

THE ANDEAN TRIBUNAL OF JUSTICE AND ITS
INTERLOCUTORS: UNDERSTANDING
PRELIMINARY REFERENCE PATTERNS IN
THE ANDEAN COMMUNITY

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INTRODUCTION

Many international law and international relations scholars theorize that judicial enforcement of international rules increases compliance with international law and thereby enhances its efficacy.¹ The evidence supporting such theories is overwhelmingly drawn from Europe, where supranational tribunals² engage in conversations with national courts about

1. See, e.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 499-500 (2005); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); see also Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000).

2. See Helfer & Slaughter, *supra* note 1, at 289 (defining "supranational adjudication" as "adjudication by a tribunal that was established by a group

the meaning, reach, and scope of European Community (EC) law and European human rights law.³ In the EC context, this dialogue is facilitated by a preliminary ruling mechanism that authorizes national courts to submit questions of interpretation to the European Court of Justice (ECJ). After the ECJ clarifies the content of EC law, the case returns to the national court where the national judge must apply the ECJ's interpretation to the facts of the case at hand.⁴

The preliminary ruling mechanism enabled national courts to seek the ECJ's guidance as to the meaning of international law. Spurred by requests from private litigants who benefitted from favorable EC rules, national judges became the ECJ's interlocutors and compliance partners. The foundational doctrines of European supranationalism—supremacy, direct effect, preemption, and implied powers—were all products of early preliminary references from national courts.⁵ Over time, as national judges referred a growing number of cases, they became habituated to following ECJ decisions and to adjudicating the treaty-compatibility of domestic laws.⁶ With international rules woven into the fabric of domestic judicial rulings, governments could not defy the ECJ without

of states or the entire international community and that exercises jurisdiction over cases directly involving private parties”).

3. José Alvarez critiques the tendency to generalize from the European experience, while Eric Posner and John Yoo consider the European experience to be *sui generis*. José Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L. J. 405, 429-31 (2003); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 55 (2005).

4. Treaty Establishing the European Community art. 234, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 240) 1, as amended by Treaty of Nice, Feb. 26, 2001, 2001 O.J. (C 80) 1, consolidated version reprinted in 2002 O.J. (C 235) 33 [hereinafter EC Treaty].

5. See generally Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

6. See J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 COMP. POL. STUD. 510 (1994) (explaining the growing acceptance of Community law); Anne-Marie Burley and Walter Mattli, *Europe Before the Court, A Political Theory of Legal Integration*, 47 INT'L ORG. 1, 41, 63 (1993) (explaining that lower national courts came to recognize two separate and distinct authorities above them: their own national supreme courts on questions of national law, and the ECJ, on questions of European law).

also calling into question the independence and authority of their own courts.⁷

This article analyzes the relationship between national and supranational courts in the Andean Community—a regional integration initiative that copied the EC’s political and legal systems with the hope of emulating their success.⁸ Established in 1969, the Andean Pact modeled its institutions on their counterparts in Europe. It created a supranational law-making body to adopt “Decisions” that were directly applicable in national legal systems, and a supranational administrative body to supervise the implementation of those Decisions. The original Andean Pact did not include a court. Later, when Andean governments considered how to overcome pervasive non-compliance with Andean rules, they again looked to Europe. Created in 1984, the Andean Tribunal of Justice (ATJ or the Tribunal) is the ECJ’s jurisdictional clone and includes a preliminary reference mechanism nearly identical to the one that exists in Europe.⁹

Andean preliminary references thus provide new evidence to evaluate the claim that creating an institutional link between international and national courts promotes trans-judicial dialogue and increases compliance with international law. Much of this evidence is unfamiliar. It is not widely known that the ATJ is the world’s third most active international court, having decided more than 1,400 cases through 2007.¹⁰

7. See KAREN J. ALTER, *THE EUROPEAN COURT’S POLITICAL POWER: SELECTED ESSAYS* chs. 4, 5 (2009).

8. A few observers of Latin American legal systems have noted this institutional borrowing. E.g., E. Barlow Keener, *The Andean Common Market Court of Justice: Its Purpose, Structure, and Future*, 2 EMORY J. INT’L DISP. RESOL. 39, 50 (1987); Ricardo Vigil Toledo, *Dispute Settlement in Andean Community Law*, in INTER-GOVERNMENTAL TRADE DISPUTE SETTLEMENT: MULTILATERAL AND REGIONAL APPROACHES 245, 246-47 (Julio Lacarte & Jaime Granados, eds., 2004); Osvaldo Saldías, *Supranational Courts as Engines of Disintegration: The Case of the Andean Community* 3 (Berlin Working Paper on European Integration No. 5 2007), available at www.fu-berlin.de/polsoz/polwiss/europa/arbeitspapiere/2007-5_Saldias.pdf.

9. As in the European legal system, lower courts may, and courts of last instance must, refer questions of Andean law to the ATJ. Treaty Creating the Court of Justice of the Cartagena Agreement art. 29, May 28, 1979, 18 I.L.M. 1203 [hereinafter ATJ Treaty]. The Tribunal began operations in 1984.

10. The two most active international courts in terms of number of decided cases are first, the European Court of Human Rights, and second, the ECJ and its Court of First Instance. See Karen J. Alter *Delegating to Interna-*

More than 90% of these cases are preliminary rulings issued in response to referrals from national courts in the five principal Andean Community member states—Bolivia, Colombia, Ecuador, Peru, and Venezuela.¹¹ This fact alone suggests that the existence of a preliminary ruling mechanism facilitates dialogue between national and supranational judges over the meaning and scope of international law.

As we explain in this article, however, judges in the Andean Community have not emulated the behavior of their counterparts in Europe. To the contrary, there are significant differences in how the ATJ and the ECJ interact with the national legal and administrative systems of their respective member states. In the Andean context, national judges do not pose far reaching or provocative questions that would provide the ATJ with opportunities to expand the scope and reach of Andean law. Rather, they are mostly passive intermediaries situated between the ATJ and domestic administrative agencies charged with protecting intellectual property (IP). These agencies seek the ATJ's guidance as to the meaning of ambiguous Andean IP rules. The agencies' demands helped to surmount national judicial reticence to preliminary references and spurred the ATJ to interpret Andean IP rules in a purposive fashion that balances IP protection against public and consumer interests. The result, as we explain elsewhere, is the creation of an IP rule of law in the Andean Community in which the ATJ plays a critically important role in shaping the behavior of national actors.¹²

This article emphasizes two different yet complementary findings from our analysis of the Andean legal system. First, we demonstrate that there is more than one way for an inter-

tional Courts: Binding vs. Other-Binding Delegation, 71 L. & CONTEMP. PROBS. 37, 57-60 (2008) (chart indicating the total number of cases heard by certain international courts).

11. The participants in Andean integration project have shifted over time. The five founding members of the Andean Pact (as it was then known) in 1969 were Bolivia, Chile, Colombia, Ecuador, Peru. Venezuela joined as a sixth member in 1973. Chile withdrew from the Pact in 1976 after a coup by Augusto Pinochet. In 2006, President Hugo Chavez withdrew Venezuela from the Andean Community, and Chile rejoined as an associate member.

12. 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, 16-36 (2009).

national tribunal to influence the behavior of government officials. Scholars have previously stressed the relationship between national and international judges as perhaps the most effective mechanism to promote national adherence to international law. Our analysis reveals that other domestic actors—such as administrative agencies—can serve as robust interlocutors and compliance constituencies for international judicial rulings.

Our second finding also emphasizes the relationship between national and international courts, but reaches a less hopeful conclusion. Even in a legal system where national courts are given explicit instructions to work with their international counterparts to enforce international law, domestic judicial support cannot be taken for granted. To the contrary, such instructions are sufficient neither to generate a robust trans-judicial dialogue over the scope and content of international rules nor to ensure that national judges act as compliance constituencies for tribunal rulings. A further—although somewhat more speculative—implication of this finding is that the EC preliminary ruling mechanism may have played a less decisive role in contributing to the ECJ's effectiveness as an international court than scholars have previously claimed.¹³

The remainder of this article proceeds as follows. Part I summarizes the history of the Andean Community, including the establishment of its supranational institutions in 1969, the founding of the ATJ in 1984, and the changes to the Tribunal's jurisdiction in 1996. Part I also describes the shifts in Andean policies that occurred in the early 1990s and the accompanying transformation of domestic administrative agencies responsible for implementing new Andean intellectual property rules. These shifts provide necessary background for our analysis of variations in national court references to the ATJ.

Part II provides an empirical overview of Andean preliminary reference rulings from 1987 to 2007. Using descriptive statistics from our coding of all ATJ preliminary rulings over the past two decades,¹⁴ we document the national, temporal, and subject matter variations in preliminary references. We

13. It is common short hand to ascribe the ECJ's success to the preliminary ruling mechanism. *See infra* Part V.

14. Database of ATJ Rulings, 1987-2007 (on file with authors).

find four important patterns. First, references to the ATJ, very low in the 1980s, increase dramatically beginning in 1995. Second, there is significant cross-national variation regarding which courts make references to the ATJ. Colombian courts refer the most cases, followed by Peru and Ecuador. Venezuelan and Bolivian courts have made only three references in twenty years. Moreover, just a handful of national courts are responsible for nearly all of the ATJ's preliminary ruling decisions. Third, the subject matter of national court references is overwhelmingly focused on intellectual property issues. Only thirty five references out of 1338 concern other issues. Fourth, the content of ATJ rulings in preliminary ruling cases are remarkably similar and remarkably narrow. Even when given a chance to rule on a wider variety of legal issues, the ATJ is highly deferential to national decision-makers. These patterns reflect a broader political reality—that national courts are mostly reluctant participants in the Andean legal system.

Part III explains these empirical patterns by identifying the factors favoring or hindering the activation of preliminary references in each member state. These factors include differences in national judicial structure, efforts by Andean judges and attorneys to persuade national judges to refer cases, and complaints filed with the Andean General Secretariat. Once the pipeline between national and international judges was opened in Colombia, Ecuador and Peru, the number of referrals increased rapidly. The low level of economic development and lack of demand for IP protection in Bolivia explains the virtual absence of cases from that country. In Venezuela, by contrast, supervening political events—specifically the election of President Hugo Chavez and his interventions in the Venezuelan judiciary—are principally responsible for the lack of referrals.

Part IV argues that, in the Andean context, dialogue occurs between the ATJ and domestic IP agencies, with national courts acting as relatively passive intermediaries. This subnational-supranational relationship is the engine that drives Andean preliminary references and the development of Andean IP law. We document how the ATJ has influenced administrative practices and procedures and, conversely, how the agencies' substantive policy preferences have influenced Andean IP jurisprudence.

Part V compares the Andean and European experiences, contrasting the relationship between national judges and the respective supranational tribunals in each region. In the EC, the judges on lower and specialized courts have used ECJ references strategically to expand their own authority. In the Andean Community, by contrast, national court judges have a limited conception of their relationship with the ATJ and have generally refrained from using the Andean legal system as a tool of judicial empowerment. This judicial reticence limits the ability of litigants to use national court cases to challenge government policies that hinder the free flow of goods in the region, and it discourages the ATJ from issuing more purposive interpretations of Andean rules. Part VI summarizes our principal findings and their implications for future research on the relationship between national and international courts.

I. THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE ANDEAN COMMUNITY

This Part provides a brief overview of the actors and institutions of the Andean Community, a regional integration project that has been called the “phoenix of regional integration” to describe its multiple births, deaths, and rebirths.¹⁵ We review changes to Andean institutions and to domestic administrative agencies that enabled the rapidly increasing usage of the Andean legal system in the mid-1990s.¹⁶

A. *The Rise and Fall of the Andean Pact and the Birth of the Andean Community*

In 1969, the five nations of the Andes region formed a regional integration pact to promote economic growth and intra-regional trade as alternatives to purchasing goods and technologies from foreign countries. To achieve these import substitution goals, the member states emulated the European Community’s strategy of integration through supranationalism. The Andean Pact’s founding treaty, the Cartagena Agree-

15. See KATRIN NYMAN METCALF & IOANNIS PAPAGEORGIOU, *REGIONAL INTEGRATION AND COURTS OF JUSTICE* 21 (2005) (using this terminology).

16. Parts I and II build on our analysis in Helfer, Alter & Guezovich, *supra* note 12, at 6-13.

ment,¹⁷ established a supranational governance structure that included a “Commission” of national executives who adopted Andean legislation (known as “Decisions”) and a regional administrative body (the “Junta”) that supervised the implementation of these Decisions. The institutions attempted to regulate foreign investment and economic growth in the region, create new export industries, and distribute the benefits of integration (such as factories and jobs) according to the different needs of each member country.¹⁸

The Pact’s policies never really got off the ground, however. National governments assumed that an influx of foreign capital would provide the funds needed for economic development. But few businesses wanted to build factories in remote areas lacking in infrastructure and political stability. These systemic impediments to investment were compounded by heavy-handed legal regulation. For example, the first Andean investment code, Decision 24, permitted foreign firms to repatriate only 14% of their profits, required investors to issue licenses to domestic firms, and mandated the transfer of IP-protected technologies into the region.¹⁹

The controversies of import-substitution defined the Andean Pact, shaping its political structure, its policies, and ultimately its failure. Regulations such as Decision 24 were nominally binding, but were honored mostly in the breach. Frequent changes of government and a dearth of foreign

17. Andean Subregional Integration Agreement, May 26, 1969, 8 I.L.M. 910 (as amended by Trujillo Protocol, Mar. 10, 1996) [hereinafter Cartagena Agreement].

18. For more on the Andean Pact, see generally THOMAS ANDREW O’KEEFE, *LATIN AMERICAN TRADE AGREEMENTS* § 1 (Martinus Nijhoff Publishers 2007) (1961); Germánico Salgado Peñaherrera, *Viable Integration and the Economic Co-operation Problems of the Developing World* (pt. 2), 19 J. COMMON MKT. STUD. 175, 184 (1980); Miguel S. Wionczek, *The Rise and the Decline of Latin American Economic Integration*, 9 J. COMMON MKT. STUD. 49, 60-61 (1970).

19. For an analysis of the controversies that Decision 24 engendered, see David E. Hojman, *The Andean Pact: Failure of a Model of Economic Integration?*, 20 J. COMMON MKT. STUD. 139, 151-56 (1981); Scott Horton, *Peru and ANCOM: A Study in the Disintegration of a Common Market*, 17 TEX. INT’L L. J. 39, 44-50 (1982).

investment also sapped the political will needed to pursue Andean integration.²⁰

1. *Andean Pact Reforms and the Creation of the Andean Tribunal of Justice*

In the late 1970s, the member states restructured Andean institutions in an effort to rescue the failing integration project. One such reform was the creation of a Tribunal of Justice to interpret Andean rules, resolve disputes, and promote compliance with Andean Decisions. The structure of the ATJ, which has its headquarters in Quito, Ecuador, is similar to other regionally-based international courts. The Tribunal's membership is comprised of one judge for each member state. Judges must be nationals of a member state, of high moral character, and either fulfill the conditions for exercising the highest judicial office in their countries of origin or be jurisconsults of recognized competence. Each judge is appointed by unanimous decision of the member states from a slate of three candidates submitted by the appointing country. Judges are "fully independent" and serve for a six-year term that may be renewed once.²¹

The ATJ's jurisdiction was directly modeled on the ECJ; in fact, members of the ECJ advised the government officials who drafted the treaty establishing the Tribunal. With regard to preliminary references, the treaty established a mechanism for national courts to seek guidance from the ATJ on issues of Andean law that arose during litigation. As in the EC, lower courts were permitted to make references to the Tribunal and courts of last-instance were required to do so.²²

The political problems that plagued the Andean Pact quickly engulfed its new Tribunal. The ATJ was busy when it began operating in 1984, but not with the activities its founders had expected. Because the member states did not deliver

20. See Jonathan E. Adams R., *A New Andean Agreement: Rules of Origin Replace the Investment Code*, 11 ARIZ. J. INT'L & COMP. L. 389, 401-05 (1994); Hojman, *supra* note 19, at 147-56.

21. The designation of judges is laid out in ATJ Treaty, *supra* note 9, arts. 7-9. For additional information on the ATJ and its operations, see Vigil Toledo, *supra* note 8, at 253-60.

22. The jurisdiction of the ATJ is set forth in ATJ Treaty, *supra* note 9, arts.17-31. See also Keener, *supra* note 8, at 54-58 (elaborating the ATJ's jurisdiction).

the resources they had pledged to the Tribunal, the first task of ATJ judges was far more mundane—to locate a permanent building and resolve labor disputes with staff members whose salaries went unpaid.²³

In contrast to these housekeeping matters, the Tribunal received little substantive work. National governments did not fully implement Andean Decisions. Yet the member states blocked the Junta from filing noncompliance suits.²⁴ The ATJ adjudicated only three nullification claims and thirty-two preliminary references in its first decade.²⁵ All told, it was not an auspicious beginning for the new Tribunal, yet hardly unexpected in light of the broader political and institutional forces impeding Andean integration.

2. *Re-launching Andean Integration in the 1990s*

In the late 1980s, in the wake of the Latin American debt crisis, Andean integration once again teetered on the brink of failure. Using the substantial economic leverage that the crisis engendered, the World Bank, the IMF, and the Inter-American Development Bank pressed Andean governments to adopt a broad array of free market and deregulatory reforms known as the “Washington Consensus.”²⁶ The reforms engendered fundamental changes in how Andean countries regulated their economies. National governments—acting on their own and through Andean institutions—adopted major policy reforms to achieve open, market-based economies and created new institutions staffed by Western-educated professionals who endorsed these economic liberalization goals.

The Andean Pact incorporated these policies into a re-launched integration effort, abandoning import substitution and replacing it with an “open regionalism” free trade model

23. Interview with Ugarte del Pino, (Peruvian) Judge, Andean Trib. J., 1990-1995, in Lima, Peru (June 22, 2007).

24. Interview with Alfonso Vidales Olviedo, former head, Secretariat Gen. Legal Advisor’s Office, in Lima, Peru (June 22, 2007).

25. See Database of ATJ Rulings, *supra* note 14. The case numbers for the nullification claims are: 1-AN-85, 1-AN-86, 2-AN-86.

26. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7 (John Williamson ed., 1990) (explaining the ideas of the Washington Consensus and the context of its application).

based on a common market.²⁷ The member states also restructured Andean supranational institutions.²⁸ They replaced the Junta with a new General Secretariat, increased the size of its budget, and appointed a cadre of young lawyers eager to use the Secretariat's resources to promote regional integration.²⁹ To signify their break with the past, the member states rechristened the new supranational organization the Andean Community.

The institutional reforms also extended to the ATJ. Where previously only states could ask the Junta to investigate another state's noncompliance with Andean law, the 1996 Protocol of Cochabamba authorized private actors to file noncompliance complaints with the General Secretariat, subject to a right of appeal to the ATJ.³⁰ The Protocol also modestly expanded the ATJ's authority in preliminary reference cases by providing that its judges could address how Andean rules applied to the facts of the cases referred by national courts.³¹ These reforms, which were part of a wider effort to increase public access to Andean institutions,³² made it more difficult for member states to block enforcement of Andean laws inasmuch as the General Secretariat could now credibly argue that its failure to initiate a noncompliance action would trigger private actors to file their own noncompliance suits.

27. See generally Mauricio Baquero-Herrera, *Open Regionalism in Latin America: An Appraisal*, 11 LAW & BUS. REV. AM. 139, 175-81 (2005); Thomas Andrew O'Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INT'L LAW. 811 (1996).

28. The member states created an Andean Presidential Council in 1990, they adopted the Cochabamba Protocol to revise the ATJ's jurisdiction in 1996, and they replaced the Junta with the General Secretariat in 1997.

29. Interviews with Monica Rosell, former legal secretary, Andean Trib. J., and attorney, Legal Advisor's Office of the Secretariat Gen., in Quito, Ecuador (Mar. 17, 2005), and in Chicago, IL (Apr. 1, 2007).

30. Treaty Creating the Court of Justice of the Cartagena Agreement, art. 25, as amended by Protocol of Cochabamba, May 28, 1996 [hereinafter Revised ATJ Treaty] available at http://www.comunidadandina.org/ingles/normativa/ande_trie2.htm.

31. *Id.* arts. 33-34 (authorizing 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.

32. Interviews with Monica Rosell, *supra* note 29.

B. *The Evolution of Andean Intellectual Property (IP) Rules and Reconstruction of Domestic IP Administrative Agencies*

The institutional changes described above were prerequisites for activating the Andean legal system. Equally as important, however, were revisions of Andean IP rules and a restructuring of domestic administrative agencies responsible for IP protection. These developments laid the groundwork for the rise in references to the ATJ in the 1990s, and for the subsequent dialogue between the agencies and the ATJ over the content of the region's IP rules.

1. *Reforming Andean IP Rules*

Intellectual property has long occupied a central place in Andean integration.³³ Early Andean Decisions treated patents and trademarks as vehicles for promoting technology transfers from foreign firms to further the import substitution policies then prevailing in the region.³⁴ In the early 1990s, however, the member states shifted course, adopting three Decisions in quick succession, each of which required progressively higher levels of IP protection.³⁵ These revisions were consistent with the economic liberalization policies of the period. They also reflected the member states' awareness that augmented protection for IP would be the price of admission to the new global trading system. By 1994, Andean Decision 344 was mostly compatible with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the multilateral IP treaty attached to the newly-created World Trade Organization.³⁶

33. The Cartagena Agreement itself proclaims the need for "a common system for the treatment of . . . trademarks, patents, licenses, and royalties." Cartagena Agreement, *supra* note 17, art. 55.

34. See Frederick M. Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYRACUSE J. INT'L L. & COM. 319, 349-51 (1975).

35. Decision 311 (1991), Decision 313 (1992), and Decision 344 (1994).

36. See Carlos M. Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 N.Y.U. J. INT'L L. & POL. 109, 114 (1997) (noting the early harmonization of Andean IP rules with TRIPS). The provisions of Decision 344, which had direct effect in national legal systems, were "intended to serve, not as broad-brush treaty norms, but as the domestic law of each of the five [member] countries." ROBERT M. SHERWOOD & CARLOS A. PRIMO BRAGA, *INTELLECTUAL PROPERTY, TRADE AND*

2. *Reforming National IP Administrative Agencies*

The same economic forces that triggered changes to Andean institutions and IP rules also led to the creation of new domestic IP agencies. When the market liberalization of the Washington Consensus failed to spur economic growth in the region, the international financial institutions advocated a second wave of reforms in which Andean governments would restructure and strengthen the administrative agencies that regulated domestic markets.³⁷

These pressures dovetailed with ongoing efforts by Andean governments to reform the administrative state. In 1992, Peru established the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI), an agency that cobbled together subjects—including intellectual property, consumer protection, and bankruptcy—that had previously been unregulated or scattered across several ministries.³⁸ In that same year, the Colombian government established a Superintendent of Industry and Commerce (SIC) and entrusted it with a similar array of competencies.³⁹ Other Andean countries also created or restructured domestic IP agencies over the next several years.⁴⁰

ECONOMIC DEVELOPMENT: A ROAD MAP FOR THE FTAA NEGOTIATIONS 14 (1996), ns.kreative.net/ipbenefits/download/roadmap.rtf.

37. This focus on agency regulation of newly liberalized markets is often referred to as the “second generation” of the Washington Consensus. INTER-AM. DEV. BANK, OFFICE OF EVALUATION AND OVERSIGHT, EVALUATION OF MIF PROJECTS - MARKET FUNCTIONING: PROMOTION OF COMPETITION AND CONSUMER PROTECTION, MIF/GN-78-14, at ii (2003).

38. On the origins of INDECOPI, see generally Michael P. Ryan, *Intellectual Property Institutions and the Public Administration of Knowledge in Developing Countries: The Case of Indecopi in Peru*, in THE ROLES OF THE STATE IN COMPETITION AND INTELLECTUAL PROPERTY POLICY IN LATIN AMERICA: TOWARDS AND ACADEMIC AUDIT OF INDECOPI (319, Beatriz Boza ed., 1998); David G. Becker, Justice for Peruvian Consumers? INDECOPI and Consumer Protection Paper presented at the XXIII Int'l Congress of the Latin American Studies Ass'n (Sept. 2001) (on file with authors).

39. More information is available on its website. Superintendencia de Industria y Comercio, <http://www.sic.gov.co/> (last visited Apr. 30, 2009).

40. Bolivia created the *Servicio Nacional de Propiedad Intelectual* (SENAPI) in 1996, Venezuela created a similar agency, the *Servicio Autónomo de la Propiedad Intelectual* (SAPI), one year later, and in 1998 Ecuador established the “Ecuadoran Institute of Intellectual Property (EIIP), a public juridical entity with its own assets and administrative, economic, financial and operative autonomy.” Cecilia Falconi Perez, *Ecuador: New Intellectual Property Law*,

INDECOPI, SIC, and the other IP agencies were logical recipients of aid from the international financial institutions. The World Bank, the IMF, and the Inter-American Development Bank provided funds and technical assistance to modernize the agencies' operations, train personnel, and adopt new technologies to disseminate information. This externally-funded support helped to transform the agencies into relatively well-resourced institutions that carried out their mandates with limited political interference.⁴¹ This was particularly true for agencies such as INDECOPI, whose budget is funded mainly by fines and IP registration fees rather than by public tax revenues, and whose organization as a public corporation "exempts it from civil service personnel rules" and "insulates it from the day-to-day managerial control of the executive branch."⁴²

Among the many functions that the new agencies performed were the review of applications to register trademarks and patents. Inasmuch as the rules governing IP protection in the five member states were found in Andean law, agency officials applied those rules to resolve disputes over trademark and patent registrations. And since all of the domestic agencies applied the same regional IP norms, their administrators naturally sought the advice of their peers in other member

GRAIN, Oct. 28, 1998, <http://www.grain.org/bio-ipr/?id=91>; see also Telephone Interview with Ricardo Colmener, former legal counsel for the SAPI (Mar. 19, 2007) [hereinafter Interview with Ricardo Colmener].

41. The agencies' autonomy also attracted Western-educated officials and staff who strongly supported economic liberalization and the rule of law. See Becker, *supra* note 38, at 17, 19.

42. *Id.* at 20, 15-16 (characterizing INDECOPI as having "some of the autonomy possessed by independent U.S. governmental agencies such as the Federal Trade Commission"). By contrast, studies of other administrative agencies in Latin America note the prevalence of "brown areas" where poorly paid and politically penetrated bureaucracies are the norm. Guillermo O'Donnell, *On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries*, 21 WORLD DEV. 1355, 1359 (1993) (elaborating on the contrast between Latin America and other regions in terms of the prevalence of blue and brown area); see also INTER-AM. DEV. BANK, *THE POLITICS OF POLICIES: ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA* 67 (2006) (providing comprehensive empirical analysis of Latin American administrative agencies concluding, inter alia, that "[t]he transition from authoritarian to democratic regimes has been linked to a certain tendency to further subordinate the bureaucracy to political control").

states. These consultations engendered an informal regional network of agency officials who shared information, developed criteria to resolve common legal and technical problems, and came to view themselves as engaged in highly skilled activities.⁴³ Several of the new agencies were also tasked with protecting consumers, a mandate that informed their views as to the proper balance between IP and the public interest.⁴⁴

Over time, the IP agencies developed a shared professional interest in applying Andean IP Decisions. Inevitably, some of the applicants seeking trademarks and patents, or the businesses that opposed their applications, were dissatisfied with the agencies' registration decisions and challenged them in court. Since the outcome of such challenges turned on the proper interpretation of Andean law, these businesses and their attorneys asked national judges to refer the cases to the ATJ to clarify the content of Andean IP rules and to resolve disputes based on those rules.⁴⁵ Part II demonstrates that these challenges to IP agency registration decisions comprise the overwhelming majority of the ATJ's docket. Part III explains how national IP agencies engage in a dialogue with the ATJ on substantive legal issues.

II. AN EMPIRICAL OVERVIEW OF ANDEAN PRELIMINARY REFERENCE PATTERNS

In this Part, we provide the first comprehensive empirical analysis of the Andean preliminary reference patterns based on our coding of all ATJ preliminary reference decisions through 2007.⁴⁶ These data reveal several interesting features

43. Interviews with officials of INDECOPI, in Lima, Peru (June 21, 2007).

44. As we explain below, the IP agencies' consumer protection mandate has contributed to consumer protection being a prominent feature of ATJ's jurisprudence. See *infra* Part IV.C.

45. Interview with Jose Barreda, partner, Barreda Moller, in Lima, Peru (June 18, 2007); Interview with Carlos Olarte, partner, OlarteRaisbeck & Frieri, in Bogotá, Colombia (Sept. 10, 2007); Interview with Marcel Tangerife Torres, partner, Tangarie Torres & Asociados, in Bogotá, Colombia (Sept. 10, 2007).

46. A few scholars and judges in Latin America have discussed the ATJ's preliminary ruling jurisprudence. See, e.g., Alejandro Daniel Perotti, *Algunas Consideraciones Sobre la Interpretación Prejudicial Obligatoria en el Derecho Andino*, in GACETA JURÍDICA DE LA COMUNIDAD EUROPEA, D-213, at 90 (2001); Ricardo Vigil Toledo, *Consulta Prejudicial en el Tribunal de Justicia de la Comunidad Andina*, in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 939

of the Andean legal system, four of which are especially important. First, preliminary ruling references dominate the ATJ's docket, and references increase dramatically beginning in the mid-1990s. Second, there is wide cross-national variation in when courts start referring cases to the ATJ and in the number of cases referred, but referrals are concentrated in only a small number of national courts. Third, the subject matter of these references overwhelmingly concerns intellectual property, notwithstanding the fact that Andean law spans a wide array of regional trade and investment issues. Fourth, national courts repeatedly pose very similar questions about Andean IP law, and the Tribunal provides the same answers to those questions in case after case. Moreover, even in references that do not involve IP, the questions that national judges ask are narrow. These patterns, standing alone, demonstrate that the Andean and European legal systems, although similar in design, operate very differently in practice.

A. National Court References Dominate the ATJ's Docket

Consider first the number of cases. The ATJ's docket is comprised of four major types of cases: (1) preliminary rulings (*interpretaciones prejudicial*) referred by national courts, usually in cases initiated by private parties; (2) noncompliance actions (*acciones de incumplimiento*), usually initiated by the Andean Secretary General or a member state; (3) nullification actions (*acciones de nulidad*) initiated by member states or (less frequently) by private actors; and (4) failure to act complaints (*recursos por omisión*), usually raised by private actors against the Secretary General.⁴⁷ Figure 1 below shows that preliminary

(10th ed. 2004). However, no comprehensive analysis of the rulings has ever been attempted.

47. In 2008 the ATJ posted statistics on its website on usage of each of these procedures. See <http://www.tribunalandino.org.ec/> (last visited Feb. 19, 2009). The total number of cases is higher than the number of publicly available ATJ rulings, suggesting that some rulings have not been posted on the Andean Community website. We were unable to clarify this discrepancy, which may be attributable to the fact that cases settle before the Tribunal issues a ruling. Figure 1 draws on statistics on the ATJ's website, with the exception of preliminary rulings for which we rely on our coding of the publicly available decisions. The ATJ web site lists a total of 105 noncompliance cases, 46 nullification rulings, and 6 omission cases since the creation of the Tribunal. For a list of ATJ rulings, divided by type, see <http://www.comunidadandina.org/canprocedimientosinternet/procedimientos.aspx>

ruling references have dominated the ATJ's docket. Between its first preliminary ruling in 1987 and the end of 2007, the ATJ issued 1338 decisions, far outstripping the number of cases raised through other complaint mechanisms.⁴⁸

FIGURE 1: ANDEAN TRIBUNAL LITIGATION 1987-2007

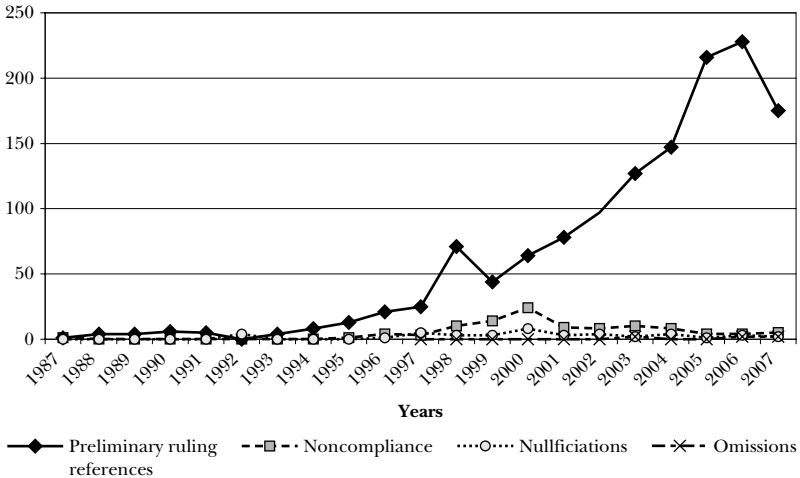


Figure 1 also reveals that the number of preliminary ruling requests increased beginning in 1993, and grew steadily after 1995. Indeed, the ATJ issued only thirty-two preliminary rulings during its first decade from 1984 to 1994. The rise in preliminary ruling references coincides with the change in Andean IP rules and the restructuring of the IP administrative agencies. The steadily increasing demand for Andean litigation peaked in 2006, when the ATJ issued 224 judgments. In 2007, the number of judgments declined to 175, higher than all but the previous two years.

These statistics demonstrate that preliminary rulings are responsible for the ATJ's status as the third most active international court. Scholars of the EC legal system will find this result unsurprising, considering the important role of preliminary rulings in building integration through law in Europe and that the ATJ's jurisdiction was copied directly from the ECJ. Stated differently, a first, cursory review of the ATJ's activity suggests that Andean litigation patterns have evolved much

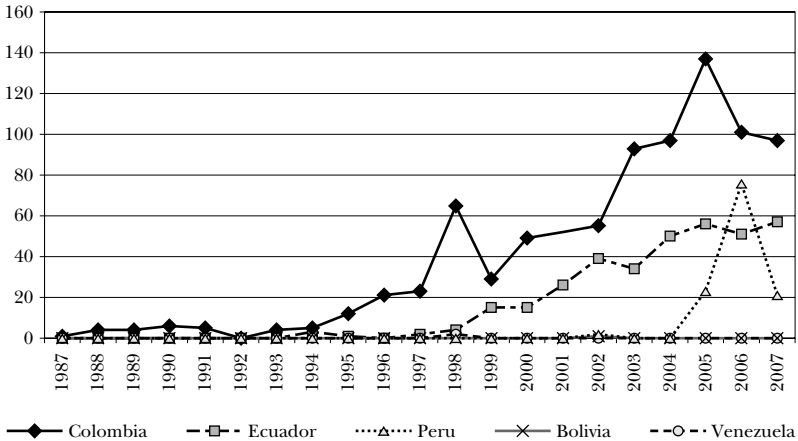
48. Database of ATJ Rulings, *supra* note 14.

as they did in Europe. As we explain below, however, a deeper empirical analysis discloses a very different legal landscape.

B. Cross-National and Cross-Court Variations in References to the ATJ

Our coding reveals significant cross-national variation in references to the ATJ. Colombian courts are responsible for 860 preliminary references, or 64%, with the second and third largest number and percentage of referrals from Ecuador (353, or 27%) and Peru (122, or 9%), respectively. In striking contrast, Venezuelan courts have referred only two cases (0.15%) and Bolivian courts have referred just one (0.07%). When we map this cross-national variation over time (see Figure 2 below), we find pivot points when referrals from national judiciaries began to rise sharply. Colombia was the first country to send a case to the ATJ in 1987. No other state referred a case for nearly a decade. Only in the mid-1990s did courts in Ecuador start to refer cases, beginning with three cases decided in 1994. The ATJ received only two requests from Peru through 2004, after which date the number of referrals rose sharply.

FIGURE 2: NUMBER OF ATJ PRELIMINARY RULINGS, 1987-2007 BY COUNTRY AND YEAR



Our interviews corroborated this pattern. Lawyers and judges attested that, after a particular date, national courts in

Colombia, Ecuador, and Peru habitually referred appeals from IP agencies to the Tribunal.⁴⁹ The pattern resembles uncorking a tap, with each uncorking producing a sharp increase in the ATJ's docket.

A more fine-grained analysis, provided in Table 1, discloses that relatively few courts refer cases to the ATJ. Of the 860 references from Colombia, for example, the overwhelming majority of cases emanated from a single court—the First Chamber of the Council of State—a first- and last-instance judicial body. A similar pattern exists in Peru, where the Permanent Chamber of Constitutional and Social Rights of the Supreme Court is the source of all but a handful of references from that country. In Ecuador, eight lower courts have made references; but two of those courts are responsible for more than two thirds of the cases referred.⁵⁰

TABLE 1. PRELIMINARY RULING REFERENCES OF ANDEAN COURTS 1987-2007 (N = 1338)

National courts referring cases to the ATJ	Number of Preliminary References	Percentage of All References
Bolivia	1	0.07
Sala Plena de la Honorable Corte Suprema de Justicia	1	0.07
Colombia	860	64.28
Corte Suprema de Justicia	2	0.15
Corte Constitucional	3	0.22

49. Interview with Marco Antonio Velilla Moreno, Martha Sofía Sanz Tobón, Rafael E. Ostau De Lafont Pianeta, & Camilo Arciniegas Andrade, Council of State of Colom., First Section, in Bogotá, Colom. (Sept. 12, 2007) [hereinafter Interview with Judges of the Council of State]; Interview with Elcira Vásquez Cortez, Vocal Supremo Jefe de la Oficina de Control de la Magistrature del Poder, and member, Sala Constitucional y Social de Peru, 2003-2007, in Lima, Peru (June 21, 2007) [hereinafter Interview with Judge Vásquez Cortez]; Interview with Ernesto Muñoz Borrero, President of Chamber No. 2, & Eloy Torres Guzmán, President of the Court and Chamber No. 1, Tribunal District No. 1, in Quito, Ecuador (Mar. 15, 2005).

50. The larger number of lower Ecuadorian courts referring cases in part reflects the fact that the Supreme Court of Ecuador does not review appeals involving Andean law. As a result, lower courts are, as a practical matter, courts of last instance for disputes over Andean law and thus are obligated to make referrals to the ATJ. For a more detailed discussion, see *infra* Part III.

Segunda Sala del Tribunal Distrital N° 1 de lo Contencioso Administrativo	1	0.07
Tribunal de Administrativo del Atlantico, Barranquilla	1	0.07
Tribunal Contencioso Administrativo del Departamento del Norte de Santander, con sede en Cúcuta	2	0.15
Consejo de Estado de la República de Colombia, Sala Plena de lo Contencioso Administrativo	1	0.07
Juzgado Civil Del Circuito De Bogotá D.C.	1	0.07
Juzgado Décimo Civil Del Circuito De Medellín	1	0.07
Consejo de Estado de la República de Colombia, Sala de lo Contencioso Administrativo, Sección Primera	845	63.15
Superintendencia de Industria y Comercio	3	0.22
Ecuador	353	26.38
Tribunal Distrital De Lo Contencioso Administrativo Con Sede En Quito (Sala Not Specified)	23	1.72
Primera Sala Del Tribunal De Lo Contencioso Administrativo De La República Del Ecuador, Distrito De Quito	137	10.24
Quinta Sala De La Corte Superior De Justicia De Quito	6	0.45
Sala De Lo Civil Y Mecantil De La Corte Suprema De Justicia De La Republica De Ecuador	2	0.15
Segunda Sala De Conjueces Del Tribunal Distrital N° 1 De Lo Contencioso Administrativo De Quito	2	0.15
Segunda Sala Del Tribunal De Lo Contencioso Administrativo De La República Del Ecuador, Distrito De Quito	130	9.72
Segunda Sala Del Tribunal Distrital De Lo Fiscal N° 1 De Quito	5	0.37
Tercera Sala De La Corte Superior De Justicia De Quito	1	0.07
Tribunal Contencioso Administrativo N° 2 Del Distrito De Guayaquil	23	1.72
Tribunal Distrital De Lo Contencioso Administrativo N° 3, Con Sede En La Ciudad De Cuenca	17	1.27
Tribunal Distrital De Lo Fiscal No. 3, De La Ciudad De Cuenca	6	0.45
Sala De Derecho Constitucional Y Social Permanente De La Corte Suprema De Justicia	1	0.07

Peru	122	9.12
Sexagésimo Juzgado Especializado En Lo Civil De Lima	1	0.07
Primera Sala Especializada En Lo Contencioso Administrativo De La Corte Superior De Justicia De Lima	2	0.15
Segunda Sala Especializada En Lo Contencioso Administrativo De La Corte Superior De Justicia De Lima	1	0.07
Sala Civil Transitoria De La Corte Suprema De Justicia De La República Del Perú	1	0.07
Sala De Derecho Constitucional Y Social Permanente De La Corte Suprema De Justicia	117	8.74
Venezuela	2	0.15
Juzgado Tercero de Primera Instancia en lo Civil, Mercantil y del Tránsito de la Circunscripción Judicial del Área Metropolitana de Caracas	1	0.07
Sala Político-Administrativa de la Honorable Corte Suprema de Justicia	1	0.07

This clumping of cases in specific courts reflects the reality that most preliminary references pertain to a single subject—an issue we address below. Because so few courts are responsible for so many references, surmounting barriers to referrals from those courts could readily generate a flood of cases in a short period of time, producing the sharp uptick in referrals shown in Figure 2. Table 1 also reveals that other courts do refer questions to the ATJ, but their references are far fewer in number. These references include the 35 non-IP decisions that we discuss in greater detail in subsection E.

The differences in national court referral patterns in the European and Andean Communities are significant. In the EC, certain national courts also account for a large percentage of ECJ preliminary rulings because their jurisdiction includes issues governed by European law. Overall, however, a much wider variety of courts are involved in referring cases to the ECJ, both because European litigation involves a broad array of legal issues (see Figure 4 below) and because courts at all levels of the national judicial hierarchy make references. In addition, lower courts have been actively involved in referring cases to the ECJ, although only courts of last instance are

obliged to do so.⁵¹ We find less lower court involvement with the ATJ. To be sure, this partly reflects the fact that Andean countries are smaller than many European countries and their judicial systems are flatter. But it is also true that lower courts do not exercise the option to refer cases to the ATJ, requiring litigants to appeal to courts of last instance. We explore the implications of these differences between the two supranational legal systems in Part V.

C. *The Limited Subject Matter Variation of ATJ Preliminary Rulings*

Figure 3 below reveals that preliminary references from national courts in the Andean Community are overwhelmingly dominated by a single subject—intellectual property. Of the 1338 ATJ preliminary rulings issued through the end of 2007, 1303 (97%) concern IP—1165 of the 1338 decisions (87%) interpret Andean trademark laws; 103 (8%) involve Andean patent rules; 11 (1%) concern copyright; and 24 (2%) concern other types of IP, such as industrial designs and utility models. Only 35 of the 1338 preliminary rulings (3%) concern issues other than IP.⁵²

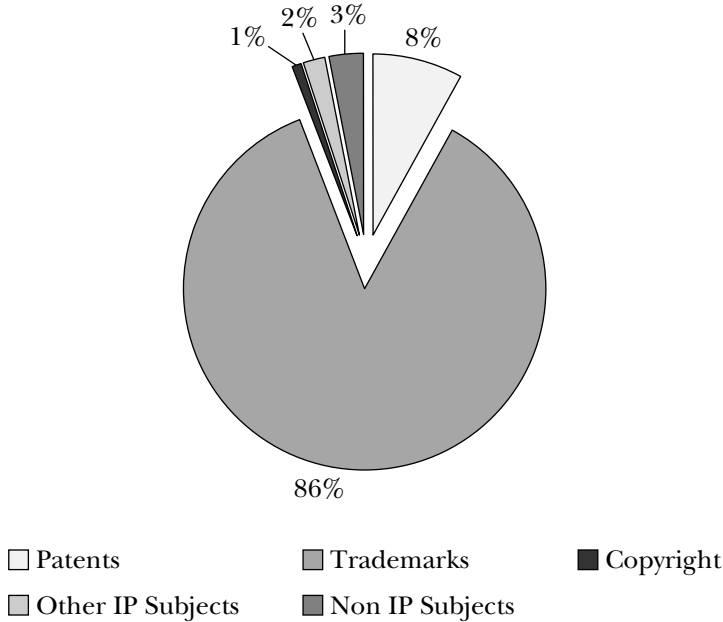
The domestic origin of these 1338 preliminary rulings is also remarkably uniform. 1285 cases began as challenges to an administrative agency's decision to grant or deny an application to register a trademark, patent or other intellectual property right. This statistic reveals that IP agency registration decisions are responsible for nearly 96% of preliminary references to the ATJ.

The substantive homogeneity of Andean references is strikingly different from the European system, where preliminary rulings canvass a broad range of issues areas regulated by EC law. Figure 4 depicts the subject matter variation of preliminary rulings during the first twenty-five years of the EC, a period comparable to the quarter-century following the creation of the ATJ.

51. For a breakdown of national court referrals to the ECJ, see Alec Stone Sweet & Thomas Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95*, 5 J. EUR. PUB. POL'Y. 66 (1998).

52. Due to rounding, these figures do not add up to exactly 100%.

FIGURE 3: 1338 ATJ PRELIMINARY RULINGS, 1987-2007
DISTRIBUTION BY SUBJECT MATTER



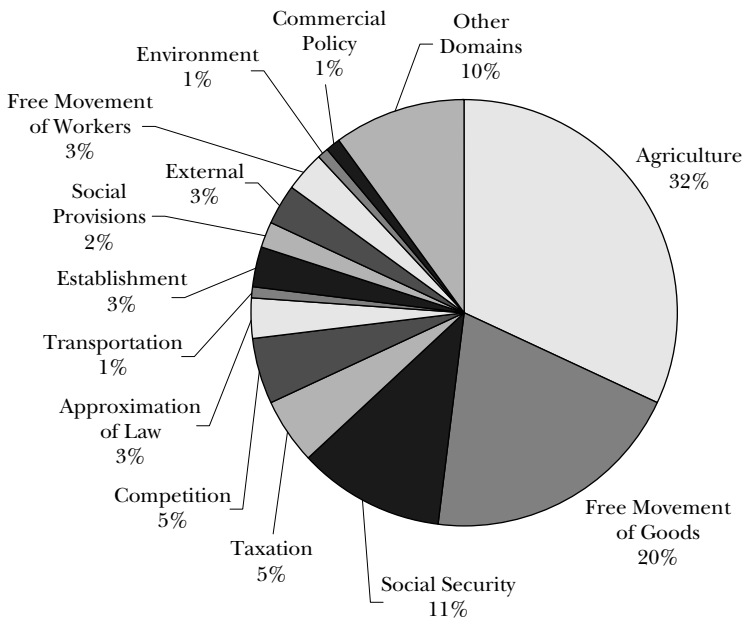
D. *National Judges Pose Narrow, Repetitive Questions of Andean IP Law and the ATJ Responds in Kind*

Given the uniform nature of ATJ preliminary references—nearly all challenge the registration decisions of IP administrative agencies—our finding that the ATJ’s decisions are highly repetitive should not be surprising. National court appeals from the agencies often raise the same legal issues, such as whether two trademarks are likely to cause confusion, whether a trademark is famous, and whether an invention satisfies the requirements for patentability.⁵³ National judges, in turn, repeatedly ask the ATJ to interpret the same provisions of Andean law even where the Tribunal has already made plain its interpretation of those provisions. The ATJ responds

53. See, e.g., Case 90-IP-2004 at 3, 5-8 (interpreting Dec. 344) (Proctor & Gamble) (likelihood of confusion); Case 162-IP-2004, at 7-8, 11 (interpreting Dec. 344) (Nestlé) (famous trademarks); Case 49-IP-2005 at 5-6 (interpreting Dec. 344) (Gillette) (patentability).

to these requests in kind, regurgitating its analysis and sometimes literally cutting and pasting paragraphs from its earlier rulings.⁵⁴ While this repetition is a source of frustration for many IP lawyers in the region, we explain elsewhere that repetition has contributed to building national judicial and administrative support for the ATJ.⁵⁵

FIGURE 4: EUROPEAN COURT OF JUSTICE PRELIMINARY RULINGS, 1959-1984 (N=1808)⁵⁶



Some observers may claim that the ATJ’s duplicative jurisprudence is an artifact of the civil law tradition, where judicial rulings apply only to the case at hand. But most national

54. Two examples of cases with much of this cutting and pasting from earlier cases are Case 4-IP-2001 (interpreting Dec. 344) (Novartis) and Case 45-IP-2006 (interpreting Dec. 344) (Warner Lambert).

55. Helfer, Alter & Guerzovich, *supra* note 12, at 21-25.

56. ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 72 (2004).

courts in Europe are part of the same tradition.⁵⁷ The key distinction between the European and Andean systems is not the difference between common and civil law but a doctrine known as *Acte Clair*—a judge-made rule that the ECJ created to dissuade national courts from referring cases that raise settled legal issues.⁵⁸ The ECJ discouraged such references to enable it to focus on more important disputes and to develop the scope and reach of EC law.⁵⁹

In our interviews, we asked whether the ATJ should also adopt *Acte Clair*, as scholars in the region have recently suggested.⁶⁰ Some attorneys mused that the Tribunal's docket would be much smaller if it did so. And a few national judges candidly admitted that the ATJ's copycat jurisprudence limited the extent to which Andean judges interfered with their discretion to decide cases. Yet this repetition is not ubiquitous. As we discuss in Part IV, the ATJ has been more willing to break new legal ground in disputes involving trademark coexistence agreements, where it has created doctrines that balance consumer protection against the interests of trademark owners. More recently, there are signs that the ATJ is becoming frustrated with the submission of repetitive questions. In a 2006 ruling, the Tribunal instructed the Colombian Council of State to "look at precedent" in cases involving pharmaceutical trademarks.⁶¹ We do not yet know whether this is an isolated statement or an indication that the ATJ is poised to adopt an Andean version of *Acte Clair* to focus on developing doctrine in other areas of regional IP law.

57. See generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3d ed. 2007).

58. See Case 283/81, Srl CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (setting out the conditions for application of the *Acte Clair* doctrine).

59. Hjalte Rasmussen, *The European Court's Acte Clair Strategy in C.I.L.F.I.T. or Acte Clair, of Course! But what does it Mean?*, 9 EUR. L. REV. 242 (1984).

60. E.g. Patricio Bueno Martínez & Alejandro Daniel Perotti, *La Teoría del Acto Aclarado ¿Resulta Necesaria su Aplicación en el Marco de la Interpretación Prejudicial Andina?*, 19 ΔΙΚΑΙΟΝ 133, 135, 146-52 (2005); Perotti, *supra* note 46, at 4-6.

61. Case 164-IP-2006 at 12 (interpreting Dec. 486) (Colinagro) (directing the Council of State to examine and apply Case 172-IP-2005 (interpreting Dec. 344) (Tecnológicas) and Case 34-IP-2006 (interpreting Dec. 486) (Merck)).

E. *Analyzing the Non-IP Cases in Greater Detail*

The question remains whether the few non-IP references are significantly different. For example, do they, as with referrals to the ECJ, raise significant legal issues or provide opportunities for the ATJ to expand the scope and reach of Andean law? To answer these questions, we summarized the 35 non-IP cases that were outliers to the reference patterns described above. Our principal findings are that although the cases involve different substantive issues (such as taxes, foreign investment, tariffs, and non-tariff barriers), the type of questions posed and the nature of the ATJ's answers are similar to the IP references. In particular, national judges ask the ATJ fairly narrow and specific questions and the ATJ responds with narrow and specific answers that adhere closely to the letter of Andean law and defer to national judges the task of applying the law to the case at hand. Moreover, in all of the non-IP references the relationship of the domestic dispute to Andean law was manifest, which explains why even reticent national judges would recognize the need for a reference. We briefly describe these 35 cases below to illustrate our core findings.

Approximately half of the non-IP referrals (sixteen cases) concerned a special Andean Program to refund value added taxes (VATs) collected on goods exported to other member states.⁶² Ten of the sixteen cases originated with a single firm that was based in Ecuador but that also exported goods from its subsidiaries in other Andean states, creating confusion as to the ultimate destination of the exports and thus their eligibility for the VAT refund. The next highest number of non-IP rulings involved non-tariff barriers (eight cases) and foreign investment (three cases), followed by one tariff case and one safeguards case. There was also a random handful of decisions—involving transportation, pesticides regulation, preliminary ruling procedures, and telecommunications. In the latter cases, the private litigants invoked Andean law (usually unsuccessfully) to challenge an unfavorable outcome under national law.

62. The case numbers for these sixteen decisions are: 75-IP-2005, 76-IP-2005, 77-IP, 2005, 112 IP-2005, 113-IP-2005, 170-IP-2005, 188-IP-2005, 215-IP-2005, 49-IP-2006, 50-IP-2006, 51-IP-2006, 52-IP-2006, 53-IP-2006, 54-IP-2006, 115-IP-2006, 114-IP-2006.

The cases related to tariffs and non-tariff barriers relied on provisions of the Cartagena Agreement, the Andean Community's founding treaty. The ATJ interpreted the relevant provisions but did not turn the agreement into a constitution for the region; thus, it did not follow the ECJ in constitutionalizing the Treaty of Rome.⁶³ The other cases interpreted "Decisions"—the secondary legislation of the Andean Community. Thus perhaps one difference from Europe is that there is less secondary Andean legislation for litigants to invoke.⁶⁴ But it is nevertheless surprising how few common-market-related disputes have actually been litigated in national courts.

There is also considerable cross-national variation in the non-IP references. Ecuador has sent the most non-IP referrals to the ATJ, but mainly because of the sixteen cases concerning the special VAT tax. Ecuadoran courts also referred four other non-IP cases. Two references concerned customs procedures for agricultural products,⁶⁵ and one concerned double taxation from the sale of an Ecuadoran firm to a company based in another member state.⁶⁶ The Supreme Court of Ecuador also referred a dispute between two private actors in which one firm argued that WTO law took precedence over Andean rules. The case provided an opportunity for the ATJ to affirm the primacy of Andean law for the Community's member states.⁶⁷

Colombia was the country of origin for most of the remaining non-IP rulings (twelve cases). The Colombian referrals involved some of the most high-profile and contentious

63. See Saldias, *supra* note 8, at 26-29; Karen J. Alter & Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT'L ORG. ____ (forthcoming 2010).

64. Alec Stone Sweet charts the number of EC directives and regulations adopted between 1959 and 1997. Stone Sweet, *supra* note 53, at 59. Until 1975, there were on average fewer than 100 regulations and directives per year. *Id.* This number is far larger than the total number of Andean "Decisions"—the secondary legislation of the Andean Community. See *Treaties and Legislation: Decisions*, <http://www.comunidadandina.org/INGLES/treaties.htm> (listing these Decisions).

65. These decisions are: Case 18-IP-2004 (interpreting Dec. 416) (AFABA); Case 141-IP-2004 (interpreting Dec. 416) (C.A. Pronaca).

66. See Case 190-IP-2006 (interpreting Dec. 40) (Stimm Soluciones Tecnologicas).

67. See Case 158-IP-2006 (interpreting Dec. 291) (Deutsche Pharma Ecuatoriana).

aspects of Andean law: the Andean Investment Code, the Andean Free Trade Program, and the use of safeguards against imports from other member states. The cases also raised issues of noncompliance with Andean law; in a few instances the preliminary ruling request was made after a noncompliance complaint by the General Secretariat led the ATJ to find a violation of Andean law. For example, Venezuela successfully contested Colombia's regional tax system for alcoholic products. A private firm followed up on this noncompliance ruling by using a preliminary reference to challenge Colombia's alcohol monopoly and discriminatory taxation system.⁶⁸

There have been far fewer non-IP cases from the remaining three member states. The sole reference from Bolivia involves taxation of long-distance telephone calls. One Venezuelan referral concerned maritime issues and the other copyright infringement involving computer software.⁶⁹ Peru has referred only one non-IP case to the ATJ, which raised a procedural question about preliminary ruling references that the ATJ refused to answer.⁷⁰

Focusing exclusively on the non-IP cases, we find that national judges refer cases in which questions of Andean law have a clear and plausible connection to the dispute. In other words, national judges appear to follow the letter of their obligation under the ATJ Treaty to refer cases in which an Andean rule "is litigated,"⁷¹ although the questions they pose are mostly narrow and technical. In terms of cross-national variation, Colombian courts are the most willing to refer disputes raising issues of noncompliance with Andean law—a finding consistent with the longstanding and frequent practice of referrals in IP cases by that country's Council of State.

68. The alcohol case number is 29-IP-98; the other cases numbers are: 5-IP-89, 1-IP-90, 2-IP-90, 5-IP-90, 3-IP-93, 30-IP-98, 103-IP-2000, 39-IP-2001, 137-IP-2003, 160-IP-2005, 115-IP-2005.

69. For more detail see *infra* Part III.D.

70. Case 30-IP-2005 (Peru) (refusing to review Peru's application for an interpretation of the difference between claim withdrawal and waiver processes).

71. Revised ATJ Treaty, *supra* note 30, art. 33.

F. *Concluding Observations*

The foregoing analysis suggests that changes in Andean IP legislation, and in the structure of domestic IP agencies, were important factors explaining the distinctive patterns of preliminary references that are overwhelmingly dominated by intellectual property issues. Yet an important question remains: why were some countries quick, and others slow, to start referring IP cases? Part III attempts to answer this question.

III. ACTIVATING THE LINKS BETWEEN NATIONAL COURTS AND THE ATJ

What accounts for the distinctive cross-national variation of preliminary references? In particular, why did Colombia begin referring cases before other countries, and why has Colombia continued to be the largest source of references to the ATJ? Why did Ecuadoran and Peruvian courts not refer cases for many years, and why have Bolivia and Venezuelan courts made hardly any references? The subjects we interviewed offered various conjectures but little hard evidence. In this Part, we use qualitative analysis to explain the variations in judicial activation patterns across the five Andean Community member states.⁷²

72. Students of the European legal integration have applied quantitative methods to examine the reference patterns of national judges to the ECJ. They have correlated variations in reference rates with a number of factors, including intra-European trade, national legal traditions (such as civil law versus common law traditions, and monism versus dualism), public opinion on European legal issues, and the subject matter of disputes. And they have claimed that their findings provide causal insight into the nature of European legal integration. See, e.g., Clifford J. Carrubba & Lacey Murrah, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, 59 INT'L ORG. 399 (2005) (finding that transnational economic activity, public support for integration, monist or dualist tradition, judicial review, and the public's political awareness influence use of the preliminary ruling system); Jonathan Golub, *Modeling Judicial Dialogue in the European Community: The Quantitative Basis of the Preliminary References to the ECJ*, (Eur. Univ. Inst., Working Paper RSC 96/58, 1996) (finding that transnational economic interaction and transnational movement of people account for almost the entire cross-national variation in reference rates); Stacey Nyikos, *Strategic interaction among courts within the preliminary reference process—Stage 1: National court preemptive options*, 45 EUR. J. POL. RES. 527 (2006) (looking at ways national courts strategically use the referral process); Stone Sweet & Brunell, *supra*

A. Colombia

Four factors help to explain the initial preliminary references from Colombia in 1987 and the increase in referrals beginning in the mid-1990s. First, Colombia has played a leading role in drafting regional laws since the founding of the Andean Pact. This is particularly true with regard to intellectual property, because Colombian IP laws were older and more developed than those of other member states.⁷³ In fact, the first Andean IP law, Decision 85, adopted in 1974, “followed almost to the letter” the patent and trademark provisions of the 1971 Colombian Code of Commerce.⁷⁴ This old lineage meant that there was a basic familiarity with the content of Andean IP legislation among lawyers in Colombia.

A second factor reinforced this concordance of domestic and regional law. Colombia was the only Andean member state to give direct effect to Decision 85 without adopting implementing legislation.⁷⁵ Since the only relevant law was Andean law, it was easier for national courts to accept that the ATJ should be involved in its interpretation.

A third element concerns informal advocacy to national judges by self-interested attorneys. Consider the first Colombian reference to the ATJ in 1987. The referral request in that

note 51 (finding that referral data such as date, state of origin, referring court, and subject matter support transaction-based theories of integration). Referral rates may well be influenced by the demand for trademarks and patents. However, because the ATJ’s docket is overwhelmingly dominated by IP cases, correlations between reference rates, state attributes, legal cultures or trade levels would likely be spurious. We therefore rely on qualitative assessment to investigate the factors that help to explain variations in national references to the ATJ.

73. See GERMÁN CAVALIER, COMPILACIÓN HISTÓRICA DE LAS LEYES COLOMBIANAS SOBRE PROPIEDAD INDUSTRIAL (2002).

74. Saldias, *supra* note 8, at 15.

75. Decision 85 gave Andean countries six months to give effect to its provisions. Ecuador and Peru enacted domestic laws within the six month window. Bolivia did so as well, but suspended its application three months later. Venezuela never complied. See Roberto Salazar Manrique, *The Andean Community’s Intellectual Property Regime*, in THE ANDEAN COMMUNITY AND THE UNITED STATES: TRADE AND INVESTMENT RELATIONS IN THE 1990s 351, 353 (Miguel Rodríguez Mendoza et al. eds., 1998). Later Andean IP Decisions were effective upon their publication in the Official Gazette and had direct effect as of that date. See Ivor D. Mogollón Rojas, *The New Andean Pact Decision No. 486 on the Common Industrial Rights Regime*, 4 J. WORLD INTELL. PROP. 549, 551 n.4 (2001).

case was made by Germán Cavelier, the respected head of a Bogotá law firm and a professor of international law at the prestigious *Universidad de Nuestra Señora de Rosario*.⁷⁶ Cavelier challenged before the Council of State the refusal of the Colombian IP agency to register the trademark of the Swedish car manufacturer Volvo. He argued that judges on the Council were required to refer the case to the ATJ and implied that their failure to do so could subject the court to a noncompliance action. Cavelier also spoke with former judges who successfully lobbied current judges on the Council to refer the case to the Tribunal.⁷⁷

The structure of the Colombian judicial system reveals a fourth factor that facilitated ATJ referrals. In all Andean countries, as in many Latin American countries, judges receive special training and make their careers in the judiciary.⁷⁸ According to the judges, attorneys, and government officials whom we interviewed, many members of this professional judicial class feared that references to the ATJ would undermine their autonomy. In Colombia, however, governmental and administrative decisions, including IP registrations, are typically reviewed by the Council of State, a first- and last-instance administrative court separated from the rest of the country's judicial system.⁷⁹ Members of the Council come from many back-

76. *See* Five Years of Achievement, 1963-1968, REPORT OF THE GENERAL SECRETARIAT 26 (1968) (noting Cavalier's affiliation with this university).

77. Interview with Germán Marín, partner, & Emilio Ferraro, director, Cavelier Abogados, in Bogotá, Colom. (Sept. 11, 2007). Another Colombian lawyer involved in IP legislation and early litigation was Manuel Pachon. Pachon helped to draft the patent and trademark provisions of the 1971 Colombian Code of Commerce, was the plaintiff in another early preliminary ruling (5-IP-89), and his writings on IP issues are frequently cited by the ATJ in its interpretation of Andean rules. Interview with Ricardo Metke, partner, Raisbeck, Lara, Rodríguez & Rueda, in Bogotá, Colom. (Sept. 11, 2007).

78. *See generally* LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA (2007).

79. There are five sections of the Council of State, each of which focuses on specific governmental or administrative issues, such as labor disputes involving government employees, contracts with the state, fiscal and tax issues, and election disputes. The First Section the Council hears appeals of IP registrations. *See generally* Consejo de Estado, <http://www.consejodeestado.gov.co/> (last visited Mar. 30, 2009). This system borrows from the French model where a separate quasi-legal administrative branch oversees review of government actions.

grounds, including the judiciary, politics, academia, the private bar, and public administration. After passing a qualifying examination, they are appointed to non-renewable eight-year terms and then return to their former careers. The Council's distinctive structure and appointment process suggest that its members would be less concerned that ATJ referrals would undermine the prestige, influence or autonomy of their office—a fact confirmed by our interviews.⁸⁰

After the first reference in the 1987 Volvo case, the Council of State continued to refer IP cases to the ATJ. As shown in Figure 2 above, there were only a small number of such cases until the mid-1990s, at which point referrals rose dramatically. This increase followed the creation of the Superintendent of Industry and Commerce in 1992 and the overhaul of Andean IP rules that we described in Part II. According to one Colombian attorney, as a result of these changes more businesses began to request trademark and patent registrations or to oppose the registrations of their competitors, and “the *Consejo de Estado* started to use the Andean system” more frequently to resolve these disputes.⁸¹

B. Ecuador

In contrast to Colombia, courts in Ecuador did not refer any cases to the ATJ until 1994, and regular referrals did not begin until 1999. One reason for this pattern was uncertainty as to whether intermediate appellate courts were required to send cases to the Tribunal. The ATJ Treaty authorizes any court to send a reference but requires last-instance courts to do so.⁸² In Europe, lower courts readily refer cases to the ECJ. In the Andean Community, by contrast, our coding reveals that primarily last-instance courts refer cases. Formally, the Supreme Court of Ecuador is that country's highest judicial body. But the *Ley de Casación* makes its review an extraordinary remedy (“*el recurso extraordinario de Casación*”) to be granted only in extremely limited circumstances. Thus, for all practical purposes, lower appellate courts are the last-instance level of review for issues of Andean law.

80. Interview with Judges of the Council of State, *supra* note 49.

81. Interview with Marcel Tangerife Torres, *supra* note 45.

82. Revised ATJ Treaty, *supra* note 30, art. 33; ATJ Treaty, *supra* note 9, art. 29.

Litigation was required to resolve whether lower appellate courts were required to refer cases. The key case involved a dispute between Proctor & Gamble (“P&G”) and an Ecuadoran company, New Yorker Guayaquil S.A. (“New Yorker”). New Yorker challenged P&G’s termination of a contract to manufacture and distribute products bearing P&G trademarks. P&G appealed a trial court ruling to the Superior Court of Guayaquil and requested a reference to the ATJ. The Superior Court refused on the ground that it was not a court of last instance. P&G then appealed to the Supreme Court and also filed a complaint with the Andean General Secretariat. Both petitions included allegations that Ecuador violated Andean law when the Superior Court rejected the reference to the ATJ.

In 1998, the General Secretariat upheld P&G’s complaint. It interpreted the ATJ Treaty as requiring references from appellate courts where the only further appeal is an extraordinary remedy.⁸³ Six months later, the Supreme Court of Ecuador reversed the Superior Court. The high court agreed with the General Secretariat that P&G’s “request for a preliminary interpretation was mandatory for the Superior Court and by not doing so the court violated [the ATJ Treaty] and the *Ley de Casacion*.”⁸⁴ Shortly thereafter, the General Secretariat issued a new decree confirming that Ecuador was now in compliance with Andean law.⁸⁵

As noted in Part II above, Ecuadoran courts began to send a steady stream of cases to the ATJ in 1999. Our interviews

83. Resolution 171, General Secretariat Infringement Decree No. 51-98 (Dec. 17, 1998). Both parties requested reconsideration of this decision, but the General Secretariat reaffirmed its decision in March 1999. It also rejected the argument that domestic courts are not required to refer cases where they believe that Andean law is clear and does require interpretation by the ATJ. Resolution 210, General Secretariat Resolution in Response to the Motion to Reconsider (Mar. 31, 1999). New Yorker then filed a nullification action with the ATJ to challenge the General Secretariat’s decrees. Following analogous ECJ case law, the ATJ held that Andean law did not authorize it to nullify the decrees. Case 24-AN-99 (nullity action brought against Res. 171 & Res. 210) (New Yorker).

84. *Recurso de Casacion*, Third Civil and Commercial Law Courtroom of the Supreme Court of Ecuador, Oct. 5, 1999 (Claim No. 13-99; Res. No. 468-99).

85. Resolution 356, General Secretariat Decree No. 08-2000 (Feb. 9, 2000).

with attorneys confirmed that the P&G litigation was the catalyst for courts to begin regularly sending cases to the Tribunal.⁸⁶ The P&G litigation also helps to explain why referrals from Ecuador originate from multiple lower courts, as distinguished from Colombia and Peru, where nearly all referrals are made by a single last-instance court.⁸⁷

If the P&G litigation was the turning point for referrals from Ecuador, what explains the first three cases referred by that country's courts in 1994? Meetings between Andean and national judges suggest a plausible answer. The President of the ATJ in the early 1990s was Gallo Pico Mantilla, a lawyer and former government minister from Ecuador. He met informally with some of the judges serving on Ecuador's administrative courts, explained the ATJ's relative lack of work, and urged them to refer cases.⁸⁸ The judges did send a few cases in the mid-1990s, but then stopped, in part because the country's IP law was itself in flux. Ecuador's legislature adopted a revised IP code in 1999. A draft of the legislation envisioned creating a specialized IP tribunal. The tribunal was never created, but the expectation that IP suits would one day be resolved by a specialized domestic tribunal provided a ready excuse for Ecuadoran judges to refrain from making regular references to the ATJ.⁸⁹

C. Peru

Unlike in Colombia and Ecuador, the activation of ATJ referrals from Peru was protracted and generated more resistance from national judges.

As described in Part I, domestic IP agencies, including INDECOPI in Peru, apply Andean IP rules to determine whether to register applications for trademarks and patents. The agencies, and the attorneys who appear before them, were thus logical interlocutors for ATJ judges. In 1999 or 2000, a partner in a well-known Peruvian law firm specializing in IP asked INDECOPI's administrative tribunal to refer a question of An-

86. See Interview with Marcel Tangerife Torres, *supra* note 45.

87. See tbl. 1, *supra*.

88. Interview with Gallo Pico Mantilla, Andean Trib. J., 1987-1993, in Quito, Ecuador (Mar. 17, 2005).

89. Interview with Eloy Torres Guzmán & Ernesto Muñoz Borrero *supra* note 49.

dean IP law to the ATJ in a pending case. The agency made the request, but the ATJ rejected it. We found no written record of this decision, but its existence was confirmed by several Peruvian attorneys, judges, and government officials. According to a Peruvian judge on the ATJ, Andean judges viewed the INDECOPI tribunal as an administrative rather than a judicial body and thus ineligible to request a preliminary reference under the ATJ Treaty.⁹⁰ As a formal matter, this distinction is correct. But it ignores the fact that the INDECOPI tribunal performs a quasi-judicial function—the review of registration decisions by the agency’s patent and trademark offices—that in other member states is carried out by the courts.

Lacking a direct link between the agency and the ATJ, attorneys seeking preliminary references were first required to appeal INDECOPI registration decisions to the Peruvian courts. Attorneys described the likelihood of pursuing such appeals as small because of the expense and time involved and because the judges were unfamiliar with Andean IP law. The disincentive to appeal was compounded by the fact that, in the few cases in which attorneys did appeal, Peruvian judges refused requests to refer the cases to the ATJ.⁹¹

In response to this situation, the same IP attorney that had asked the INDECOPI tribunal to refer a case to the ATJ filed a complaint with the Andean General Secretariat. He argued that Andean law required the Supreme Court of Peru (which has wider appellate jurisdiction than its Ecuadoran counterpart) to request preliminary references. In a 2000 decree, the General Secretariat agreed, issuing a formal finding of noncompliance against Peru that echoed its earlier noncompliance decree against Ecuador.⁹²

The parties to an unrelated trademark case then pending before the Supreme Court of Peru cited this decree in support of their request for a reference, but the court again refused to send the case to the ATJ. It reasoned that the “independence and exclusive judicial function” of Peruvian judges would be

90. Interview with Ugarte del Pino, *supra* note 23.

91. *E.g.*, Interview with Jose Barreda, *supra* note 45.

92. Resolution 459, General Secretariat Noncompliance Decree No. 38-2000 (Dec. 5, 2000).

threatened if they applied the Tribunal's interpretation of Andean law.⁹³

Following this decision, the IP attorney, with the support of the Peruvian government, filed a second complaint with the General Secretariat.⁹⁴ In a 2003 decree finding a continuing breach of Peru's treaty obligations, the General Secretariat reaffirmed its prior analysis. It reasoned that although in general national judges have discretion to decide in good faith whether a dispute raises issues of Andean law meriting a referral to the ATJ, in trademark disputes Andean law is the only applicable law and so the Supreme Court must ask for a preliminary reference to guide its analysis.⁹⁵

In the months following the 2003 decree, Andean and Peruvian officials made a concerted effort to persuade the Supreme Court to change its ways. The General Secretariat is located in Lima, the country's capital, which facilitated meetings at which Andean officials sought to convince the Peruvian high court judges to begin making references. The Secretariat also partnered with the Andean Committee of Jurists, which organized a conference in Lima with the members of the Supreme Court's Chamber of Constitutional and Social Rights. The conference participants explained the obligation to refer cases and provided specific instructions on how to do so.⁹⁶ Ac-

93. The Peruvian Supreme Court's decision is discussed in Resolution 771, General Secretariat Noncompliance Decree No. 173-2003 (reporting the Supreme Court's statement that "su independencia y violaria el principio de la unidad y exclusividad de la función jurisdiccional en el caso de aplicar el artículo 35 del Tratado y someter a su criterio a la decisión del Tribunal Andino adoptando en su sentencia la interpretación del Tribunal").

94. *Id.* (citing Memorandum of the Government of Peru, File No. 277-2003-MINCETUR/VMCE/DNINCI, which states that the government had formally requested that the Supreme Court send cases to the ATJ, arguing that preliminary references were "necessary to determine the scope and reach of the Andean Laws," "not a intrusion on domestic jurisdiction," and required for the state to "fulfill its treaty obligations").

95. See Resolution 771, *supra* note 93 ("Even though the final decision related to the confusion or not of the trademarks is within the jurisdiction of the domestic judge, this decision should be done subject to the criteria and rules established by the interpretation of the [ATJ].").

96. See El Principio de Cooperación Judicial Entre el Tribunal Andino y los Tribunales Nacionales en el Marco de la Comunidad Andina, Nov. 28, 2003, <http://www.cajpe.org.pe/RIJ/Memorias/principio1.htm> (last visited Mar. 30, 2009) (listing attendees and conference program); Telephone Interviews with Salvador Herencia Carrasco, Legal Advisor, Andean Comm'n

ording to Elcira Vásquez Cortez, a judge on the Supreme Court at the time, this conference and series of meetings were the catalyst for the subsequent stream of referrals from Peru to the ATJ beginning in 2005.⁹⁷

The foregoing narrative reveals that Supreme Court eventually yielded to increasing pressure to refer cases. The change in the Supreme Court's position is not all that surprising. In 1996 Peru opted-out of the newly-created Andean Free Trade Area. But in the 1997 Sucre Protocol it agreed to fully participate by the end of 2005.⁹⁸ Peru was thus in the process of normalizing its relations with the Andean Community. As the country became more active in the Andean system, the refusal of its courts to refer cases to the Tribunal appeared increasingly problematic. This was especially true because the country's IP agency, INDECOPI, favored references in IP cases. In other words, the time was right for Peruvian courts to give up their exceptional position.

What remains uncertain is why Peruvian judges continued to resist sending references long after their colleagues in Colombia and Ecuador had begun to do so. The structure of the Peruvian judicial system suggests one explanation. Judges reach the Supreme Court after studying at the *Academia de la Magistratura*, a training that does not include Andean law. In addition, judges frequently change positions within the judiciary. In 2003, when Elcira Vásquez Cortez assumed the Presidency of the Chamber of Constitutional and Social Rights—the Supreme Court division responsible for IP appeals—her first inclination was to replicate past practice and not to refer any cases to the ATJ. None of the judges “had experience con-

of Jurists, 2003-2008 (May 5, 2008 & Dec. 8, 2008) [hereinafter Interviews with Salvador Herencia Carrasco]. The Commission also encouraged Bolivian judges to make references, with less apparent success.

97. Interview with Judge Vasquez Cortez, *supra* note 49.

98. The Sucre Protocol contained a “transitory provisional chapter” that declared that the Free Trade Area would become operational no later than December 31, 2005, and it allowed Peru to work out with the Commission to structure its entry into the common external tariff system. An English version of the Protocol is available at http://www.comunidadandina.org/INGLES/normativa/ande_trie4.htm (last visited April 6, 2009). For a summary of the Protocol's key achievements, see Press Release, Comunidad Andina, Sucre Protocol Deepening Andean Integration Enters Into Effect Today (Apr. 4, 2003), <http://www.comunidadandina.org/INGLES/press/press/np14-4-03b.htm>.

sulting the Tribunal. . . . We thought the Tribunal was about relations for the Andean Community, and didn't see implications for Peruvian courts."⁹⁹ Vásquez Cortez had no conclusive explanation for why her predecessors did not follow the trends in other countries. But she offered two suggestions: first, that her colleagues did not have regular contact with their counterparts in other Andean countries, and second, that although one of her predecessors (Ugarte del Pino) later served on the ATJ, he did not, unlike the Ecuadoran ATJ judge, personally lobby his colleagues to refer cases.¹⁰⁰

As these events reveal, judicial misconceptions of Andean law and the Andean legal system were difficult to dislodge and were only overcome by cumulative pressure from the Peruvian government, the private bar, and Andean officials.

D. *Bolivia and Venezuela*

In stark contrast to Colombia, Ecuador, and Peru, the two remaining Andean Community member states¹⁰¹ have referred a grand total of three cases to the Tribunal. None of these cases concern the IP registration disputes that comprise the overwhelming majority of referrals to the ATJ. The sole Bolivian case involved a challenge by the foreign-owned TELECEL to a tax on long distance telephone rates based on whether the call was made from a mobile telephone or a land line. The ATJ refused to address the merits of the complaint because the Andean law in question contained a provision making it applicable only to transborder disputes.¹⁰²

We asked the individuals we interviewed to explain the absence of referrals concerning IP registrations from these two countries. In the case of Bolivia, the respondents pointed to several factors. First, Bolivia is the poorest country in the Andean Community. Its judicial and administrative infrastructure is underdeveloped and subject to pervasive political inter-

99. Interview with Judge Vásquez Cortez, *supra* note 49.

100. *Id.*

101. For an explanation of the changes to membership in the Andean Community, see *supra* note 11.

102. The Supreme Court of Bolivia referred this case to the ATJ. Case 87-IP-2002 (interpreting Dec. 285, Dec. 439, Dec. 462, & Dec. 432). The Andean law at issue was Decision 285. Article 2 excludes from the law's scope discriminatory practices that have effects only in one member state.

ventions. For example, governments frequently change the composition of the Bolivian Supreme Court. The high turnover rate makes it difficult to build relationships between the ATJ and Bolivian judges.¹⁰³ Second, the Bolivian Constitution lacks a provision authorizing the government to delegate law-making powers to the Andean Community.¹⁰⁴ As a result, recognizing the supremacy of Andean law and making referrals to the ATJ poses a greater risk for Bolivian judges than it does for jurists in other member states. Third, there is little reason to undertake this risk because the domestic demand for IP protection is weak. As late as 1995, the United States characterized the protection of IP in Bolivia as “nearly non-existent.”¹⁰⁵ The following year, Bolivia established the *Servicio Nacional de Propiedad Intelectual* (SENAPI) to improve this situation. Unlike its counterparts in other member states, however, SENAPI “is seriously under-funded, lacks a cadre of trained personnel, and lacks any mechanism by which to enforce intellectual property rights.”¹⁰⁶ Our interviews confirmed that all these factors contributed to the absence of Bolivian national court referrals to the ATJ.¹⁰⁷

The explanation for Venezuela is somewhat different. That country did not lack the legal or administrative capacity to implement Andean rules. Moreover, in the late 1990s it appeared as if Venezuelan judges might be open to ATJ referrals. In 1998, the Venezuelan Supreme Court referred a case in which the plaintiff had asked a national judge to nullify a deci-

103. In 2002, the Andean Commission of Jurists established a program aimed at increasing awareness of the Andean legal system in Bolivia, Peru, and Venezuela. Commission officials held meetings with the Bolivian Supreme Court, but these meetings had to be rescheduled frequently because of the many changes to the court’s composition. Interviews with Salvador Herencia Carrasco, *supra* note 96.

104. Eric Tremolada, *Application of the Andean Communitarian Law in Bolivia, Ecuador, Peru, and Venezuela in Comparison with the European Union Experience*, 4 (Jean Monnet/Robert Schuman Paper Series, 2006), available at <http://www6.miami.edu/EUCenter/Tremoladafinal.pdf>.

105. OFFICE OF THE COORDINATOR FOR BUS. AFFAIRS, U.S. DEP’T OF STATE, BOLIVIA COUNTRY COMMERCIAL GUIDE (1996).

106. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2002 SPECIAL 301 REPORT: BOLIVIA 310, 313.

107. *E.g.* Interviews with Salvador Herencia Carrasco, *supra* note 96; Interview with Augusto Rey, Executive Dir., Asociación Nacional de Laboratorios Farmacéuticos (ALAFARPE), in Lima, Peru (June 19, 2007).

sion of a Venezuelan ministry. The case raised the question of whether Andean law required Venezuela to implement a common Andean policy aimed at strengthening the competitiveness of the regional shipping industry.¹⁰⁸ A year later, a different Venezuelan court referred a question concerning the scope of Andean IP protection for computer software in a copyright infringement action brought by the Microsoft corporation.¹⁰⁹

This potential opening to engaging the ATJ could perhaps have been expanded through attorneys' repeated requests for referrals, as occurred in Ecuador and Peru. The possibility of such requests diminished, however, following the election of President Hugo Chavez in 1998. In 2002, the Andean Commission of Jurists established a project to increase awareness of the Andean legal system in national judiciaries. The Commission's efforts made little headway in Venezuela due to the politicization of the country's Supreme Court.¹¹⁰ Chavez's appointment of numerous provisional judges exacerbated the politicization of the judiciary and made it exceptionally risky for judges to refer cases to an international tribunal not controlled by the government.¹¹¹ The possibility of additional ATJ references from Venezuela vanished entirely with the country's formal withdrawal from the Andean Community in 2006.

E. *Concluding Observations*

Once attorneys and Andean officials overcame national judicial resistance, the judges and lawyers we interviewed indi-

108. The plaintiff, an Andean maritime company, was challenging a decision by the Venezuelan Ministry of Transportation and Communication, which had denied the plaintiff's request that a Brazilian competitor be barred from access to Venezuela's port. Case 19-IP-98 (interpreting Dec. 314, Dec. 288, & Res. 422) (Naviero del Pacífico).

109. The reference, involving Decision 351, came from the Juzgado Tercero de Primera Instancia en lo Civil, Mercantil y del Tránsito de la Circunscripción Judicial del Área Metropolitana de Caracas. See Case 24-IP-98 (interpreting Dec. 351) (Promotora Cedel).

110. Interviews with Salvador Herencia Carrasco, *supra* note 96.

111. See generally GREGORY WILPERT, CHANGING VENEZUELA BY TAKING POWER: THE HISTORY AND POLICIES OF THE CHAVEZ GOVERNMENT 45-56 (2007); HUMAN RIGHTS WATCH, RIGGING THE RULE OF LAW: JUDICIAL INDEPENDENCE UNDER SIEGE IN VENEZUELA (2004), available at <http://www.hrw.org/reports/2004/venezuela0604/index.htm>.

cated that the relevant courts habitually referred IP registration cases to the ATJ. Several distinctive features of the region's IP system contributed to this result. IP was an issue area regulated by Andean rather than national rules, rules that had been comprehensively revised in the early 1990s. As a result, there were no entrenched bureaucratic or judicial actors committed to the domestic resolution of disputes. The IP rules also raised highly technical issues that many national judges did not fully understand. The regional, novel, and technical nature of Andean IP rules helps to explain why domestic IP agencies were eager to seek guidance from the ATJ. The next Part discusses the symbiotic relationship that developed between agency officials and the Andean judges and analyzes its consequences.

IV. DOMESTIC IP AGENCIES AS THE ENGINE OF THE ANDEAN PRELIMINARY REFERENCE PROCESS

As discussed in the introduction, scholars have identified national courts as the key actors in facilitating the expansion of EC law and its penetration into the national legal systems of EC member states. Moreover, national judges, spurred by requests from self-interested litigants, referred provocative questions to the ECJ, providing that court with multiple opportunities to expand the scope and reach of EC law. The willingness of national judges to apply the far-reaching doctrines that European judges developed in response to those questions legitimated the ECJ's expansive lawmaking and transformed national courts into crucial compliance constituencies for EC law.¹¹²

In the Andean context too, national judges request preliminary rulings from their Andean colleagues and apply those rulings once the ATJ has spoken. But our analysis of the cases, coding of ATJ rulings, and extensive interviews reveal that in practice national judges are mostly passive intermediaries who do not engage in an active dialogue with the ATJ. Instead, our research discloses that national IP agencies are the ATJ's principal interlocutors and compliance constituencies, repeatedly seeking the Tribunal's guidance and habitually applying ATJ rulings that clarify ambiguities and lacunae in Andean IP

112. See sources cited in *supra* notes 5, 6.

rules. The General Secretariat has reinforced the symbiotic relationship between the Tribunal and the agencies by consulting agency officials regarding revisions to Andean IP legislation as interpreted by the ATJ.¹¹³

This Part describes several developments that reveal the primacy of the ATJ-IP agency dialogue as the engine that drives Andean preliminary references. These developments include (1) how agency officials frame the legal issues presented to Andean judges; (2) the influence of ATJ rulings on the agencies' working methods; (3) the influence of the agencies' substantive policy preferences on ATJ jurisprudence; and (4) a recent change to the structure of the preliminary reference mechanism that creates a direct link between agency officials and Andean judges.

A. *Framing the Questions Presented to the ATJ*

The domestic IP administrative agencies influence the questions that national courts present to the ATJ in several ways. First, and most basically, the agencies have the initial opportunity to interpret and apply Andean IP rules when deciding whether to grant an application for a trademark or a patent. In so doing, they identify and analyze any unsettled legal issues that may later be the subject of a reference to the Tribunal. Second, the agencies participate as parties in litigation challenging their registration decisions. When private actors ask national courts to overturn agency rulings, they name the agencies themselves as defendants.¹¹⁴ As parties to national court proceedings, the agencies can suggest to national judges which issues of Andean law should be referred to Andean judges. Third, the IP agencies participate in litigation before the ATJ, providing information directly to the Tribunal in defense of their substantive policy preferences and registration decisions.¹¹⁵

113. Interviews with Monica Rosell, *supra* note 29.

114. See, e.g., *Annual Review: The Twelfth Annual International Review of Trademark Jurisprudence*, 95 TRADEMARK REP. 267, 343-54 (2005) [hereinafter *2005 Annual International Review*] (reviewing "nullity actions" filed by trademark applicants and opponents against the SIC with the Colombian Council of State).

115. See, e.g., Case 104-IP-2004 at 3-4 (Colombian SIC defended before the ATJ its refusal to register a trademark due to lack of distinctiveness) (interpreting Dec. 344) (Sociedad Muebles & Accesorios); Case 100-IP-2006 at 5-6

B. *The ATJ's Influence on IP Agency Practices and Procedures*

Our research and interviews with current and former agency officials in Peru, Colombia, and Venezuela revealed that the IP agencies are avid consumers of the ATJ's preliminary rulings. For example, a member of the INDECOPI administrative tribunal (a quasi-judicial administrative body that hears appeals from registration decisions issued by the agency's trademark and patent divisions) stated:

We [the members of the tribunal] expect and await the [ATJ] rulings. We read the rulings and they help us to clarify the procedures and substantive issues in the law. We apply the rulings as soon as they come down from the tribunal, and we reference the rulings in the texts of our decisions about registrations.¹¹⁶

The head of the Industrial Property Division at Colombia's Superintendent of Industry and Commerce (SIC) concurred, stating that ATJ "rulings certainly help" the division's work: "We read all the decisions, and discuss the important points," especially now that the internet makes it possible to "review cases immediately" after the Tribunal decides them.¹¹⁷ The agency's *Compendio de Doctrina* confirms the pervasive influence of Andean jurisprudence.¹¹⁸ This 2005 publication catalogues the procedures and substantive standards that SIC applies when reviewing trademark and patent applications. It is peppered with quotes from ATJ preliminary rulings, including cases referred from other Andean countries. Venezuela's *Servicio Autónomo de la Propiedad Intelectual* (SAPI) followed a similar practice, at least prior to the country's withdrawal from the Andean Community in 2006. According to SAPI's former legal counsel, the agency viewed the ATJ's rulings as persuasive

(interpreting Dec. 344) (Sony) (reproducing arguments by INDECOPI in favor of considering the protection of consumers in trademark registration decisions).

116. Interview with Teresa Mera Gómez, member of the INDECOPI administrative tribunal, Lima, Peru (June 21, 2007).

117. Interview with Giancarlo Marcenaro Jiménez, Superintendencia de Industria y Comercio (SIC), in Bogotá, Colom. (Sept. 12 2007).

118. SUPERINTENDENCIA INDUSTRIA Y COMERCIO, COMPENDIO DE DOCTRINA: PROPIEDAD INDUSTRIAL (2005) [hereinafter COMPENDIO DE DOCTRINA].

authority and referred to them in hundreds of IP registration decisions.¹¹⁹

Our coding of preliminary rulings disclosed another way in which ATJ judges have shaped the agencies' activities—by clarifying and augmenting the procedures that administrators must follow when reviewing contested IP applications. These include strict adherence to Andean rules regulating trademark and patent oppositions,¹²⁰ an obligation to provide a reasoned justification for rejecting an opposition,¹²¹ a responsibility to apply Andean IP rules with particular care when applications are contested,¹²² and a duty to provide sufficient facts and legal analysis to enable both parties to challenge a registration decision in court.¹²³ Taken together, these procedures have helped to foster a hospitable climate within the agencies for fair and evenhanded adjudication of IP disputes. They have also reduced the basic errors that the agencies sometimes committed in early registration proceedings.¹²⁴

C. *The IP Agencies' Influence on Andean IP Jurisprudence*

The vectors of influence between the ATJ and the domestic IP agencies point in both directions. Just as administrative officials have revised their substantive standards and procedural rules in response to ATJ rulings, so too have the administrative agencies shaped the Tribunal's jurisprudence in light of their policy preferences.

The agencies' influence is especially apparent in the area of trademark coexistence agreements—contracts between two or more trademark owners that establish the “rules by which

119. Interview with Ricardo Colmener, *supra* note 40.

120. Case 5-IP-99 at 6-7 (interpreting Dec. 344) (Banacol).

121. *Id.* at 7-8.

122. Case 16-IP 2003 at 7 (interpreting Dec. 344) (El Comercio).

123. Case 44-IP-2006 at 10 (interpreting Dec. 344) (Offsetec).

124. *See, e.g.*, Case 9-IP-95 at 2 (interpreting Dec. 85, Dec. 344, & Dec. 313) (stating that SIC had forgotten its prior registration of a trademark, resulting in the registration of two similar trademarks in violation of Andean law); Case 9-IP-97 at 7-8 (interpreting Dec. 344) (Olegario) (chiding SIC for registering a trademark without investigating whether it conflicted with previously registered trademarks and rejecting the agency's defense that no oppositions had been filed during the registration process) (discussed in *Annual Review: The Sixth Annual International Review of Trademark Jurisprudence*, 89 TRADEMARK REP. 191, 274-75 (1999)).

the[ir] marks can peacefully co-exist” in the same market for “the same or similar goods or services.”¹²⁵ Coexistence agreements provide important benefits to business competitors with similar trademarks, enabling them to “market[] their products to the public without the fear of defending a trademark infringement lawsuit.”¹²⁶ Whether such agreements benefit consumers is less clear, however. Even where business competitors have agreed to coexist in the same market, consumers may still be misled by goods or services whose trademarks are confusingly similar.

In many countries, including the United States and Mexico, IP agencies and national courts give strong deference to coexistence agreements in deciding whether two similar trademarks are eligible for registration.¹²⁷ The judge-made law in the Andean Community is starkly different. In assessing the validity of coexistence agreements, the ATJ considers not only the private rights of trademark owners but also the interests of consumers who purchase their products. For example, the Tribunal has held that coexistence agreements “do not create legal rights, do not . . . exempt a trademark from a study of its eligibility for registration, and do not render inapplicable an analysis of consumer confusion by the [agency’s trademark] examiner.”¹²⁸ More generally, the ATJ has stressed the critical role of Andean trademark law in protecting the consuming public.¹²⁹

The ATJ’s focus on the public interest originated with the IP agencies in Peru and Colombia, both of which, as explained above, have a mandate to protect consumers as well as IP. In Peru, INDECOPI developed an internal culture that holds

125. International Trademark Association (INTA), Glossary, http://www.inta.org/index.php?option=com_glossary&func=display&letter=All&Itemid=0&catid=45&Itemid=127&getcontent=1.

126. Marianna Moss, *Trademark “Coexistence” Agreements: Legitimate Contracts or Tools of Consumer Deception?*, 18 LOY. CONSUMER L. REV. 197, 199 (2005).

127. *See id.* at 210-13 (discussing coexistence agreements in United States trademark law); John M. Murphy, *The Confusing Similarity Standard in Mexican Trademark Law*, 96 TRADEMARK REP. 1182, 1190 (2006) (discussing coexistence agreements in Mexican trademark law).

128. Case 79-IP-2003 at 11 (interpreting Dec. 344) (Starbucks) (quoting Case 15-IP-2003 (interpreting Dec. 344) (Mobil Oil)).

129. Case 85-IP-2003 at 11-12 (interpreting Dec. 344) (Sony); *see also* Case 41-IP-99 at 5 (interpreting Dec. 344) (Pasteur Sanofi) (analyzing the “consumer protection function” of Andean trademark law).

consumer rights in high regard.¹³⁰ The agency has a division devoted to enforcing consumer protection laws and educating Peruvians about unlawful market practices. INDECOPI's pro-consumer orientation also influenced its interpretation of Andean IP rules.¹³¹ In the 1990s, the INDECOPI administrative tribunal invalidated trademark coexistence agreements that failed adequately to take consumer interests into account.¹³² The Colombian IP agency SIC developed a similar approach, emphasizing the importance of "societal concerns" in evaluating trademark applications.¹³³

When businesses challenged the agencies' refusal to register confusingly similar trademarks, the ATJ drew upon these practices and concluded that coexistence agreements must take consumer interests into account.¹³⁴ In a series of preliminary rulings, the ATJ extended this basic principle and required the parties to such agreements to: (1) adopt measures to prevent confusion among consumers concerning the origins of their products; (2) promote fair commercial practices and competition; (3) record their agreement with the domestic IP agencies; and (4) subject the agreement to the scrutiny of agency examiners, who may refuse to register the trademarks if they conclude that the public could be confused by such registrations.¹³⁵

Applying these pro-consumer standards, the IP agencies, the ATJ, and national courts have rejected or modified trademark coexistence agreements involving large multinational corporations such as Starbucks, Mars, Sony, General Motors, Deutsche Bank, Sun Microsystems, Novartis, L'Oreal, and

130. See Becker, *supra* note 38.

131. The former head of INDECOPI's Trademark Office explained that agency examiners consider three policy issues in deciding whether to register a trademark: (1) the private interests of the applicant; (2) how the trademark will operate in the market; and (3) how it will affect consumers. Interview with Teresa Mera Gómez, *supra* note 116.

132. This migration was facilitated by the elevation of an INDECOPI official in the consumer protection division to serve on the INDECOPI administrative tribunal. Interviews with Monica Rosell, *supra* note 29.

133. Interview with Giancarlo Marcenaro Jiménez, *supra* note 117.

134. E.g., Case 17-IP-2005 at 13 (interpreting Dec. 486) (Reckitt & Colman); Case 177-IP-2004 at 12 (interpreting Dec. 486) (Deutsche Bank).

135. See 2005 *Annual International Review*, *supra* note 114, at 345-48 (discussing these requirements in the context of the Council of State's determinations regarding the Starbucks Coffee and Wega marks).

Unilever.¹³⁶ Some of these rulings had adverse economic consequences for the firms involved. For example, a 2004 decision of the Colombian Council of State rejecting a coexistence agreement between Starbucks and Mars had “a strong impact on the business world, as Starbucks . . . has not been able to open markets in some of the Andean Community countries for this same reason.”¹³⁷

D. *Establishing a Direct Link Between the ATJ and the IP Agencies*

For the first two decades of the ATJ’s operation, the private litigants who sought Andean-level review of IP agency registration decisions were required to appeal the decisions to national courts, since only courts were competent to refer questions of Andean law to the ATJ. The time and expense involved in litigating a case through several layers of judicial review—as well as the refusal of many national judges to refer cases to the Tribunal—deterred businesses and their counsel from challenging the agencies’ rulings.¹³⁸ The same impediments to Andean-level review also blocked agency officials from seeking the ATJ’s guidance on unsettled questions of Andean law. As described above, when the Peruvian agency IN-DECOPI attempted to refer a case directly to the Tribunal in 1999 or 2000, the ATJ rejected it.¹³⁹

In 2007, however, the ATJ shifted course and accepted a direct referral from the Colombian IP agency SIC. The Tribunal did not expressly indicate that it was overruling its past practice. But it devoted several paragraphs to explaining how the ruling squared with article 33 of the Revised ATJ Treaty,¹⁴⁰

136. Database of ATJ Rulings, *supra* note 14. For an administrative example, see Resolution 18176, Coexistence Agreement (July 30, 2004), *reprinted in* COMPENDIO DE DOCTRINA, *supra* note 118, at 398-401.

137. 2005 *Annual International Review*, *supra* note 114, at 348; *see also* Case 104-IP-2002 (ATJ preliminary ruling in Starbucks’ challenge to the SIC’s refusal to register its trademarks in light of a coexistence agreement with Mars).

138. Interview with Jose Barreda, *supra* note 45; Interview with Carlos Olarte, *supra* note 45; *see also supra* Part III.B (discussing resistance by national courts in Ecuador to referring cases to the ATJ); *supra* Part III.C (same, for national courts in Peru).

139. *See supra* Part III.C.

140. Revised ATJ Treaty, *supra* note 30, art. 33 (“National judges hearing a case in which one of the provisions comprising the legal system of the An-

which authorizes “national judges” to make preliminary references:

It is clear that today it is not sufficient to use organic or fundamental criteria (*criterio organico*) to analyze the nature of [judicial] acts, since judicial acts may not only come from judges. The State can ascribe judicial acts to organs different from those exercising judicial power. For this reason, the Tribunal considers it important to interpret article 33 of the [Revised ATJ Treaty] in a broad way. This broad interpretation will allow the identification of actors with standing to request preliminary interpretation that are empowered to issue judicial resolutions. . . . [T]he term “domestic judge” shall be interpreted in such way to include organs that carry out judicial functions as long as they fulfill the requirements established in domestic law. These organs will have standing to request a preliminary interpretation when they resolve a controversy where Andean Law is at issue in the exercise of their powers.¹⁴¹

Nominally, the ATJ’s ruling applies only to SIC. However, inasmuch as the IP agencies in other member states exercise functions similar to those carried out by Colombian IP administrators, Andean judges are likely to accept direct references from those agencies.

E. *Concluding Observations*

It is too early to assess whether this restructuring of the preliminary reference process will affect the relationship between the ATJ and the administrative agencies. However, several conjectures are plausible. First, some IP owners and their attorneys will bypass national courts and seek direct Andean-level review of agency registration decisions. This is likely to strengthen the symbiotic relationship between Andean judges and agency administrators. Second, the ATJ’s ruling provides a mechanism for SENAPI, the Bolivian IP agency, to send cases to the ATJ. As noted above, however, there is far less demand

dean Community should be applied or is litigated, may directly request the [ATJ’s] interpretation of such provisions, providing that the verdict is susceptible to appeal under national law.”).

141. Case 14-IP-2007 at 7-8 (interpreting Dec. 486) (Industrias Mayka).

for IP protection in Bolivia than in other Andean member states, making it uncertain whether the agency will in fact seek such references. Finally, the ATJ's ruling raises the possibility of referrals from other administrative agencies that interpret or apply Andean rules and that function in a quasi-judicial capacity. This may increase the likelihood of preliminary references to the ATJ in issue areas other than IP, although larger political and structural forces are likely to impede such referrals.¹⁴²

V. ANALYZING THE BROADER IMPLICATIONS OF THE DIFFERENCES BETWEEN THE ANDEAN AND EUROPEAN LEGAL SYSTEMS

In this Part, we build on the foregoing analysis to compare the relationships that national courts in the European and Andean Communities have developed with their respective international tribunals. We focus on the willingness or reticence of national judges to engage in a dialogue with their regional colleagues, and on differences in how the two tribunals respond to referred questions. Our analysis also suggests another, albeit more tentative, conclusion—that the preliminary ruling mechanism may have played a less decisive role in contributing to the ECJ's success than commentators have previously asserted.

In the European context, it is an article of faith widely shared by judges and scholars that national court references have been the engine driving legal integration. The following statement by ECJ Judge Federico Mancini, which describes how the ECJ constructed a constitution for Europe, exemplifies this belief:

The Court would have been far less successful had it not been assisted by two mighty allies: the national courts and the Commission. It is sufficient to mention here that by referring to Luxembourg sensitive questions of interpretation of Community law, the national courts have been indirectly responsible for the boldest judgments the Court has made. Moreo-

142. For a discussion of why Andean litigation has not spilled over to areas of Andean law other than IP, see Helfer, Alter & Guerzovich, *supra* note 12, at 36-39.

ver, by adhering to these judgments in deciding the cases before them, and therefore by lending them the credibility national judges usually enjoy in their own countries, they have rendered the case law of the Court both effective and respected throughout the Community.¹⁴³

Note Mancini's use of the term "allies." This word choice reflects the reality that many national judges supported the ECJ's efforts to bolster and expand EC law. This support created opportunities for the ECJ to engage in a dialogue with national courts, a dialogue that has left its stamp on the scope and substance of EC law,¹⁴⁴ much as the ATJ's administrative partners have shaped Andean doctrines concerning regional IP rules.

A key factor facilitating these court-to-court communications in Europe was the wide variety of national judges willing to refer cases to the ECJ.¹⁴⁵ For example, a low level tariff commission requested the ruling that yielded the ECJ's historic doctrine of direct effect, and a small claims court referred the case that led the ECJ to announce the supremacy of European law.¹⁴⁶ In some cases, references reflected the judge's openness or enthusiasm for European law. In others, national judges on lower and specialized courts acted strategically, sending questions to the ECJ to circumvent the con-

143. Federico Mancini, *The Making of a Constitution for Europe*, 24 COMMON MKT. L. REV. 595, 597 (1989); see also MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 371, 376 (1989) (characterizing the ECJ's reliance on national courts as "a shrewd political judgment" and stating that "wise sensitivity to its own weakness may . . . have convinced the Court to avoid a direct confrontation with national courts").

144. For example, the ECJ's human rights jurisprudence emerged because of national judicial concerns that the rights of citizens were not sufficiently protected under European law. See Weiler, *supra* note 5, at 2417-18 (describing the ECJ's approach to human rights and its relationship with courts in EC member states). Stone Sweet explores how trans-judicial dialogue contributed to the development of ECJ doctrines regarding the free movement of goods, sex equality, and environmental protection. See Stone Sweet, *supra* note 53.

145. For discussion of the reasons behind this phenomenon, see Carrubba & Murrah *supra* note 72; Stone Sweet and Brunell, *supra* note 51.

146. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; Case 6/64, *Costa v. Ente Nazionale per L'Energia Elettrica (E.N.E.L.)*, 1964 E.C.R. 585.

straints of national law or higher court doctrine.¹⁴⁷ In addition, because judges at many different levels of national legal systems referred questions to the ECJ, private actors in Europe had access to multiple venues in which to pursue EC litigation strategies.¹⁴⁸ None of these dynamics is present in the Andean context, where the judicial hierarchy is flatter (i.e., some first-instance courts are also last-instance courts) and where judges are comparatively less attuned to how strategic behavior can influence the development of legal doctrine.

The willingness of national courts to serve as interlocutors also influenced the prescriptive nature of the ECJ's responses to referred questions. Judge Mancini openly acknowledged the extent to which the ECJ has guided national judicial decisionmaking:

It bears repeating that . . . national judges can only request the Court of Justice to interpret a Community measure. The Court never told them they were entitled to overstep that bound: in fact, whenever they did so—for example, whenever they asked if national rule A is in violation of Community Regulation B or Directive C—the Court answered that its only power is to explain what B or C actually mean. But having paid this lip service to the language of the Treaty and having clarified the meaning of the relevant Community measure, the court usually went on to indicate to what extent a certain type of national legislation can be regarded as compatible with that measure. The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play.¹⁴⁹

The practice in the Andean Community is strikingly different. The ATJ rarely issues purposive rulings with outcome-determinative consequences for domestic litigation. ATJ judges defend this limited conception of the preliminary ruling process as required by the treaty that established the Tribunal, a treaty whose drafters, as we explained above, were

147. KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 48-52 (2001).

148. See generally CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW 268-90 (1992); Stone Sweet & Brunell, *supra* note 51.

149. Mancini, *supra* note 143, at 606.

well aware of ECJ practice. The relevant EC treaty provision states simply that the ECJ has “jurisdiction to give preliminary rulings concerning” the validity and interpretation of EC rules.¹⁵⁰ The ATJ Treaty is narrower and more specific. Article 30 provides that the Tribunal “shall restrict its interpretation to defining the content and scope of the norms of the juridical structure of the Cartagena Agreement. The [Tribunal] may not interpret the contents and scope of domestic law nor judge the substantive facts of the case.”¹⁵¹

The ATJ has been scrupulously faithful to this provision, leaving key interpretive issues to national courts. In case 1-IP-90, for example, the ATJ found that countries could raise tariffs on products included in the list of exceptions to the Free Trade Program. The ATJ then left it to the national judge to decide if the dispute concerned a product that was part of the list of exceptions. Similarly, in case 3-IP-93 the ATJ identified three possible Andean trade and tariff rules that could apply to the case at hand. It interpreted all three provisions but left it to the national court to decide which provision applied to the case.

Formalist or textual arguments are, however, insufficient to explain the marked difference in practices in two regions whose supranational institutions have such similar structures. The ATJ could, after all, have issued more purposive and directed rulings. Indeed, it has done so in discrete areas of IP law, such as trademark coexistence agreements.¹⁵² A more plausible explanation for the ATJ’s formulaic approach, especially outside of the IP subject area, is the passivity and reluctance of national courts. The judges we interviewed in Colombia, Ecuador, and Peru expressed a highly compartmentalized view of the Andean legal system. As shown in Part IV, judges needed persuasion to begin referring IP cases notwithstanding the fact that IP is an area clearly governed by Andean law. Even in IP disputes, judges are rarely bold or creative when interacting with their Andean colleagues. Instead, they are du-

150. EC Treaty, *supra* note 4, art. 234.

151. ATJ Treaty, *supra* note 9, art. 30. In 1996, the member states amended the ATJ Treaty to explicitly authorize the Tribunal to examine the facts of referred cases, adding the following sentence to the end of what is now Article 34: “Even so, it may refer to those facts when essential for the requested interpretation.” Revised ATJ Treaty, *supra* note 30, art. 34.

152. See *supra* Part IV.C.

tiful technocrats, requesting referrals in ways that are unlikely to produce expansive rulings.¹⁵³

Yet the question remains: why are European courts more willing to engage with the ECJ whereas Andean judges remain reticent? Joseph Weiler considered the first part of this question in an article entitled "The European Court of Justice and its Interlocutors."¹⁵⁴ Weiler highlighted three factors to explain national judicial support for the ECJ. First, there was the formal legal obligation to refer questions. Second, there was growing peer pressure as courts in other countries accepted the ECJ's authority. Finally, and most significantly, Weiler argued that national judges were empowered by their relationship to the ECJ:

[N]ormative acceptance of the ECJ's constitutional construct and practical utilization [of the preliminary reference mechanism] by national courts may be rooted in plain and simple judicial empowerment. Whereas the higher courts acted diffidently at first, the lower courts made wide and enthusiastic use of the . . . procedure in many member states. This is understandable both on a commonsense psychological level and on an institutional plane as well. Lower courts and their judges were given the facility to engage with the highest jurisdictions in the Community and, even more remarkable, to gain the power of judicial review over the executive and legislative branches, even in those jurisdictions where such power was weak or nonexistent. . . . The ingenious nature of [the preliminary reference mechanism] ensured that national courts did not feel that the empowerment of the ECJ was at their expense. After all, it is they who held the valve. Without the coopera-

153. The judges of the Council of State, for example, candidly admitted that they do not present specific questions to the ATJ, but instead mainly summarize the lawyers' arguments. The judges also expressed satisfaction with the ATJ's abstract interpretations of Andean law, since those interpretations give the Council members leeway to decide how to apply Andean law to the facts of each case. Interview with Judges of the Council of State, *supra* note 49.

154. Weiler, *supra* note 6.

tion of the national judiciary, the ECJ's power was illusory.¹⁵⁵

The first two factors Weiler identified also operate in the Andean Community, although, as we have shown, with somewhat lesser force. With respect to the judicial empowerment factor, Weiler's statement glosses over the fact that in the EC's early years many national judges were reluctant to engage with the ECJ.¹⁵⁶ To the contrary, as Renaud Dehousse has noted, some lawyers and judges viewed EC law and ECJ rulings as disrupting deep structures in national legal systems.¹⁵⁷ The creation of a cooperative trans-judicial relationship thus took significant time. Writing on the recognition of ECJ authority in the 1970s, Stuart Scheingold observed:

The picture with respect to the recognition of the authority of the Court of Justice . . . and the supremacy of Community law is a mixed one. . . . [I]n most matters there has been a real reluctance by national courts to [request preliminary rulings]. . . . [O]nly in Holland can the primacy of Community law be taken for granted. Elsewhere, the status of Community law and the willingness to use [the preliminary ruling mechanism] remain in doubt, although national judges seem increasingly receptive on both counts."¹⁵⁸

Seen from this perspective, the Andean judicial system—created more than a quarter century after its European cousin—may simply be at an earlier stage of the integration process. But it remains puzzling that so few national judges view their ATJ colleagues as allies in a broader project of build-

155. *Id.* at 523.

156. *Id.* at 517 (referring to “pockets of resistance” to an otherwise widespread acceptance by national courts of the ECJ's “hegemony”).

157. RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* 173 (1998) (“From the standpoint of a national lawyer, European law is often a source of disruption. It injects into the national legal system rules which are alien to its traditions and which may affect its deeper structure, thereby threatening its coherence. . . . [W]hat appears as integration at the European level is often perceived as disintegration from the perspective of national legal systems.”).

158. STUART SCHEINGOLD, *THE LAW IN POLITICAL INTEGRATION: THE EVOLUTION AND INTEGRATIVE IMPLICATIONS OF REGIONAL LEGAL PROCESSES IN THE EUROPEAN COMMUNITY* 34 (1971).

ing regional integration through law. We posit three plausible answers, although we recognize that none of the answers is fully satisfactory and that each requires further research.

First, national judges in the Andean member states may not be as independent as their counterparts in Europe. If this were true, however, we would expect national judges to defer to governments in all issue areas. In fact, recent institutional reforms have increased the assertiveness of many courts in Latin America, especially in the area of human rights, with the result that judges in the region are exerting more independence and influence over executive branch officials and legislatures.¹⁵⁹ This trend has not, however, spilled over to national court interactions with the ATJ.

Second, perhaps the support of administrative agency officials has been as important in Europe as it has been in the Andean countries. The more diverse range of references to the ECJ would reflect, in this view, the larger volume of EC secondary legislation¹⁶⁰ and the greater number of administrative agencies seeking to coordinate their domestic policies. Seen from this perspective, the ECJ's success would be attributable, at least in part, to the fact that its mission interacted synergistically with the efforts of agency officials to build national administrative states constrained by a common rule of law.¹⁶¹

Such an account might explain the vast majority of European preliminary references, although not the most provocative references that enabled the ECJ to constitutionalize EC law. Still, this account suggests that if we stripped away those references asking bold questions and developing foundational doctrines, we would be left with a European legal integration

159. For a recent and comprehensive survey of the literature, see Diana Kapiszewski and Matthew M. Taylor, *Doing Courts Justice? Studying Judicial Politics in Latin America*, 6 PERSP. ON POL. 741, 749-50 (2008). For an early application to human rights, see Ellen Lutz and Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633 (2000). For a discussion of the challenges of reforming Latin American judiciaries, see HAMMERGREN, *supra* note 78.

160. STONE SWEET, *supra* note 53, at 58.

161. For supporting analyses, see Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 COLUM. J. EUR. L. 241 (2005); Peter L. Lindseth, *The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s*, 37 LOY. L.A. L. REV. 363 (2003).

process that evolved much as it has in the Andean Community. If this explanation is correct, we would expect to find higher levels of supranational engagement in issue areas where detailed European secondary legislation existed and where administrative agencies were open to working with the ECJ to clarify ambiguities and close lacunae in this legislation.

A third explanation draws on broader political and social forces. Perhaps European judges were initially as reticent as their Andean counterparts, but a few were also part of or influenced by the networks of advocates who were striving to build European integration through law.¹⁶² While Joseph Weiler identified national judicial support as essential to the ECJ's success, he noted that tacit support within executive and legislative branches, and among academics, also helped the ECJ establish its new legal order.¹⁶³ More recently Rachel Cichowski has stressed the importance of support for European legal initiatives among a broader range of governmental and non-governmental actors.¹⁶⁴ If this explanation is accurate, then the regional differences we observe would be attributable to the lack of jurist advocacy networks in the Andean Community that might encourage at least some national judges to become ATJ allies.¹⁶⁵

These three explanations are not mutually exclusive. But it matters which is correct because the broader implications of

162. For two recent accounts that highlight the influence of these networks, see Karen J. Alter, *Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)* in ALTER, *supra* note 7, at 61, 63-91; Morten Rasmussen, *The Origins of a Legal Revolution: The Early History of the European Court of Justice*, 14 J. EUR. HIST. 77, 77-98 (2008).

163. See Weiler, *supra* note 6, at 523-31.

164. RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007).

165. In 2003 Andean Community officials contracted with the Comisión Andina de Juristas (a branch of the International Commission of Jurists in Geneva, a non-governmental organization) to build bridges between the ATJ and national judiciaries, universities, and civil society groups. Interviews with Salvador Herencia Carrasco, *supra* note 96. The Comisión's outreach efforts highlight the fact that ATJ judges and lawyers had little success on their own in establishing Andean advocacy networks. The absence of domestic interlocutors for the Andean institutions contrasts sharply with the experience in Europe, where lawyers, government officials, and academics established national associations dedicated to studying and developing legal issues to promote European integration. For a more detailed discussion, see Alter, *Jurist Advocacy Movements*, *supra* note 162, at 81-84.

each explanation are different. If judicial independence is a prerequisite to national courts serving as interlocutors for international tribunals, then regional integration processes mediated by international tribunals—and perhaps international legal regimes more generally—will face absolute limits on their ability to penetrate national jurisdictions where the rule of law is weak or unstable.¹⁶⁶ The second explanation suggests that, for economic regulation at least, a key factor determining the success of international legal regimes will be the existence of administrative actors that benefit from, and thus are committed to, enforcing international rules. If, by contrast, the third explanation is correct, then bold efforts to constitutionalize international law may require the support of advocacy networks comprised of lawyers, academics, and at least some judges.¹⁶⁷ Absent such support, international legal systems may more closely resemble the Andean than the European experience.

VI. CONCLUSION

We began our research into the Andean legal system expecting that preliminary rulings would play a role similar to that which they have played in the system's model—the European Community. A cursory analysis of the ATJ's docket supports this assumption, since the vast majority of ATJ rulings are the result of referrals by national courts. We were also not surprised to see some national variation in reference rates, since those rates vary in Europe as well.

A deeper investigation of these trends, however, revealed two patterns that we did not anticipate: first, that nearly all disputes involve intellectual property issues, and second, that preliminary references come from only a few national courts. The two patterns are related—because so few non-IP disputes are referred to the ATJ, most of the cases that are referred

166. The effectiveness of the legal system for IP protection in the Andean Community belies this conclusion. See Helfer, Alter & Guertzovich, *supra* note 12, at 16-36.

167. For discussions of the role of advocacy networks in the human rights domain, see generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1 (2001).

originate in the small number of national courts that have jurisdiction over IP issues.

Equally unexpected is the finding that domestic IP agencies are the ATJ's key interlocutors and compliance constituencies. The relationship between agency administrators and Andean judges is symbiotic. The ATJ has responded to the agencies' concerns by clarifying ambiguous provisions of Andean IP law and developing detailed procedures for administrators to resolve disputes over trademark and patent registrations. And the agencies, in turn, have influenced ATJ doctrine to reflect the agencies' mandate to protect consumers as well as IP owners. In striking contrast to the experience in Europe, national courts are mostly reluctant and passive intermediaries that rarely submit references on issues of Andean law outside of IP and refrain from using the Andean legal system to expand their authority.

These distinctive patterns reflect the very different relationships that national courts in the Andean Community have with the ATJ as compared to the relationships between national and international judges in the European Community. In Europe, at least some national judges used preliminary references to promote doctrinal change and judicial empowerment, which, in turn, provided the ECJ with opportunities to develop and expand European law. In the Andean context, national judges are technocratic intermediaries who refrain from using the Andean legal system as a tool to aggrandize their authority, and the ATJ focuses mostly on technical IP registration issues within the purview of administrative agencies that are its primary constituencies.

Our conclusion that administrative agencies are the engine that drives ATJ preliminary references has implications for future research on the Andean legal system and the relationship between national and international courts more generally. If national judges are largely passive conveyer belts for preliminary references in the Andean Community, then the influence of Andean law over national law will depend upon the support of other public actors within member states. Domestic IP agencies have an unusual level of independence from national executives, in part because they have their own source of funding (trademark and patent application fees) and in part because external actors (the international financial institutions and multinational corporations) monitor their

behavior. In other areas of Andean law, agencies remain closely tied and attendant to the direction of national executives.¹⁶⁸ This does not bode well for the expansion of ATJ litigation beyond the relatively narrow and technical confines of intellectual property disputes.

Our findings also raise broader questions about the conditions under which we should expect national courts to be in the vanguard of efforts to enforce international law. A comparison of the Andean and European experiences highlights the importance of identifying factors that convince national judges to embrace or reject this role.¹⁶⁹ In the Andean context, it took persistent and coordinated action by litigants, lawyers, ATJ judges, and Andean officials to surmount national judicial barriers to preliminary references. But these pressures succeeded in part because they were applied at a time when the broader political climate favored judicial engagement—when newly restructured domestic IP agencies clamored for guidance on Andean IP rules and national governments supported the application of those rules. Our study thus suggests that changes in national legal practices are closely linked to domestic political conditions. Rather than assuming national courts will act as either compliance constituencies or compliance opponents for international rulings, scholars should instead investigate the political conditions that shape where, when, and how national judges engage with international law and international tribunals.

168. See Jacint Jordana & David Levi-Faur, *Toward a Latin American Regulatory State? The Diffusion of Autonomous Regulatory Agencies Across Countries and Sectors*, 29 INT'L J. PUB. ADMIN. 335 (2006).

169. Compare Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 248 (2008) (asserting that “[f]or domestic courts, the new international judicial forums challenge their own authority as interpreters of the law and balancers of competing state interests against rights grounded in constitutional or international law”), with Weiler, *ECJ Interlocutors*, *supra* note 6, at 518 (highlighting “the acceptance of [European] Community discipline by the national judiciary” resulting from preliminary references to the ECJ).