

In Alter, Helfer and Madsen eds
International Court Authority, OUP 2018

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The Andean Tribunal of Justice

From Washington Consensus to Regional Crisis

*Karen J. Alter and Laurence R. Helfer**

The Andean Tribunal Justice (the ATJ or Tribunal) is the most active international court operating in a developing country context, with over 2,800 binding rulings through 2014.¹ This chapter builds on our earlier research demonstrating how the ATJ developed close working relationships with several national courts and administrative agencies, which habitually send preliminary references to the Tribunal. These relationships helped the ATJ establish narrow, intermediate, and extensive de facto authority over Andean intellectual property (IP), creating what we labeled an island of effective international adjudication—a zone in which legal rules, rather than power, political influence, or bribery, govern decision-making by state actors.

We examine how political crises within a regional integration project affect the authority of this regional court. The consensus about economic policy, open markets, and IP protection that underpinned the rule of law island eroded sharply beginning in the mid-2000s. This followed the election of leftist-populist political leaders in Bolivia and Ecuador, and the decision of another leftist-populist President—Hugo Chavez—to withdraw Venezuela from the Andean Community in 2006. The remaining four member states were then ideologically split between the neoliberal-leaning governments of Colombia and Peru—both of which entered into free trade agreements with the United States that precipitated Venezuela’s departure—and the leftist-populist regimes of Evo Morales in Bolivia and Rafael Correa in Ecuador. These divisions, together with the pull of competing regional projects such as the Southern Common Market (MERCOSUR) and the Union of South American Nations (UNASUR), have impeded the longstanding goal of creating an Andean common market and led to significantly reduced government support for the Andean integration project as a whole. Our primary objective in this chapter is to understand what happened to the ATJ during this crisis.

Section I divides the Andean integration project into three phases—the Developmentalist Period between the Andean Pact’s founding in 1969 and 1989, the

* This chapter was previously published in KAREN J. ALTER & LAURENCE HELFER, *TRANSPLANTING INTERNATIONAL COURTS: LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE* (2017).

¹ The ATJ issued 2,853 preliminary rulings, noncompliance judgments, and nullification and omissions decisions from its founding in 1984 through 2014. In comparison, as of that same date the ICJ had issued 85 judgments in contentious cases and 26 advisory opinions (denying jurisdiction or finding the case inadmissible in 26 additional cases); the WTO dispute settlement system adopted 201 panel reports and 134 Appellate Body rulings; the ITLOS issued 18 decisions and 2 advisory opinions. In 2015 the ICC has at different stages of progress 22 cases involving 26 individuals and 9 “situations.”

Washington Consensus Period between 1990 and 2005, and the Crisis Period between 2006 and the present. During the first period, the ATJ had no authority in fact. The discussion of the Washington Consensus Period recaps our previously published analysis of how, beginning in the early 1990s, the Tribunal forged alliances with domestic administrative agencies to build narrow, intermediate, and extensive authority in IP cases, while having little if any impact in other areas regulated by Andean law.

Section II investigates how the IP rule-of-law island has fared during the last decade of political crisis in the region. We find that the island of effective international adjudication for IP disputes has thus far remained resilient. The total output of ATJ decisions has doubled, the number of non-IP rulings has increased, and Andean judges have solicited references from courts and administrative bodies that had not previously referred cases. Our data and analysis thus suggest an unexpected result—that an international court can maintain its *de facto* authority even in a politically fraught environment in which governments are questioning the foundations of the international legal project that provides the court's *raison d'être*.

Section III considers the ATJ's influence outside of the IP island during the Crisis Period. We discuss three examples where member states changed Andean law to allow greater national discretion. The most important retrenchment—the abrogation of the Common External Tariff in 2015—acknowledges the longstanding noncompliance with core principles of a common market and the implausibility of changing that reality in the foreseeable future. To understand the ATJ's authority during this crisis, we also consider a set of high-profile noncompliance and nullification complaints challenging Ecuador's economically consequential violations of Andean free trade rules. We situate this litigation alongside ongoing high-level discussions regarding the future of Andean integration and the ATJ.

Section IV considers how the crisis illuminates the difference between the concepts of authority and power in the Alter, Helfer, and Madsen introduction to this edited volume. The ATJ depends on the support of government officials, agency administrators, or other sub-state actors across the region. Within the IP island, the ATJ has long enjoyed the backing of administrative agencies and the businesses and law firms whose financial livelihood depends on IP. This support—which has enabled the Tribunal to push back against government deviations from Andean IP rules—makes Andean law and the ATJ legally and politically powerful, albeit only within a narrowly circumscribed policy domain. The ATJ's support among sub-state actors is much weaker outside of the IP island, and the Tribunal has been far less powerful as a result. Yet the Andean legal system—backstopped by the overlapping legal constraints of the World Trade Organization (WTO)—pushed Ecuador to search repeatedly for legally plausible grounds to defend the imposition of new import restrictions designed to ease its economic and financial crisis. The result is that Rafael Correa's leftist-populist government—even as it openly distained the Community and pushed to retrench some Andean rules and institutions—did not have a free hand in responding to the crisis.

A final note before proceeding. The first sections of this chapter refer to the ATJ as a freestanding judicial body and do not discuss the other institutions of the Andean legal system, in particular the General Secretariat. This focus on the ATJ alone makes sense when discussing the preliminary ruling system and its impact on IP agency decision-making—legal procedures in which the Secretariat plays no part. When the chapter turns to considering the Tribunal's authority outside of the IP island, the focus shifts to noncompliance suits challenging safeguards and other emergency measures. Because the General Secretariat first adjudicates these cases, we assess the Andean legal system

as a composite of the General Secretariat, operating in the shadow of potential ATJ review, and the Tribunal itself.

I. The ATJ in its Global and Regional Context

We begin with an overview of forty years of political struggle over economic policy in the Andes. We return to the beginning of the Andean integration project because, in many respects, the current crisis harkens back to the challenges that initially stymied regional integration and respect for Andean law. During these early years—which we label the Developmentalist Period—there was no Tribunal and national political leaders professed lofty integration goals with little follow-through. The creation of the ATJ was a response to the failures of this period. The second era, which we call the Washington Consensus Period, was the heyday of Andean integration. The expansion of regional secondary legislation and a more muscular and well-resourced Andean administrative body—the General Secretariat—contributed to the activation of the ATJ and to the creation of its narrow, intermediate, and extensive authority in IP cases. Finally, we summarize the current Crisis Period, which was triggered by the schism between the Community's leftist-populist and neoliberal-oriented member states.

A. The developmentalist period (1969–1989): The ATJ struggles to establish any authority in fact

The Andean Pact began in 1969 as a union of left-leaning governments committed to state-led development based on the principle of import substitution. Andean governments sought to parcel out economic projects across the member states, and they adopted stringent regulations to transfer technology from multinational firms to local businesses and to retain profits within the region. To achieve these goals, Andean political leaders created supranational institutions and adopted common legal rules, and for this reason some observers saw the Andean Pact as progressing further than other Latin American integration projects.² But the Pact's economic development strategy depended on foreign investment, and few multinational firms would accept such stringent regulations of their local subsidiaries.

Pro-business actors especially disliked the Andean investment code (*Decisión 24*), which limited the repatriation of profits. Controversies over the investment code delayed Venezuela's entry into the Andean Pact until 1973, provoked the legal and political challenges to the code in Colombia and Chile in the early 1970s, and precipitated Chile's withdrawal from the Pact in 1976.³ As we explain elsewhere, these controversies provided the impetus to create the ATJ. Political leaders hoped that a regional court, together with an agreement to give direct effect and supremacy to Andean law, would facilitate domestic implementation of regional rules and protect the Pact's initiatives from domestic legal and political challenges.⁴

² See, e.g., Ricardo Ffrench-Davis, *The Andean Pact: A Model for Economic Development*, 5 WORLD DEVELOPMENT 137 (1977).

³ Thomas Andrew O'Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INT'L L. 811, 816 (1996).

⁴ Karen J. Alter, Laurence R. Helfer & Osvaldo Saldías, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMP. L. 709, 720–24 (2012).

The Andean Pact's second decade included a series of initiatives to revive the stalled integration project. In 1979, political leaders created an Andean Parliament, a Council of Foreign Ministers, and a Tribunal (which was not actually constituted until 1984). These efforts, however, had little actual impact on promoting regional integration. For example, the 1987 Quito Protocol set firm timetables for establishing a Free Trade Area and a Common External Tariff, but these deadlines were quickly ignored.⁵

The ATJ began operating during this period, but cases were few and far between, and its early rulings were legally and politically timid. The ATJ eschewed several opportunities to follow the path of the European Court of Justice (ECJ) and adopt expansionist doctrines to advance Andean integration. For example, the Tribunal rejected a private litigant's attempt to file a noncompliance suit, which at the time only member states could raise. The ruling adhered to the letter of Andean law, but the predictable result was that the Tribunal received no noncompliance cases until the major restructuring of Andean institutions discussed later.⁶ In another early ruling, the ATJ refused to investigate the compatibility of national regulations with the Andean Free Trade Program, concluding that the regulations fell within a "list of exceptions" that, in effect, allowed member states to do as they pleased.⁷ Overall, "the ATJ often thwarted litigant efforts to use Andean law to dismantle national policies contrary to their economic interests. The ATJ's refusal to help litigants achieve their goals set up a vicious circle that inhibit[ed] the filing of additional cases that might have expanded community law."⁸

This cautious and deferential approach reveals that the Tribunal had little if any authority in fact during the Developmentalist Period. Most ATJ preliminary rulings were abstract legal interpretations that gave national courts wide discretion to apply Andean rules to the facts before them. In addition, the Tribunal did little if anything to move governments beyond paper endorsements of regional integration goals.⁹

B. The Washington Consensus Period (1990–2005): Establishing narrow, intermediate, and extensive authority within the intellectual property island

The ideological and institutional shifts that transformed the Andean Pact into a neoliberal integration project were precipitated by global and regional political changes that created the conditions leading to the activation of the ATJ and the establishment of narrow, intermediate, and extensive authority in IP disputes. These shifts began in the late 1980s as a response to the economic collapse triggered by the Latin American debt crisis. They gathered steam in the early 1990s as a new crop of national political leaders endorsed the free market reforms of the so-called Washington Consensus—a set of neoliberal policies touted by the United States and international financial institutions to promote the productive capacity of private industry, spur economic growth, encourage foreign investment, and protect property rights, including IP.¹⁰

⁵ These reforms are discussed in O'Keefe, *supra* note 3, at 817–19.

⁶ See 1-AI-1987. The ATJ held that private litigants had no standing to file noncompliance suits.

⁷ 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. 563, 570–73 (2010).

⁸ *Id.* at 580.

⁹ As of 1996, only "Colombia and Venezuela came close to meeting the deadlines for implementation of the intraregional free trade area and the CET [Common External Tariff] ... In theory, nontariff barriers have also been eliminated among the four countries, although recent actions by Colombia and Venezuela indicate that this is still not always the case in practice." O'Keefe, *supra* note 3, at 819.

¹⁰ See, e.g., John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7, 7–20 (John Williamson ed., 1990).

IP had long been a central feature of Andean integration. Early regional IP rules were crafted to serve the Andean Pact's import substitution goals. The rules granted limited protection to patents and trademarks and viewed IP as a tool to transfer technology from foreign investors. The Washington Consensus categorically rejected this approach. Its package of neoliberal reforms subsumed IP within the broader rubric of protecting private property and lowering barriers to trade in pharmaceuticals, software, and other knowledge goods. The benefits of expanding protection for trademarks, patents, and copyrights were also touted by international institutions such as the World Intellectual Property Organization (WIPO), and given greater prominence by the inclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the Uruguay Round of trade talks that led to the creation of the WTO. Reflecting this new global Zeitgeist, and spurred by Andean government's desire to join the WTO, member states adopted four Andean laws in the early 1990s (*Decisiones* 291, 311, 313, and 344) that codified the progressively higher levels of IP protection that TRIPS required.

As they were adopting this new IP legislation, Andean governments were also focused on another tenet of the Washington Consensus—creating new regulatory institutions to facilitate the operation of national markets. To implement this prescription, governments created or restructured administrative agencies to regulate areas such as consumer protection, competition, bankruptcy, and IP. In 1992, Peru and Colombia established agencies with these broad mandates, and other Andean countries restructured their domestic IP agencies over the next few years. The agencies received financial and technical assistance from international organizations, including WIPO, support that helped the agencies—especially the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOP) in Peru, and the Superintendent of Industry and Commerce (SIC) in Colombia—to become relatively well-resourced institutions that were better insulated from domestic political pressures than other national administrative bodies.

In all countries, a business seeking a trademark or patent must file an application with a domestic IP administrative agency, which grants the application if it meets certain legal criteria. In the Andes, those criteria were found in the recently adopted Andean IP legislation. The agency administrators who reviewed trademark and patent applications were thus natural consumers of Andean IP law. The officials were also eager for interpretive guidance to address the ambiguities, gaps, and complex interpretive questions they encountered on a daily basis.

Given the substantial economic consequences of registering a trademark or patent, private firms rushed to register their trademarks and patents. The lawyers, judges, and IP administrators we interviewed all claimed that court challenges to agency registration decisions remained constant over time. But where Andean IP legislation was ambiguous or contained gaps, some businesses found it worthwhile to pursue judicial review of agency rulings. These same sources expressed skepticism that national judges, most of whom were generalists, could master the specialized and technical issues that IP law often involves. They thus asked the judges to send preliminary references to the ATJ, seeking its guidance to help resolve these issues. The IP agencies—which were often named as parties or otherwise participated in the litigation—supported the referral requests. Administrators then applied the Tribunal's interpretations to resolve other registration disputes raising the same or similar legal issues.

This description reveals how the ATJ acquired first narrow and then intermediate authority. Evidence of narrow authority is found in the recognition by agency

officials of an obligation to comply with each preliminary ruling. As a member of the INDECOPI administrative tribunal, who previously led the Peruvian agency's Trademark Office, recounted in an interview: "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."¹¹ The ATJ's interpretation of Andean law thus determined whether the agency would grant or deny a specific patent or trademark application. That registration decision, in turn, was binding on the business that submitted the application and the decision determined whether the firm received legal protection for its brand or invention.

Over time, the quality of the agencies' decisions and procedures improved as they internalized the ATJ's guidance. These improvements, in turn, led to an increase in applications for trademarks and patents by both foreign and domestic businesses. Although the rate of litigation remained constant, the rise in applications generated a growing demand for Andean litigation. Our coding of ATJ case law reveals a sharp uptick in ATJ preliminary rulings beginning in the mid-1990s, a few years after the restructuring of the IP agencies, and continuing throughout the Washington Consensus Period. More than 95 percent of these cases began as challenges to agency IP registration decisions. The increase in preliminary references—together with the testimonies of lawyers and industry associations representing IP industries—provide compelling evidence of intermediate authority. In particular, the Tribunal cast a legal shadow that covered similarly situated litigants, lawyers, and agency officials across the Andes—the private firms whose businesses depended on IP protection, the attorneys who filed or opposed trademark and patent applications, and the administrators in all five member states who applied Andean IP rules as interpreted by the ATJ to review those applications.

Later in the Washington Consensus Period, the ATJ achieved extensive authority within the island of Andean IP law. One indicator of this extensive authority is the growth of a specialized bar of IP lawyers who repeatedly appeared before the administrative agencies, national courts and the ATJ. For example, a lawyer in Ecuador estimated that, while in the past there were ten lawyers or firms in the country whose practices included IP issues, by 2004 approximately two hundred single lawyers or firms were practicing in the area.¹² In Peru, a leading IP lawyer told us that his firm had added IP to its corporate law practice in 1997. In 2007 the firm decided to focus exclusively on IP.¹³ In 2007 a Colombian lawyer estimated that there were twenty law firms in Bogotá specializing in IP, compared to five firms in 1997.¹⁴

Additional evidence of extensive authority can be found in specialized publications devoted to Andean IP law. These include law firm newsletters explaining new ATJ decisions and touting courtroom victories; a legal journal, the *Anuario andino de derechos intelectuales*; and detailed practice digests that collect and synthesize Tribunal rulings relevant to the IP agencies' registration decisions.

The ATJ's de facto authority outside of the IP island was strikingly different. As a formal matter, Andean Community officials viewed the Tribunal's jurisdiction as extending to all areas governed by Andean law. Yet the Tribunal received only twenty-six preliminary references concerning taxes, tariffs, customs duties, taxes, and other

¹¹ Interview with official (B) of the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI), June 21, 2007, Lima, Peru.

¹² Interview with two attorneys from IP law firm in Ecuador, Mar. 16, 2005, Quito, Ecuador.

¹³ Interview with attorney from IP law firm in Peru, June 18, 2007, Lima, Peru.

¹⁴ Interview with attorney from IP law firm in Colombia, Sept. 13, 2007, Bogotá, Colombia.

integration law topics from its inception through 2005. Our interviews also disclosed a broadly shared sense that violations of Andean *Decisiones* on these issues were rarely challenged, and that important Secretariat and ATJ noncompliance findings remained unaddressed.

One reason for the paucity of cases outside of the IP island is that Andean secondary legislation often included loopholes or ambiguities to preserve domestic discretion and reflect member states' tepid commitment to regional integration. Private actors had few incentives to challenge violations of Andean *Decisiones* that national governments could easily defend in court. A related explanation concerns the ATJ's reticence to construe Andean rules purposively, either to close gaps or give greater precision to vague commitments. With little to gain from an ATJ preliminary ruling, there was little reason to file suit in a national court in the first instance. A third reason relates to the absence of Tribunal compliance constituencies—whether among national judges, administrative agencies, or private industry—whose professional or economic interests favored the application of Andean law and the referral of cases to Quito. The three factors were broadly self-reinforcing, creating a negative feedback loop that inhibited the emergence of ATJ authority in fact outside of the IP issue area.

C. The Crisis Period (2006–present): Political threats to ATJ de jure and de facto authority

The return in the mid-2000s of populist-leftist governments in several Andean countries triggered a rejection of the Washington Consensus and its legal and policy reforms. This section discusses the political and institutional manifestations of this rejection, focusing on Venezuela's withdrawal from the Andean Community, the ideological schism among the remaining four member states, and the championing of other regional cooperation projects by leftist-populist political leaders. We defer until sections II and III a discussion of the ATJ's activities during this period and the impact of the crisis on the Tribunal's de jure and de facto authority.

The first signs of rejecting the Washington Consensus arose with the election of Venezuelan President Hugo Chavez in 1999. Buoyed by high oil prices, Chavez sought to return Andean integration, and Latin American politics more generally, to state-led development. Consistent with this vision, in 2003 Venezuela supported a MERCOSUR-Andean Community Trade Agreement that the country's Vice-Minister of Commerce described as "a first generation agreement ... which goes much beyond the commercial component" to encompass "physical, political, cultural, social, and economic integration."¹⁵ Chavez also sought to diminish United States influence in the region. His grand vision included the creation of regional alternatives to the Organization of American States, the World Bank, and the International Monetary Fund—which are all based in Washington and in which the United States plays a central role.¹⁶

This vision was not shared by Peru and Colombia, whose continuing commitment to reducing trade barriers and liberalizing markets was reflected in the negotiation of bilateral free trade agreements with the United States. These free trade treaties

¹⁵ Simone Baribeau, *Chavez: Venezuela to Withdraw from the Andean Community of Nations*, Venezuelananalysis.com (Apr. 21, 2006), <http://venezuelanalysis.com/news/1706>.

¹⁶ This radical view has its origins in the Alianza Bolivariana para los Pueblos de Nuestra América (ALBA), a socialist-oriented regional integration system created in 2004 at the initiative of Chavez and Cuban President Fidel Castro. ALBA's members include Venezuela, Bolivia, Ecuador, Cuba, Nicaragua, and several small island states.

precipitated Venezuela's withdrawal from the Andean Community in April 2006.¹⁷ At the time of Venezuela's exit, Chavez had only one ally in the Community, the newly elected populist President of Bolivia, Evo Morales. Just over a year later, Rafael Correa, another leftist-populist, was elected as Ecuador's President. Had Chavez remained in the Community, there would have been a majority of three member states in favor of returning to a more statist economic development policy. Instead, Venezuela's withdrawal resulted in a two–two split between the remaining countries, creating a nearly insurmountable obstacle to adopting new secondary legislation or advancing any vision of Andean integration.

This schism also exacerbated competition between the Andean Community and other Latin American initiatives that offer different ideological visions of economic and political cooperation. Unlike the European Union (EU), the Andean Community has long followed an “open regionalism” model that permits member states to join other regional ventures. During the Crisis Period, open regionalism created opportunities for advocates of both neoliberal and populist-leftist visions for Latin America to advance their objectives. Both types of initiatives sapped government support for the sharply divided four-member Andean Community.

For proponents of neoliberalism, open regionalism is a device “to accelerate the progress toward global liberalization and rule-making.”¹⁸ In the early 2000s, for example, the United States advocated stitching together preexisting trade treaties and integration projects into a trans-continental Free Trade Area of the Americas (FTAA). The United States abandoned this initiative in 2005, and redirected its efforts toward negotiating the Trans-Pacific Partnership (TPP), a plurilateral treaty that would link the free trade-oriented countries of the Pacific Rim. Among Latin American countries, this neoliberal vision was reflected in the Pacific Alliance, an integration pact endorsed by Chile, Colombia, Mexico, and Peru.¹⁹

The counter-liberal alternative is embodied in UNASUR, which seeks to merge MERCOSUR and the Andean Community.²⁰ When Venezuela left the Community in 2006, Chavez announced his intention to join MERCOSUR.²¹ Bolivia's Evo Morales later followed Chavez's lead. Although Bolivia remains a member of the Andean Community, it became an associate member of MERCOSUR in 2013 and a full member in 2015.

Ecuador, although not a part of MERCOSUR, is a strong proponent of subsuming the Community into UNASUR. Ecuador's President Correa has attempted to coopt the Andean legislative process to achieve this goal. *Decisión 792*, nominally described as an effort to “reengineer” Andean integration, was in fact a critical review of all Community institutions.²² In the end, the member states decided to retain all of these

¹⁷ Carlos Malamud, *Venezuela's Withdrawal from the Andean Community of Nations and the Consequences for Regional Integration*, Working Paper (WP) 28/2006, at 1 (2006), <https://www.files.ethz.ch/isn/31899/WP%2028,%202006.pdf>.

¹⁸ C. Fred Bergsten, *Open Regionalism*, 20 WORLD ECON. 545, 549 (1997).

¹⁹ See, e.g., Moises Naim, *The Most Important Alliance You've Never Heard Of*, THE ATLANTIC (Feb. 17, 2014); Mauricio Bacquiero-Herrera, *Open Regionalism in Latin America: An Appraisal*, 11 L. & BUS. REV. OF AM. 139 (2005); see also José Antonio Sanahuja, *Post-Liberal Regionalism in South America: The Case of UNASUR*, EU RSCAS Working Paper 2012/5 (2012), <http://cadmus.eui.eu/handle/1814/20394> (discussing the context between “open regionalism” and “post-liberal regionalism”).

²⁰ UNASUR is Brazil's version of regional integration, a vision that Ecuador and Venezuela also support. See also *supra* note 16 (discussing ALBA).

²¹ See Simon Romero, *With Brazil as Advocate, Venezuela Joins Trade Bloc*, N.Y. TIMES (July 31, 2012).

²² Andean Community Decision 792—Reengineering Implementation the Andean Integration System (Sept. 19, 2013), <http://www.sice.oas.org/trade/junac/Decisiones/DEC792s.pdf>.

institutions except for the Andean Parliament, which has been suspended and will be merged into a proposed UNASUR legislative body—the South American Parliament.

If leftist-populist political leaders eventually succeed in merging all Andean institutions into UNASUR, the move would shift the focus of regional cooperation away from free trade and economic integration toward other development goals.²³ UNASUR’s “character would be eminently political [with] a specific focus on cooperation and common policies in non-trade areas.”²⁴ The extent and significance of this shift is somewhat obscured by vague references to the Andean Community and MERCOSUR in the UNASUR Treaty,²⁵ and by the focus on grand political gestures—such as plans for a South American passport that would give citizens “the right to live, work, and study in any UNASUR country”—rather than concrete policies.²⁶ To many observers, however, this strategic ambiguity masks a concerted effort by leftist-populist leaders to create a continent-wide pact in which the fiction of interstate cooperation and a fig leaf of economic integration obscure a reality that places national priorities over common regional objectives.

To date, UNASUR remains mostly a paper initiative with a handful of symbolic achievements, such as the high-profile opening of UNASUR’s headquarters in Quito, Ecuador. Meanwhile, the Andean Community continues to limp along, hamstrung by the ongoing schism between the two neoliberal and two leftist-populist member states. For most of the Crisis Period, this schism has resulted in a lack of progress towards stated Andean goals rather than open conflict. More recently, however, a move to scale back Andean integration objectives, together with multiple legal suits challenging Ecuador’s flagrant violation of Andean free trade rules, have threatened to end that détente. Before we describe these make-or-break legal controversies and the parallel developments regarding retrenchment of Andean rules and institutions, we first explain how the ATJ has managed to defend—and in some instances even expand—its de facto authority in IP cases over the last decade.

II. The Persistence of the ATJ’s Authority in the IP Island during the Crisis Period

Our initial research on the Andean legal system ended in 2007, early in the Crisis Period. We recently coded seven additional years of ATJ preliminary rulings and conducted additional interviews with Andean and national judges and IP agency officials. We found, to our surprise, that the ATJ’s narrow, intermediate, and extensive authority within the island of effective international adjudication for IP disputes has not only survived, it is flourishing and arguably expanding, as shown by an increasing number of cases, engagement with new actors (including specialized courts and administrative

²³ Thus far, UNASUR has remained more promise than reality, in large part due to its “low demands and flexibility concerning trade and development.” José Antonio Sanahuja, *Post-Liberal Regionalism in South America: The Case of UNASUR*, EUI RSCAS Working Paper 2012/5, at 19 (2012). See also Andrés Malamud & Gian Luca Gardini, *Has Regionalism Peaked? The Latin American Quagmire and its Lessons*, 47 INT’L SPECTATOR 116 (2012).

²⁴ Sanahuja, *supra* note 23, at 1–8.

²⁵ Tratado Constitutivo de la Unión de Naciones Suramericanas (adopted May 23, 2008), <http://www.unasursg.org/images/descargas/DOCUMENTOS%20CONSTITUTIVOS%20DE%20UNASUR/Tratado-UNASUR-solo.pdf>.

²⁶ Ewan Robertson, *UNASUR Moves Toward Continental Freedom of Movement, Venezuela Makes “Equality” Call*, Venezuelananalysis.com (Dec. 5, 2014), <https://venezuelanalysis.com/news/11057>. See also UNASUR, *Specific Goals*, <http://www.unasursg.org/en/node/180>.

agencies), and a widening geographic scope due to an uptick in preliminary references from Bolivia.²⁷

One suggestive piece of evidence is the increase in the number of IP preliminary references during the Crisis Period. After falling from about 200 to about 125 per year between 2006 and 2010, references began to rise sharply, reaching 325 in 2014 and an all-time high of 691 in 2015—the latest year for which figures are available.²⁸ As has been true throughout the Tribunal’s history, the overwhelming majority of cases involve disputes over trademark and patent registrations and other topics relating to intellectual property.²⁹

Other indicia of ATJ authority have also carried over from the Washington Consensus era. Interviews we conducted in late 2014 revealed that the parties to individual cases, future litigants, national judges, IP agency administrators, and IP lawyers all recognize ATJ rulings as legally binding interpretations of Andean IP legislation. As before, the IP agencies are the vehicle by which these actors demonstrate their recognition of the Tribunal’s authority. Agency administrators incorporate the Tribunal’s interpretations of Andean law into their policies and practices. Businesses and their legal counsel, in turn, frame their applications to register trademarks and patents—or their opposition to those applications—in light of these interpretations. And the *Anuario andino de derechos intelectuales* continues to publish analyses of noteworthy ATJ rulings and agency decisions. An observer who compared these sources in 2005 and 2015 would likely conclude that little had changed in the ensuing decade.

Even more surprising, however, are indications that the ATJ’s de facto authority within the IP island is expanding to encompass new domestic actors. First, to improve the quality of judicial rulings on economic matters, including IP, in 2012 Peru established a specialized intermediate appellate court to review decisions of the INDECOPI administrative tribunal. The judges appointed to the new court received training in IP law and met with ATJ judges to familiarize themselves with the preliminary reference procedure and the Tribunal’s jurisprudence. In its first two years, the specialized court referred dozens of cases to the ATJ, accounting for much of the increase in ATJ preliminary rulings in 2013 and 2014.³⁰

Second, in a pair of decisions in November 2014, the ATJ permitted administrative agencies to submit preliminary references.³¹ In the past, the Tribunal approached this issue in a highly formalistic way, concluding that only true judicial bodies could refer questions of Andean law. In 2007, the Tribunal reversed course and accepted a reference from the Colombian IP agency SIC. This isolated decision did not, however, spur references from the region’s other IP agencies. The 2014 rulings, which accepted referrals from INDECOPI and Bolivia’s IP agency, SENAPI, were much broader. They articulated a multi-factor functional test that considers an entity’s powers and the types of activities it performs. The rulings are already increasing direct references from other

²⁷ See ALTER & HELFER, *supra* note *, 72–3.

²⁸ Tribunal de Justicia de la Comunidad Andina, *Interpretaciones Prejudiciales 1985–2015*, http://www.tribunalandino.org.ec/sitetjca1/index.php?option=com_wrapper&view=wrapper&Itemid=24.

²⁹ Tribunal de Justicia de la Comunidad Andina, *Informe de Labores Gestión*, at 70–72 (2015). <http://www.tribunalandino.org.ec/sitetjca1/INFORME%20TOTAL%202015%20final.pdf>.

³⁰ Interview with judges of the Octavo Sala Especializada en lo Contencioso Administrativo de Peru, Dec. 12, 2014, Lima, Peru.

³¹ ATJ Preliminary Ruling 121-IP-2014 (reference from Peruvian IP agency INDECOPI); ATJ Preliminary Ruling 105-IP-2014 (reference from Bolivian IP agency SENAPI).

IP agencies.³² The functional test also suggests the possibility that administrative agencies in other areas could refer cases to the Tribunal.

Third, the ATJ's authority has expanded geographically to include preliminary references from Bolivia. As we have explained elsewhere, Bolivian courts had submitted only three references between 1984 and 2013. One reason for the paucity of cases is that the Bolivian Constitution lacks a provision authorizing the delegation of lawmaking powers to the Andean Community. Recognizing the supremacy of Andean law and sending references to the ATJ thus poses greater political risk for Bolivian judges than for jurists elsewhere in the region. This judicial reluctance, combined with the ATJ's formalist definition of which actors can refer cases, meant that the SENAPI officials had no way to communicate with Andean judges. The ATJ's 2014 rulings opened up a direct pipeline to the Tribunal. That year Bolivian courts referred three cases and SENAPI referred an additional three cases, more than doubling the total number of references from the country in a single year.³³ In 2015, Bolivian courts and administrative bodies referred thirty-four preliminary rulings, all but one of which concerned IP.³⁴

How has the ATJ managed to retain its de facto authority within the IP island notwithstanding the collapse of the commitment to neoliberal policies that supported the Andean Community during the Washington Consensus era? Part of the answer is surely the extensive outreach efforts of ATJ President Luis José Diez Canseco Núñez—a former member of the INDECOPI administrative tribunal—who traveled across the region to meet with national judiciaries and administrative agencies to promote the ATJ, encourage the referrals of new cases, and explore opportunities for deeper cooperation.³⁵

A few distinctive features of the IP island have also aided its survival. First, a diverse group of stakeholders—the officials in IP agencies, the businesses that own IP, and the lawyers who represent them—support Andean IP law and the ATJ preliminary reference mechanism. In addition, trademark and patent registrations (other than those for pharmaceuticals) are mainly private disputes that do not raise politically contentious legal or policy issues, whether the parties are foreign firms, domestic businesses, or local subsidiaries of multinational corporations. There is thus little reason for governments to pick a fight over the ATJ's exercise of de facto authority in these cases.

Second, the funding source of the domestic IP agencies—registration fees and fines—sets them apart from other administrative bodies. Firms must apply to register patents and trademarks, and many foreign businesses that depend on IP rights are quite wealthy. The agencies retain the revenue from these registrations, which has enabled them to attract and retain high-quality and professionalized officials and staff who protect their resources and institutional culture. Yet, the agencies' independence is not especially concerning to governments, especially in comparison to the tax and customs agencies that provide a more lucrative and politically important revenue stream, as well as a tool to police national borders.

Third, the island does not depend on national judicial support. Many scholars, ourselves included, have argued that such support greatly enhances IC authority.³⁶ Yet,

³² The most recent ATJ annual report notes the following referrals from IP agencies in 2015: Colombia's Unfair Competition and Industrial Property Group (twenty-five cases), Colombia's Directorate of Distinctive Signs (two cases); Bolivia's SENAPI (six cases), Peru's INDECOPI (three cases). *Informe de Labores Gestión*, *supra* note 29, at 9.

³³ ALTER & HELFER, *supra* note *, Ch. 3.

³⁴ See *Informe de Labores Gestión*, *supra* note 29, at 70.

³⁵ *Id.* at 52–65.

³⁶ Karen J. Alter, *Who Are the Masters of the Treaty? European Governments and the European Court of Justice*, 52 INT'L ORG. 125 (1998); Laurence R. Helfer, *Overlegalizing Human Rights: International*

authoritarian leaders may seize control of the judiciary, as has occurred in Venezuela and Ecuador.³⁷ The recent ATJ decisions accepting references directly from the IP agencies have created a way to circumvent any national judicial reticence or opposition that may arise now or in the future. Moreover, the fact that domestic IP agencies regularly request ATJ interpretations of Andean IP law makes it less politically risky for sympathetic national judges to refer cases and apply Tribunal rulings. Finally, the general satisfaction of most stakeholders with the existing system suggests another reason why Andean political leaders have left the IP island alone.

III. The ATJ Outside of the IP Island during the Crisis Period: Changing De Jure and De Facto Authority?

This section focuses on the ATJ's authority and power outside of the IP island during the Crisis Period. We discuss two legal and political developments affecting ATJ authority: (1) a decision to scale back Andean legislation, including eliminating the Common External Tariff; and (2) suits challenging Ecuador's pervasive restrictions on imports in response to a severe financial crisis that raised fundamental challenges to the Community. Overall, we find that the Crisis Period has seen a diminution of the ATJ's de jure authority outside of the IP island, which has correspondingly reduced the ATJ's de facto authority in those areas. The conclusion of the chapter assesses the impact of these developments on the ATJ's power.

A. Contracting Andean law: Does restricting the ATJ's de jure authority also diminish its authority in fact?

The Crisis Period has witnessed a scaling back of Andean law. Contracting the reach of Community legal norms necessarily constricts the ATJ's de jure authority. If Andean legislation no longer governs a particular topic or issue, the ATJ has nothing to interpret nor can member states be condemned for domestic laws and practices that conflict with Andean rules. Do these changes also diminish the Tribunal's de facto authority? The answer may seem obvious, but if the ATJ decided few cases concerning the more expansive but now repealed regional rules, then Andean judges may not have lost authority in fact in any meaningful sense.

In at least two instances, the member states revised Community secondary legislation following ATJ noncompliance judgments that found states in breach of earlier *Decisiones* that were more prescriptive or expansive. The contested *Decisiones* were created during the Washington Consensus Period when member states favored enhancing the regional integration process. The revisions introduced legal loopholes that allowed the member states to retain or adopt domestic laws and practices previously proscribed by Andean law.

Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes, 102 COLUM. L. REV. 1832 (2002).

³⁷ E.g., Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela* (2004), <http://www.hrw.org/reports/2004/venezuela0604/index.htm>; Human Rights Watch, *Ecuador: Supreme Court Purged: President and Congress Thwart Judicial Independence* (2004), <https://www.hrw.org/news/2004/12/16/ecuador-supreme-court-purged>; DUE PROCESS OF LAW FOUNDATION, *JUDICIAL INDEPENDENCE IN ECUADOR'S JUDICIAL REFORM PROCESS* (2014), http://www.dplf.org/sites/default/files/indjud_ecuador_executivereport_eng.pdf.

The first instance of retrenchment involved Andean rules regulating the test data that drug companies submit to domestic health agencies when seeking approval to market new medicines. The pharmaceutical industry favors laws that give the companies an exclusive right to control such data. Most governments and generic drug firms in the Andes opposed this right. Andean *Decisión* 486, adopted in 2000, struck a compromise. It protected undisclosed test data “against unfair commercial use,” but did not resolve whether this protection would be exclusive. In 2002, Colombia—under pressure from the United States, with which it was then negotiating a bilateral free trade agreement—adopted a decree granting pharmaceutical firms five years of exclusive data protection. Local generic drug companies sued. The General Secretariat sided with the government, finding no violation of Andean law. The generic companies then appealed to the ATJ, which upheld their noncompliance complaint in late 2005. This was a rare case in which the Secretariat and the ATJ took opposing positions.³⁸

Following the judgment, Colombia lobbied the other four member states to adopt new secondary legislation affirming that its more IP-protective domestic decree was in fact consistent with Andean law. After several failed attempts to reach agreement, Colombia forced the approval of *Decisión* 632 at a meeting where the two opponent states—Venezuela and Bolivia—were ineligible to vote because they had not paid their Community membership dues. The legislation retroactively validated the Colombian decree and, by facilitating Colombia’s free trade negotiations with the United States, contributed to Venezuela’s withdrawal from the Andean Community soon thereafter.³⁹

A second retrenchment involved Andean secondary legislation that restricts chemical pesticides for agriculture. This legislation, adopted in 1998, was part of a set of policies introducing environmental protection rules into Andean integration.⁴⁰ In two preliminary rulings from Colombia and three noncompliance judgments against Peru, the ATJ became increasingly forceful in challenging the failure to follow the legislation in full. In the Colombian cases, the ATJ ruled that member states could neither enact parallel requirements nor allow exemptions to Andean rules.⁴¹ In the Peruvian suits, the Tribunal found violations involving the adoption of more favorable registration procedures for chemical pesticides imported by farmers and the granting of automatic import licenses if the government did not evaluate the registration request within a certain time.⁴² Peru responded with a halfhearted measure, creating a simplified registration process that circumvented the review of imported pesticides required by Andean law. The persistent litigants returned to the ATJ a third time. The Tribunal once again ruled against Peru and warned that the prevailing litigants could file suit in national courts seeking damages—an enforcement mechanism envisioned in the ATJ Treaty but never previously utilized.⁴³

³⁸ ATJ Noncompliance Judgment 114-AI-2004, at 41.

³⁹ This dispute is discussed in depth in Laurence R. Helfer, Karen J. Alter & M. Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 Am. J. Int’l L. 1, 30–34 (2009).

⁴⁰ See THOMAS ANDREW O’KEEFE, *LATIN AMERICAN AND CARIBBEAN TRADE AGREEMENTS: KEYS TO A PROSPEROUS COMMUNITY OF THE AMERICAS* 282–83 (2009).

⁴¹ See ATJ Preliminary Rulings 114-IP-2009 and 115-IP-2009.

⁴² See ATJ Noncompliance Judgments 05-AI-2008 and 02-AI-2010.

⁴³ See ATJ Noncompliance Judgment 01-AI-2012, at 20; see also Treaty Creating the Court of Justice of the Cartagena Agreement art. 25, as amended by Protocol of Cochabamba (May 28, 1996) [Revised ATJ Treaty] art. 30 (“A verdict of noncompliance issued by the [ATJ], in the cases envisaged in Article 25, shall constitute legal and sufficient grounds for the party to ask the national judge for compensation for any damages or loss that may be due.”).

Member states responded to the ATJ rulings by relaxing Andean pesticides rules to give greater leeway for domestic regulations.⁴⁴ In interviews we were told that the prior regional rules were highly restrictive, to the point that only a handful of importers could pass muster. Although environmentalists supported the strict regulations, farmers wanted more relaxed rules for importing chemical pesticides, and governments sided with the farmers.⁴⁵

The retrenchments following the data protection and pesticide litigation realigned Andean legislation with the contested national laws and practices. How do these sorts of retrenchments affect the ATJ's de jure authority and de facto authority? Since the ATJ can still interpret and enforce the revised Andean legislation, one might argue that the ATJ's authority is unaffected. The data protection case supports this view. Privately, Colombian officials insisted that the original Andean legislation, although ambiguous and poorly written, permitted national variation in the extent of data protection.⁴⁶ The Secretariat's position in the litigation supports this claim. Member states reversed the ATJ's contrary position, issuing an "interpretive decision" that kept the legislation intact while clarifying the contested provision. Given that this clause was but one small piece of a larger set of rules, it is plausible that the reversal did not meaningfully constrict the ATJ's authority.

The pesticides dispute is different. The ATJ stringently applied Andean law against both Peru and Colombia, but this forceful approach led member states to add the sort of legal loopholes that have long hindered the growth of ATJ authority outside of the IP island. As a formal legal matter, the ATJ retains de jure authority vis-à-vis the contested Andean pesticides rules. But will litigants conclude from this experience that efforts to enforce Andean law are counterproductive? There is evidence that potential litigants have been voting with their feet. During the height of the Washington Consensus Period (1996–2005), the ATJ adjudicated ninety-four noncompliance suits, an average of 9.4 per year. In the Crisis Period (2006–2014), the filing of noncompliance suits dropped sharply, eventually falling to zero. The ATJ adjudicated only twenty-three noncompliance cases in this period, an average 2.3 per year.⁴⁷ The decline may have been an implicit recognition of the decreasing legal capacity of the Andean Secretariat, or potential litigants may have wondered if there was any point in turning to the Andean legal system if national governments would simply respond to adverse rulings by overturning Andean rules.

The third and arguably the most important constriction of the ATJ's de jure authority concerns the 2015 abrogation of the Common External Tariff (CET).⁴⁸ The 1969 Cartagena Agreement listed the CET as one of the Andean Pact's founding objectives, but it was not adopted until 1995.⁴⁹ The date for full implementation of the CET was subsequently pushed back several times, but the member states took numerous steps to adopt harmonized procedures that applied to both intra-Andean and

⁴⁴ *Decisión 804* (Apr. 28, 2015), <http://www.sice.oas.org/trade/junac/Decisiones/Dec%20804s.pdf>.

⁴⁵ Interview with ATJ judge, Nov. 17, 2015, Florence Italy.

⁴⁶ Interview with official of the Ministry of Trade, Industry and Tourism of Colombia, Sept. 14, 2007, Bogotá, Colombia.

⁴⁷ ALTER & HELFER, *supra* note *, Chs. 3 and 8.

⁴⁸ *Decisión 805*, <http://www.iri.edu.ar/wp-content/uploads/2016/08/a-2016-alatina-comunidadandina-decision-805-1.pdf>.

⁴⁹ See Andean Subregional Integration Agreement, May 26, 1969, 8 I.L.M. 910 (1969) arts. 80–86. The Andean Comisión adopted the CET in *Decisión 370*, and subsequently modified it in *Decisiones 465* and 535.

external trade. These legislative enactments expanded the ATJ's de jure and de facto authority over these aspects of the CET.

During the Washington Consensus and Crisis Periods, the ATJ interpreted this secondary legislation and explained the CET's central place in the Andean integration process. In a 1999 ruling, for example, the Tribunal identified the common tariff as a key element of the Andean integration project:

Without it we cannot speak of common market and ... little or nothing serious in the integration process could be considered effective. [The CET] is, together with the Trade Liberalization Program, indispensable for the construction of the expanded market area, in other words a substantial part of the existence of the Andean market ... *Decisión 370* [adopting CET] begins to fulfill the obligations agreed to in [the Cartagena Agreement]. The *Decisión* sets tariff levels based on the rules of the Cartagena Agreement and the procedures and conditions for introducing amendments to such instruments. [It is] noteworthy that in no case can such amendments may be adopted unilaterally by any country ...⁵⁰

In 2005, toward the end of the Washington Consensus Period, the ATJ twice applied the CET, condemning Colombia for unilaterally lowering the tariff on rice,⁵¹ and castigating Ecuador for unilaterally changing tariffs on paper products.⁵² During the Crisis Period, an ATJ preliminary rulings strongly suggested that the Colombian customs agency contravened the common tariff classification system—known as NANDINA—and that national judges should overturn its decision.⁵³ These are only three cases, but we do know how often the General Secretariat adjudicated complaints involving the CET, authorizing emergency derogations or adopting resolutions finding violations of Andean law that were not appealed to the ATJ.

Given the importance that Andean judges attached to the CET as a pillar of the Community, the decision to abrogate its core legislative instruments (*Decisiones 370, 465, and 535*) must be seen as a significant diminution of the ATJ de jure and de facto ATJ authority. Yet, the Andean rules harmonizing customs procedures were not repealed. These harmonized rules, which mostly concern procedural and technical requirements, have been the primary focus of the ATJ's tariff-related rulings. It is also noteworthy that the conflict with Ecuador, discussed below, is unrelated to the CET's abolition, revealing that the Secretariat and the ATJ retain considerable de jure authority over free trade, tariffs, and customs rules governing Andean markets.

B. The ATJ and mega-politics: Ecuador challenges fundamental common market precepts

We previously noted that the number of noncompliance suits dwindled to zero during the Crisis Period. The dearth of Andean noncompliance cases ended in late 2013 when Ecuador adopted a series of administration regulations and trade restrictions to discourage imports and improve its balance of payments situation. Ecuador's domestic measures raised serious questions about the country's continuing commitment to Community law and the Andean integration project more generally. This section

⁵⁰ ATJ Noncompliance Judgment 7-AI-98 (quoted in ATJ Preliminary Ruling 115-IP-2005, at 11).

⁵¹ ATJ Preliminary Ruling 115-IP-2005. A Columbian administrative court enforced the ATJ's ruling in 2010. *Expediente 2001-0163-01, Dorian Rocha Avila v. Decreto 635 de 2001*, Consejo de Estado (Apr. 22, 2010).

⁵² ATJ Noncompliance Judgment 200-AI-2005.

⁵³ ATJ Preliminary Ruling 17-IP-2008, at 7–8.

reviews three high-stakes legal disputes related to Ecuador's efforts to manage its current financial crisis—an import certification regulation that hindered the importation of hundreds of products into Ecuador, a safeguard applied to Peruvian and Colombian imports to compensate for those countries' currency devaluations, and a far more significant balance of payments safeguards applied to a broad range of imports originating both within but also outside of the Andean Community.

When faced with litigation, Ecuador at first seemed poised to walk away from the Andean Community entirely or to accelerate its merger with MERCOSUR or a transition to UNASUR. Much to our surprise, Ecuador participated in and respected Andean and WTO legal processes. Peruvian and Colombian economic interests remain dissatisfied with the General Secretariat's approval of Ecuador's balance of payments safeguards, and suits relating to all three disputes were referred to the ATJ. As of now, however, Ecuador appears to have found a legal way to achieve its economic objectives within the Andean Community's legal structure.

C. Challenges to Ecuador's COMEX import certification regulations

In November 2013, Committee on Commerce (COMEX), the policy-making arm of Ecuador's Ministry of Foreign Trade, established a certification requirement for 200 to 450 imported products, ostensibly to ensure the quality of the imports and protect the health of domestic consumers.⁵⁴ The certification scheme angered actors involved in intra-regional trade—including the Peruvian Chamber of Commerce, a Peruvian paint company, the Colombian commerce and trade ministries, and Ecuadorean businesses dependent on imports—who challenged the COMEX regulations as contrary to Andean law.⁵⁵

In a 2014 resolution, the Secretariat concluded that the COMEX regulation's restrictions on trade were not justified as a public health measure and violated Andean administrative regulations.⁵⁶ The Secretariat also condemned Ecuador for applying more permissive certification rules to imports from the EU but not from other Andean countries.⁵⁷ After the Secretariat refused to reconsider its initial findings,⁵⁸ Ecuador asked the ATJ to review the Secretariat's determination.

The COMEX litigation was one facet of a broader controversy linked to Ecuador's dollar liquidity crisis. President Rafael Correa pursued an aggressive plan of state-led economic development and social policies. Correa financed these policies using foreign loans that offered significant financial benefits to bondholders, most notably high interest rates.⁵⁹ These actions made the US dollar—Ecuador's official

⁵⁴ COMEX Resolution 116 art. 1 (Nov. 19, 2013). In 2014, COMEX extended the certification requirement to additional classes of imported goods.

⁵⁵ General Secretariat Resolution 003-2014. Although the COMEX regulation nominally applies to all imports, the EU secured an exemption for European imports, which require only a sworn statement to satisfy the regulation. US Trade Representative, *2015 National Trade Estimate Report on Foreign Trade Barriers—Ecuador*, at 97 (2015), https://ustr.gov/sites/default/files/files/reports/2015_NTE/2015%20NTE%20Ecuador.pdf. Thus, in practice, the certification scheme primarily burdens intra-Andean trade.

⁵⁶ General Secretariat Resolution 1695 art. 1 (June 6, 2014).

⁵⁷ General Secretariat Resolution 003-2014 (Nov. 7, 2014).

⁵⁸ General Secretariat Resolution 1716 art. 1 (Aug. 18, 2014).

⁵⁹ For more on how the search for funds is driving a broad range of Ecuador's economic policies, see Katie Porzecanski, *Ecuador's Bond Slump Is Just Beginning to Stone Harbor*, ABERDEEN BLOOMBERG Bus. (May 20, 2015), <http://www.bloomberg.com/news/articles/2015-05-20/ecuador-s-bond-slump-is-just-beginning-to-stone-harbor-aberdeen>.

currency—extremely valuable. Yet a rise in the value of the dollar and a decrease in the price of oil (one of the country's key industries) increased the price of Ecuadorean exports while making goods imported from the country's non-dollarized Andean neighbors much cheaper.

One way to cushion the economic shock for domestic producers and stem the exodus of much-needed dollars was to stop imports into Ecuador. Many observers thus suspect that trade protectionism was the true goal of the COMEX regulations.⁶⁰ Some government officials obliquely confirmed this suspicion by acknowledging that the regulations were part of a wider program to spur the domestic economy.⁶¹

As far as we know, Ecuador never complied with the Secretariat's legal ruling. Peruvian and Colombian businesses were also upset that Ecuador continued to apply more permissive certification rules to imports from the EU. Ecuador negotiated bilateral agreements with Peru and Colombia that gave imports from those countries some of the procedural benefits it afforded to EU imports. This relieved some of the pressure to pursue the litigation. But a violation of the Cartagena Agreement's most-favored nation rule persisted because only EU imports could be certified under the technical regulations of the country of origin, whereas Andean imports had to be certified as complying with Ecuadorean regulations.

Meanwhile, as the COMEX litigation unfolded, discussions regarding the Andean Community's future accelerated. A few years earlier, in 2011, Andean officials had created a working group to study the possibility of transition to UNASUR. In May 2012, the member states commissioned two non-Andean consulting groups to make recommendations regarding the transition.⁶² A year later, with the consultants' recommendations in hand, the working group suggested a "new vision" for the Community that recognized that the expansion of its goals had undermined its effectiveness.⁶³

In September 2013, the Ministers of Foreign Affairs adopted the working group's recommendations. They authorized the drafting of a protocol to eliminate the Andean Parliament and created a High Level Group comprised of Deputy Foreign Ministers and Deputy Ministers of Trade, coordinated by the Secretariat. Appended to this decision was the "new vision" of the working group, and a set of slides from a presentation by the Ecuadorean Foreign Ministry. The slides suggested eliminating the CET, the Community's competence to negotiate commercial relationships with non-Andean countries, and any regional-level initiatives relating to corruption or municipal

⁶⁰ See César Augusto, *Cristian Espinosa: Las empresas nacionales crecieron por la apertura, no por la protección estatal*, EL COMERCIO (undated), <http://www.elcomercio.com/actualidad/negocios/cristian-espinosa-empresas-nacionales-crecieron.html> ("Creo que el Gobierno tomó esa decisión viendo el déficit de la balanza comercial;" "Un aumento de los precios de los productos importados, sin que necesariamente suba la calidad"); see also *No hay vuelta atrás a la aplicación de la Resolución 116*, EL COMERCIO (undated), <http://www.elcomercio.com/actualidad/negocios/no-hay-vuelta-a-aplicacion.html>.

⁶¹ Richard Espinosa, the Coordinating Secretary of Production, Employment and Competition, stated that the certificate system is a strategic move intended to foster domestic production. See <http://www.elcomercio.com/actualidad/negocios/resolucion-116-estrategica-cambiar-matriz.html>.

⁶² *Decisión 773* art. 1, at 2 (May 3, 2012) (commissioning a study by the Economic Commission for Latin America and the Caribbean and the Getulio Vargas Foundation). The first organization is a regional commission based in Santiago, Chile that works in conjunction with the United Nations. The second organization promotes Brazil's economic and social development.

⁶³ *Decisión 792*, at 5–8 (Sept. 19, 2013). The recommendation regarding the ATJ is item "h" on page 7.

development.⁶⁴ With respect to the ATJ, the Foreign Ministry suggested a revision of its constituting treaty with the goal of “adapting to the new needs and realities of the Andean integration process.”⁶⁵ The Foreign Ministers instructed the High Level Group to consider these Ecuadorean recommendations “as input” in its decision-making.

In October 2014—in the midst of the General Secretariat’s review and condemnation of Ecuador’s COMEX regulations—the Andean Council of Foreign Ministers established a number of ad hoc committees to review twenty-seven different aspects of the Andean integration project.⁶⁶ These groups continued to meet while litigation against Ecuador proceeded.

D. Challenges to Ecuador’s currency safeguards

The COMEX certification scheme soon proved insufficient to stabilize Ecuador’s dollar liquidity crisis. In January 2015, Peru and Colombia devalued their respective currencies, leading Ecuador to impose safeguards on thousands of imports from both countries. Ecuador justified these levies as “temporary corrective measures” under Article 98 of the Cartagena Agreement, which creates a procedure for the Secretariat to review and authorize remedies for competitive shocks caused by currency devaluations.⁶⁷ One month later, the Secretariat admonished Ecuador’s government for applying the safeguards without prior approval, and it rejected the safeguards because the government had failed to prove that the currency devaluations caused what were in any event only modest changes in the terms of trade with the two Andean countries.⁶⁸

The Secretariat’s decision incensed Correa’s government, which initially sought a reconsideration of its ruling. Ecuadorean officials were deeply annoyed that the other member states and Andean officials refused to acknowledge the severe economic difficulties their country faced due to the strong dollar and the low price of oil. Shortly after the Secretariat issued the ruling, Correa openly speculated about leaving the Andean Community, which he suggested “serves very little” purpose.⁶⁹

E. Challenges to Ecuador’s balance of payments safeguards

As the country’s financial crisis deepened, however, the government shifted tactics. It abandoned the currency safeguards⁷⁰ and notified the Secretariat that it would impose a more extensive set of safeguards to restore its global balance of payments. This time, Ecuador suggested that the safeguards were provisional and it requested permission to impose measures.⁷¹ A different safeguards provision in Andean law allows member

⁶⁴ *Id.* at 15. ⁶⁵ *Id.* at 18,

⁶⁶ *Decisión 797* (Oct. 14, 2014).

⁶⁷ Rebecca Moral, *Imports, Investments on Chopping Block in Ecuador: Trade Partners, Consumers Feel Brunt of Austerity Plan*, PANAM Post (Jan. 6, 2015), <https://panampost.com/rebeca-morla/2015/01/06/imports-investments-on-the-chopping-block-in-ecuador/>.

⁶⁸ *Resolución 1762* (Feb. 6, 2015), http://www.andi.com.co/cse/PublishingImages/Paginas/Informacion_de_Interes/RESO%201762.pdf.

⁶⁹ Michael Lerner, *Ecuador Considers Leaving Trade Bloc Amidst Currency Dispute*, BLOUIN NEWS BLOGS (Feb. 12, 2015), <http://blogs.blouinnews.com/blouinbeatbusiness/2015/02/12/ecuador-considers-leaving-trade-bloc-amidst-currency-disputes/>.

⁷⁰ *Ecuador Lifts Tariffs on Peruvian and Colombian Imported Goods following Pressure from the Community of Andean Nations*, CUENCA HIGH LIFE (Feb. 9, 2015), <https://www.cuencahighlife.com/ecuador-lifts-new-tariffs-on-peruvian-and-colombia-goods-following-pressure-from-the-community-of-andean-nations/>.

⁷¹ WTO News Item, *WTO Members Consult with Ecuador on its Import Surcharges Imposed on Balance-of-Payment Grounds*, June 29–30, 2015, https://www.wto.org/english/news_e/news15_e/bop_29jun15_e.htm.

states to adopt “measures to correct the imbalance of its global balance of payments” if the measures are found to be temporary and nondiscriminatory.⁷²

Over the objections of Peru and Colombia, the Secretariat approved the balance of payments safeguards for one year. The approval came two months after the initial application, thus three months after the Secretariat’s disapproval of the currency measures. In defending its decision, the Secretariat noted that the safeguards were proportional in size (applying to 30 percent of Ecuador’s imports) and in geographic scope. Colombian and Peruvian products comprised only 10 and 4 percent, respectively, of the targeted goods, 35 percent of Chinese imports, 14 percent of US imports, and 9 percent of EU imports.⁷³ The Secretariat thus accepted Ecuador’s claim that the balance of payments crisis justified a temporary trade-restrictive response. Peru and Colombia filed annulment proceedings challenging the Secretariat’s authorization.⁷⁴ At the time this book went to press, it was uncertain when, if ever, the ATJ would rule on these complaints.⁷⁵

The global orientation of Ecuador’s safeguards helped to defend the measures in the Andean legal system. But this same orientation also gave rise to a WTO complaint. The WTO Committee on Balance of Payments Restrictions met in June and October 2015 to review the surcharges. At the latter meeting, Ecuador announced that it would end the surcharges by June 2016.⁷⁶ In 2016, however, Ecuador notified the WTO that it would delay compliance at least until 2017, explaining that “the prevailing macroeconomic conditions show a severe deterioration in the balance of payments which the country has been unable to resolve fully.” Urgent humanitarian and economic needs created by a powerful recent earthquake in Ecuador provided a further justification for delay.⁷⁷

These events reveal that the domestic restrictions adopted by Correa to protect Ecuador from Colombian and Peruvian imports were insufficient to remedy the widespread economic turmoil engendered by falling oil prices and a stronger US dollar. Once the currency safeguards dispute migrated to the WTO, with its much larger and more economically important membership, the legal battles within the Andean Community became far less important.

F. How the Andean legal system channels responses to systemic noncompliance

Stepping back from the details of these disputes and returning to the authority framework, we argue that the filing of the noncompliance and nullification suits and Ecuador’s participation in the litigation suggests that firms, business associations, governments, and the Andean Secretariat all recognize the ATJ’s legal authority, and have some faith in the Andean legal system’s ability to fairly adjudicate these disputes. But

⁷² *Decisión 389*, expanding on art. 95 of the Cartagena Agreement. See especially art. 1.

⁷³ General Secretariat *Resolución 1784*, at 54 (June 2, 2015) (authorizing Ecuador to impose safeguards for a period of one year from Mar. 11, 2015).

⁷⁴ ATJ Nullification Proceedings 0003-AN-2015 and 0004-AN-2015.

⁷⁵ What is clear, however, is that high-profile litigation in the Andean Community has resumed. A recent report notes that ten noncompliance and five nullification suits were filed with the ATJ in 2015. See *Informe de Labores Gestión 2015*, *supra* note 29, at 69.

⁷⁶ WTO News Item, *Ecuador Starts Phasing Out Import Surcharge* (Feb. 17, 2016), https://www.wto.org/english/news_e/news16_e/bop_17feb16_e.htm.

⁷⁷ Communication from Ecuador to the Chairman of the Committee on Balance of Payment Restrictions, WTBOP/G/24 (May 4, 2016). The surcharges were removed in June 2017. See: https://www.wto.org/english/news_e/news17_e/bop_24jul17_e.htm.

is it wise to encourage supranational adjudication of these sorts of high politics disputes? During the COMEX litigation, Ecuador justified its more favorable treatment of European products by implicitly questioning the competence and trustworthiness of Peruvian and Colombian regulatory systems to ensure the safety and quality of their exports. During the safeguards litigation, Colombia and Peru raised numerous procedural and legal arguments against Ecuador's emergency measures, contributing to the sense that they had no sympathy for the very real economic problems that the government is facing.

In principle, there were three plausible responses to Ecuador's measures—ignore them, bring them within the system via a politically sanctioned derogation, or confront them as violations. As we now explain, the strengthening of the Andean legal system during the Washington Consensus Period has combined with the current ideological dissensus among the member states to take the first two options off the table. This leaves confrontation, a response that creates grave and foreseeable risks to the Community's future.

Under the Andean legal system's original design, the Secretariat likely would have ignored the complaints against Ecuador's trade measures.⁷⁸ Ignoring violations seems to be the strategy of choice for MERCOSUR. Indeed, when Argentina adopted trade-restricting legislation that was very similar to Ecuador's COMEX regulations, none of the other MERCOSUR member states challenged the legislation before MERCOSUR's Permanent Tribunal.⁷⁹

After the reforms of the 1996 Cochabamba Protocol, however, the Secretariat can sit on a noncompliance case for at most two months; thereafter, complaining private actors and governments can challenge the Secretariat's inaction before the ATJ.⁸⁰ This institutional structure creates an incentive for the Secretariat to act, since the Tribunal's review of the dispute on the merits is all but inevitable. In fact, the Secretariat did not shy away from investigating and condemning the COMEX suits against Ecuador or in quickly reviewing both of the country's safeguards measures.

A second way to avoid the conflict would have been for member states to grant Ecuador a derogation from Andean free trade rules. There is precedent for this approach. In 1992, when Peruvian President Alberto Fujimori's neoliberal shock therapy caused prices for necessities to skyrocket, the government enacted trade restrictions to stop low-cost Andean imports from displacing demand for more expensive domestic goods. Recognizing that Fujimori's policies were an essential part of his domestic policy agenda, the other member states passed numerous *Decisiones* granting Peru multi-year exemptions from Andean trade rules.⁸¹ Creating a similar derogation for Ecuador to mitigate the severe economic pain of the country's dollarized economy and the slump in oil prices could have provided a politically sanctioned "exit within the system" that

⁷⁸ During the Developmentalist Period, only member states could initiate noncompliance complaints, and the *Junta* (the precursor to the General Secretariat) did not bring those complaints to the ATJ if it could not resolve a dispute diplomatically.

⁷⁹ Argentina's restrictions are also designed to protect a fragile dollar liquidity. See *Argentina's Current Import Restrictions Forecasted to Continue During 2015*, MERCO PRESS (Jan. 28, 2015), <http://en.mercopress.com/2015/01/28/argentina-s-current-import-restrictions-forecasted-to-continue-during-2015>. This legislation was recently condemned by the WTO Appellate Body in response to a suit by the EU, Japan, and the United States. The WTO Appellate Body recently upheld a panel ruling finding that Argentina's trade restrictions were contrary to WTO law. See *WTO Appellate Body Condemns Argentina's Import Restrictions*, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1235>.

⁸⁰ These reforms also granted private litigants the right to raise and pursue noncompliance cases. Revised ATJ Treaty, *supra* note 43, arts. 24 and 25.

⁸¹ See ALTER & HELFER, *supra* note *, Ch. 6 (discussing the "Peru Exceptions Case").

would have mooted the noncompliance suits and legalized Ecuador's actions. When we asked why the member states had not granted a similar derogation for Ecuador, we were told that the government had not requested an exemption.

With these two options effectively off the table, the only alternative was confrontation, which led to legal condemnations by the General Secretariat and risked definitive ATJ noncompliance judgments condemning one or more Ecuadorean trade measures. This result risked a collision course that could have led Correa to ramp up his opposition to the Andean Community and to undermine or dismantle its institutions and replace them with more politically malleable regional alternatives.

1. The state of play as of the end of 2017

Recent shifts in the political winds in the region have overtaken the legal conflicts in the Andean Community. Worried about his own electoral prospects, Correa decided against calling for a referendum to allow him to seek another term in office.⁸² In May 2017, the candidate from Correa's political party, Lenin Moreno, assumed Ecuador's presidency. It is too soon to say if he will deviate from the path Correa has set or if Correa will someday return to office.⁸³ Meanwhile, in 2016 Bolivian voters rejected President Morales's bid to change the constitution to allow him to run for a fourth term.⁸⁴ And Venezuela now faces a disastrous economic, political, and social crisis that has only deepened since the 2013 death of Hugo Chavez.⁸⁵

The political landscape in the two neoliberal Andean countries is somewhat less volatile, but the prospects for creating a free trade alternative to the Andean Community remain in doubt. Although some Peruvian and Columbian government and business leaders favored the TPP, that agreement was rejected by US President Trump.⁸⁶ In addition, the defeat of Argentina's President Cristina Fernández de Kirchner in November 2015, the rising violence in Venezuela, and the explosive impeachment trial and corruption investigations in Brazil in 2016 and 2017, cast grave doubt not only on UNASUR but on the very survival of leftist-populism in Latin America. The flux in the region appears to be overshadowing any remaining legal conflicts over Ecuador's trade restrictions and financial controls among the Andean Community member states.

IV. Conclusion: Reflections on the Power of the ATJ in the Andean Legal System

We have demonstrated that ATJ's narrow, intermediate, and extensive authority within the IP island remains resilient. More surprisingly, we have also shown that the Tribunal has solidified and expanded its de facto authority within this island during the current Crisis Period. We emphasize, however, that these expansions are modest. Overall, the

⁸² *Ecuador: Wily Correa*, THE ECONOMIST, Nov. 21, 2015.

⁸³ Maggy Ayala & Barcelo Rochabrun, *Ecuador Votes to Bring Back Presidential Term Limits*, N.Y. TIMES (Feb. 4, 2018).

⁸⁴ *Bolivian voters reject fourth term for Morales*, BBC News (Feb. 24, 2016).

⁸⁵ Matt O'Brien, *Venezuela Is on the Brink of a Complete Economic Collapse*, WASH. POST (Jan. 29, 2016).

⁸⁶ Maira Sutton, *TPP under Fire in the U.S. as Other Signatories Advance towards Ratification*, Electronic Frontier Foundation (Mar. 25, 2016), <https://www.eff.org/deeplinks/2016/03/tpp-under-fire-us-other-signatories-advance-towards-ratification>.

Andean Community has mostly failed to achieve its broader economic integration objectives.

Viewing the Andean legal system in a wider perspective reveals that the ATJ's authority and power are inextricably linked to the fate of the regional integration project as a whole. The ATJ's de facto authority depends on support of national governments, sub-state actors such as the IP administrative agencies, or both. Within the IP island, firms, lawyers, agency officials, and national judges support Andean IP law as interpreted by the ATJ. When Andean governments issued decrees that diverged from Andean IP law, IP stakeholders filed suits to challenge them. When administrative agencies took the side of the ATJ in these disputes, the governments backed down. The support of domestic agencies in these cases translated ATJ de facto authority into a source of political power for the Tribunal—albeit within a confined policy space.

The problem arises when the ATJ has the support of neither sub-state actors nor governments. This is the situation the ATJ now faces. Member states have not shied away from retrenching the Andean integration process. They abrogated the Andean Parliament and renounced the goal of a Common External Tariff while retaining harmonized customs procedures for intra-regional trade. The ATJ navigates this difficult territory by enforcing the letter of the law. In the data protection suit, Andean legislation was ambiguous and Community actors disagreed as to its meaning. Following the Tribunal's ruling and seizing on a moment when Bolivia and Venezuela could not vote, Colombian officials reimposed their preferred interpretation. With respect to Andean pesticides legislation, the ATJ's insistence that states respect Andean legal rules led to changes in regional pesticides rules to give greater discretion to the member states.

The disputes involving Ecuador were in a different category altogether. Ecuador's policies were at odds with core principles of the common market, including the extension of national and most-favored national treatment to goods within the region, and the requirement to seek Secretariat authorization before imposing temporary safeguards. Yet it is also true that Ecuador faced grave economic problems. The Secretariat sought a legal compromise, but Peruvian and Colombian economic actors remained unhappy with some of its rulings.

The fact that major political disputes are resolved via the Andean Community's established legal processes suggests that the ATJ and the Secretariat exert power—at least to a limited degree. Ecuador participated fully in the litigation and provided a wealth of economic and policy information to support its actions. The Secretariat's rulings were based on a deep analysis of law and fact, allowing for a nuanced and substantive review of the issues at stake. And even heated objections to Ecuador's actions did not trigger unauthorized retaliation by Peru or Colombia.

At the same time, Ecuador did not appear to be greatly constrained by common market rules or the Community's longer-term aspirations. Ironically, the relative effectiveness of the region's legal system may actually be exacerbating the conflict, propelling efforts to cut back on Andean rules and restructure Andean institutions.⁸⁷

Ran Hirschl warns that judicializing controversies of high political significance will inevitably politicize courts and the legal process in general.⁸⁸ We see this politicization in the debate over merging the Andean Community with MERCOSUR. The drive for a merger is not inspired by economic gains from a larger regional market. Rather,

⁸⁷ For more on how international litigation can exacerbate conflict, see Karen J. Alter, *Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System*, 79 INT'L AFF. 783 (2003).

⁸⁸ Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

the chief attraction of UNASUR is the prospect of weaker and more politically malleable regional institutions, including legal institutions involved in dispute settlement. Embedding adjudication into this wider and shifting political context reveals that the ATJ's de facto authority and power is more fragile than an examination of its formal legal architecture, a quantitative analysis of its judicial output, or a doctrinal analysis of its decisions would suggest.

Many consider the International Monetary Fund to be a powerful institution because it can force governments to adopt painful and highly unpopular economic policies. The Andean Community is clearly not this powerful. Ecuador's government preferred to violate Andean law rather than compromise on domestic policies that it viewed as necessary for the country's financial health and development, and Correa cared more for his party's political future than he did for the regional integration project. Perhaps, in a democracy, this is how it should be.

When confronted with major economic uncertainty, Ecuador was not overly focused on the Andean Community because trade with its Andean neighbors remains limited. By contrast, Ecuador remains constrained by its dependence on trade beyond the region and its need to borrow capital from foreign lenders. We were surprised that Correa mostly followed Andean legal procedures. But his willingness to do so was influenced by the reality that violations of Andean rules were packaged together with violations of WTO rules, and Ecuador could not afford to antagonize its major trading partners that are all WTO members. So long as Andean laws and procedures are not more demanding than those of the WTO, and Andean officials are willing to authorize derogations from common market rules when given plausible reasons to do so, adhering to the Andean legal system is not too onerous—even for a recalcitrant government.

Stepping back to a comparative perspective, it is worth pointing out a few features that are specific to the Andean context. The Andean Community has only four member states. This small number, the low political salience of Andean integration, and strong presidential systems in each country make changing Andean legal rules relatively easy. In other words, the Andean Community is not like the WTO or the EU, where it is nearly impossible to renegotiate legal rules or the revise the institutional architecture every time an international court issues an interpretation that one or two countries dislike.

How do these insights add up to an assessment of ATJ authority and power? The Tribunal exercises de facto as well as de jure authority where it can count on the support of sub-state interlocutors to enforce or voluntarily embrace its rulings. Where there is a transnational consensus in favor of international adjudication among sub-state actors, as exists for IP, the ATJ can exercise narrow, intermediate, and extensive authority—and even power—within a confined policy domain.

For most areas regulated by Andean law, however, the ATJ lacks such compliance partners, and the most it can hope to do is push states to follow procedures that are not especially constraining. In fact, where member states are ideologically divided, strict enforcement of Andean law can be counterproductive, exacerbating underlying political and economic disputes. This is a fine line for the Andean judges to navigate. Thus far, they have managed to tread this line, buoyed by the ATJ's support within the IP community which raises the costs of any political decision to abandon the ATJ or mount a fundamental challenge to its rulings.