁹⁷ 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 Protocol reforms also reflected learning by Andean actors. The individuals who drafted the ATJ Treaty incorporated ECJ doctrines on the direct effect and supremacy of community law and required national judges to follow the Tribunal's

93. 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_trie2.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, June 22, 2007, Lima, Peru.

94. 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 JONAS TALLBERG, *EUROPEAN GOVERNANCE AND SUPRANATIONAL INSTITUTIONS: MAKING STATES COMPLY* 72-82 (2003).

95. Revised ATJ Treaty, *supra* note 93, art. 25.

96. *Id.* art. 19, adding instead, that the challenged act should affect the individual's "legitimate interests."

97. *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.

rulings. But they also adapted the ECJ model to protect national sovereignty, for example by authorizing private actors to bring noncompliance suits in national courts but not to the General Secretariat. The next generation of Andean leaders recognized that this adaptation had in fact undermined the system's ability to induce adherence to Andean rules. Their solution was to incorporate the institutional features of the EC legal system that the founders had originally rejected, and to enhance those features by allowing private actors to bring noncompliance cases directly to the ATJ.

III. CHARTING ITS OWN COURSE: ATJ JURISPRUDENCE FROM 1984-2007

Having compared the design of the ATJ and ECJ, we now consider whether the two supranational courts have operated in similar ways.⁹⁸ The ATJ exhibited an early willingness to copy foundational ECJ 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 counterpart in several significant respects. Like the ECJ, the Tribunal exercised its power to assess the validity of Andean rules and to find states in noncompliance with unambiguous Andean laws. But unlike European judges, the members of the ATJ generally rejected the pleas of private litigants to construe Andean laws expansively and to adopt unwritten legal obligations that might have advanced integration, especially when doing so was likely to trigger objections from national actors.

A. *Importing Foundational 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 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

98. This section adapts material previously published in Karen J. Alter & Laurence R. Helfer, *Legal Integration in the Andes: Lawmaking by the Andean Tribunal of Justice*, 17 *EUROPEAN LAW JOURNAL* 701(2011) [hereinafter Alter & Helfer, *Legal Integration*], and Karen Alter & Laurence Helfer, *Nature or Nurture: Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 *INTERNATIONAL ORGANIZATION* 563 (2010) [hereinafter Alter & Helfer, *Nature or Nurture*].

measures from the Member Countries being able to oppose this legal system, c) the *Decisions* implying obligations for the Member Countries come into effect on the date indicated.⁹⁹

The ATJ thus confirmed the founders' belief that transplanting the ECJ model also brought along with it 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 innovations. 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* decision of June 15, 1964, and the *Simenthal* decision 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 decisions, 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.¹⁰⁰

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.¹⁰¹ The two rulings

99. 1-IP-87 p.3.

100. 1-IP-88 point 2, p. 2-3.

101. 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.” 1-IP-96, Section III. This reality “distinguishes community law from international law.” 1-IP-96, Section III.

also appeared to set the stage for the Tribunal to follow in the audacious footsteps of its European predecessor.

B. *Deviating from the ECJ*

Over its nearly thirty year existence, the ATJ has faced several opportunities to emulate the ECJ's practice of promoting integration through law. It has responded by charting a course that deviates from the ECJ model. We discuss three examples of this divergence and suggest that they reflect weak local demand for Andean integration by governments and private actors.

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.¹⁰² 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.

Two decisions from the early 1990s illustrate this divergence.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ The ATJ agreed with the government, reasoning that the Program afforded member states free reign to exempt goods notwith-

102. Proponents of this claim note how the ECJ made the Treaty of Rome directly effective within national legal orders, and supreme to national law. They also cite the ECJ's human rights jurisprudence. See Stein, *supra* note 3; Weiler, *supra* note 3.

103. 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.

104. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, [1963] E.C.R. 1, 12.

105. Osvaldo Saldias, *Supranational Courts as Engines of Disintegration*, Berlin Working Paper on European Integration No. 5, at 12 (2007).

standing the eventual adoption of broader free trade rules envisioned by the treaty.¹⁰⁶

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 undergoing major structural adjustments to its economy—to derogate from certain provisions of Andean law.¹⁰⁷ The *Junta* filed suit to nullify the *Decision* in November 1996, when Andean governments were actively discussing Peru's situation. A few months later, the member states adopted the Sucre Protocol, one provision of which affirmed the derogation.¹⁰⁸ But the *Junta's* nullification suit was still on the ATJ's docket, and the Tribunal refused to dismiss the case.¹⁰⁹ In its ruling on the merits, the ATJ found that the *Decision* granting a derogation to Peru was procedurally improper, but that this illegality had been "purged" by the Sucre Protocol. In other words, the ATJ did not need to nullify the *Decision* because a valid Andean 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" (*reunión de plenipotenciarios*).¹¹⁰

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.¹¹¹ In reality, however, convening a *reunion de plenipotenciarios* does not appear to be very difficult. There are fewer member states in the Andean Community, no evidence of a

106. 1-IP-90, Conclusion point 1.

107. 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.

108. Sucre Protocol of July 30, 1997, available at http://www.comunidadandina.org/INGLES/normativa/ande_trie4.htm. The Protocol was much like the Single European Act that re-launched European integration by advancing the EC's longstanding goal of developing a common market. The Protocol contained a "transitory provisional chapter" stating that the Andean 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. For a summary of the Protocol's key achievements, see <http://www.comunidadandina.org/INGLES/press/press/np14-4-03b.htm>.

109. 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* request to dismiss the case. Point 1.4.1 of ATJ ruling 1-AN-1996.

110. Points 2.4 & 2.5 of ATJ ruling 1-AN-1996.

111. It isn't entirely clear what qualifies as a *reunión 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.

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.

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

Another question that both the ATJ and ECJ faced was whether the creation of community rules in particular policy domains implicitly precluded member states from enacting national laws in those domains even in the absence of regional legislation that expressly preempted national law. 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.¹¹² 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 “favored a teleological, purposive rule drawn from the book of constitutional interpretation.”¹¹³ 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 preemption not only constitute an additional constitutional layer on those already mentioned but also have had a profound effect on Community decisionmaking. Where a

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

113. Weiler, *supra* note 3, at 2416 (discussing the *ERTA* decision).

field has been preempted or is exclusive and action is needed, the Member States are pushed to act jointly.¹¹⁴

The ATJ, although aware of the ECJ's experience, chose a different path—the principle of *complemento indispensabile*. According to this doctrine, first espoused in a 1988 ruling, member states may enact domestic laws necessary to implement a community measure provided that those laws do not obstruct or nullify the community rule.¹¹⁵ 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,¹¹⁶ 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, are still within the competence of the national legislator for an indefinite time until they are effectively covered by Community norms.”¹¹⁷

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 an 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.”¹¹⁸ In later cases, the ECJ set stringent limitations on national judges' ability to interpret EC law without first seeking the Court's guidance.¹¹⁹

Although the ATJ referred to the *Simmenthal* decision in early preliminary rulings,¹²⁰ it subsequently refused to endorse the full implications of the case and its progeny. The key dispute involved

114. *Id.* at 2416-17.

115. ATJ decision 2-IP-88, Point 3.

116. 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. 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).

117. 2-IP-90, Point 1.

118. *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (II), ECJ Case 106/77 (1978) ECR 629, [1978] CMLR 263, 283.

119. *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, *supra* note 77.

120. *See* discussion of 1-IP-88, *supra* note 100 and accompanying text.

various challenges to municipal alcohol regulations in Colombia. In one suit, opponents argued before the Colombian Constitutional Court that the licenses violated Andean law.¹²¹ 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,¹²² 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.¹²³

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 regulations 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.¹²⁴ In all other

121. The licenses were also successfully challenged in an ATJ noncompliance suit. See 3-AI-97.

122. 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.

123. *Id.* Section 3.1.

124. 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. The ATJ chronicled *Naviera Pacífico’s* efforts to get the Venezuelan government to create domestic incentives that might help it weather economic hard times, and to exclude the Brazilian company *NORSUL* from transporting cargo from the route assigned to *Naviera Pacífico*, since Brazil 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 ac-

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 continued even after the 1996 reforms to the ATJ Treaty, discussed previously, in which member states indicated that the Tribunal could consider the facts of preliminary references and thus, implicitly, guide domestic courts in the application of Andean law.¹²⁵

4. Why Diverge?

When ATJ judges considered each of the three legal issues discussed above, they were unquestionably aware of the analogous ECJ precedents. They nonetheless chose to diverge from the path that their European colleagues had previously trod. 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.¹²⁶ What explains the distinctive evolution of ATJ jurisprudence and the broad leeway that the ATJ has given to the member states? The cases themselves do not answer this question, but the broader political context into which a supranational court was transplanted suggests a number of plausible explanations. One 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.¹²⁷ This resolution was in tension with the Cartagena Agreement, which prohibited imposing new trade barriers and required their progressive removal. But it was a plausible

cess 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.

125. See *supra* notes 93-97 and text accompanying (discussing changes made by Cochabamba Protocol to preliminary reference procedures).

126. 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. See Alter & Helfer, *Legal Integration*, *supra* note 98.

127. Hojman, *supra* note 54.

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 construe 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-peddle 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.¹²⁸

IV. SUPRANATIONAL TRANSPLANTS: LESSONS FROM THE ANDEAN TRIBUNAL OF JUSTICE

A critical issue that emerges from the literature on the diffusion of legal transplants 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 claims before supranational courts and thereby help to develop community rules. Studies of the export of ideas offer a range of other reasons why local actors may either embrace or reject transplants. The literature on legal transplants suggests that 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 embrace voluntarily, and transplants that are adapted to local needs, are more likely to be effective.

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 una-

128. For a more detailed discussion of the ATJ's intellectual property jurisprudence, see Laurence R. Helfer, Karen J. Alter & M. Florencia Guertzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT'L L. 1 (2009).

ware 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 deterred the Tribunal from applying Andean laws to the facts, thus limiting the guidance the Tribunal could give to national courts.

The member states relaxed these structural constraints in 1996 when they adopted a package of institutional reforms that were intended to increase the effectiveness of the Andean legal system and expand the Tribunal'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, the ATJ has continued to issue mostly narrow, technical rulings and to avoid the expansionist law-making of its European cousin.

One reason for the Tribunal's circumspect approach is that the ATJ has confronted the same basic challenge that all supranational transplants face: how to enlist the support of key domestic interlocutors and compliance constituencies. 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 these 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.¹²⁹ But they do not work in tandem with the ATJ to develop community law. They do not send expansive questions to the Tribunal, and display 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 administrative agencies responsible for protecting intellectual property. These agencies apply Andean *Decisions* to determine whether to register the thousands of applications for trademarks and patents that they receive from private firms. 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 habitually applied those rulings even when doing so challenges national executive or legislative decisions. Over time, the ATJ and the agencies have developed a symbiotic relationship that has helped to establish intellectual property as a

129. For an account of how litigants overcame domestic judicial barriers, see Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutors: Understanding the Preliminary Ruling Reference Patterns in the Andean Community*, 42 N.Y.U. J. INT'L L. & POL. 871, 900-11 (2009).

distinctive “island of effective international adjudication” in the Andean Community legal system.¹³⁰

These findings have important implications for neofunctionalism, including its recent revival as a theory of legal integration. Neofunctionalism predicts that an alignment between the demands of private litigants and the interests of supranational judges will promote regional integration. Our study indicates that it is insufficient for litigants to challenge domestic rules. A supranational court must also 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.¹³¹ 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 neofunctionist theory—that transplanting supranational laws and legal institutions is insufficient in itself to stimulate local demand for those laws and institutions. This is so even where a handful of entrepreneurial litigants present a supranational court with opportunities to embed the transplants, and even where at least some supranational actors are interested in promoting integration.¹³²

At the level of legal doctrine, the ATJ’s selective emulation of ECJ jurisprudence offers insights for ideational diffusion theory. The ECJ is widely viewed as 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 chose not to chart this course, suggesting that socialization is not the mechanism through which the ECJ model has diffused. Instead, the Tribunal’s *à la carte* approach suggests lesson-drawing—a type of emulation 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

130. Helfer, Alter & Guertzovich, *supra* note 128, at 21-25.

131. This is also true for the ECJ, where ECJ rulings can either increase or decrease litigation on specific issues. See Karen J. Alter, *The European Legal System and Domestic Policy: Spillover or Backlash*, 54 INTERNATIONAL ORGANIZATION 512-15 (2000).

132. Karen J. Alter, *Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)*, in THE EUROPEAN COURT’S POLITICAL POWER (Karen J. Alter ed., 2009).

integration were far more modest. This lesson-drawing, as opposed to blind mimicry—another type of emulation—gave ATJ judges the discretion to pick and choose which EC legal doctrines were germane to the Andean context and consonant with local political realities.¹³³

Some legal scholars have argued that the European experience is *sui generis* in ways that preclude the ECJ from serving as a template for other international courts and tribunals.¹³⁴ 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.¹³⁵

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.¹³⁶ European universities also invite students from around the world to study European integration, generating pro-integration scholarship by local actors. Officials provide these forms of aid with

133. The ECJ also relies on persuasion to influence public and private actors to follow its lead. We explore how the European and Andean environments differed in Alter & Helfer, *Nature or Nurture*, *supra* note 98.

134. Jose Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 25-27 (2003); Eric A. Posner & John C. Yoo, *A Theory of International Adjudication*, 93 CAL. L. REV. 1, 55-57 (2005).

135. Alter & Helfer, *Nature or Nurture*, *supra* note 98.

136. In the Andean context, this support took a variety of forms. As previously noted, INTAL consulted with ECJ judges during conversations about creating an Andean Tribunal. The EC later negotiated an associate agreement with the Andean Community to bolster Andean integration efforts. The EC and its member states also provided financial support for the work of the *Comisión Andina de Juristas*, which undertook initiatives to promote Andean legal integration, including disseminating rulings on the ATJ's website and facilitating the Tribunal's outreach to national judges. Telephone interviews with the *Asesor jurídico* at the *Comisión Andina de Juristas*, May 20, 2008 and Dec. 8, 2008.

no overt strings attached because they believe the European model is worth emulating.¹³⁷

For these and other reasons, the judges who serve on international tribunals, and the scholars who write about these tribunals, continue to invoke ECJ rulings. This may mislead observers to conclude that judicial practices around the world are more alike than they actually are. In this respect, the ATJ's significant deviations from the ECJ model are noteworthy. While we expect supranational courts to consider how the ECJ has handled analogous legal issues, ECJ transplants may ultimately find that they have more in common with each other than with their common parent. Seen from this perspective, the ATJ—which has close to thirty years of experience—may in fact be a better guide for other ECJ transplants to consult and possibly emulate.

137. Alter, *supra* note 14; Tobias Lenz, *Spurred Emulation: The EU and Regional Integration in Mercosur and SADC*, 35 W. EUR. POL. 155 (2012).