

Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community

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Abstract

The Andean Community—a forty-year-old regional integration pact of small developing countries in South America—is widely viewed as a failure. We show that the Andean Community has in fact achieved remarkable success within one part of its legal system—Intellectual Property (IP). The Andean Tribunal of Justice (ATJ) has helped to establish IP as a rule of law island in the Andean Community in which national judges, administrative officials, and private parties actively participate in regional litigation and conform their behavior to regional IP rules. In the vast seas surrounding this island, by contrast, Andean rules remain riddled with exceptions, under-enforced, and often circumvented by domestic actors. We explain how the ATJ helped to construct the IP rule of law island and why litigation has not spilled over to other issue areas regulated by the Community.

Puzzles: Why is the Andean legal system effective? Why is that effectiveness limited to intellectual property?

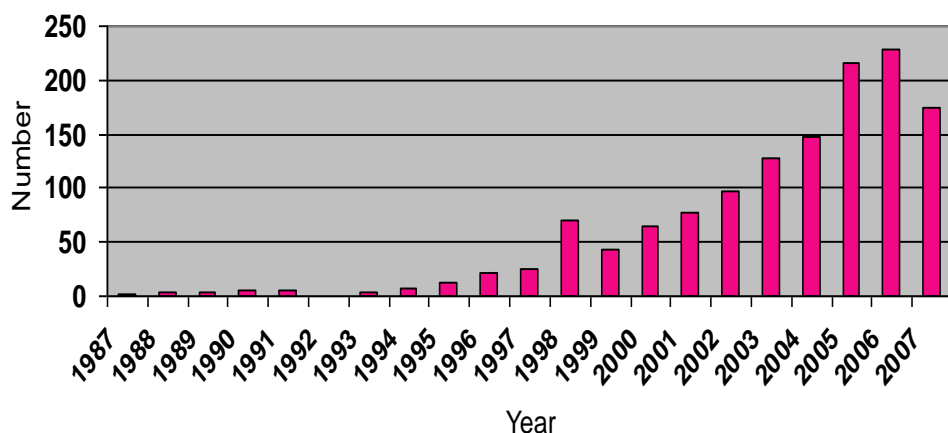
Methodology: Coding more than 1,400 ATJ preliminary rulings and interviewing over 40 government officials, judges, lawyers, and interest groups in the region.

Findings:

- (1) More than 1,400 ATJ rulings have helped to establish IP as a rule of law island in the Andean Community in which legal rules—rather than power, political influence or bribery—shape decision-making by state actors.
- (2) Within the island, national judges, administrative officials, and private parties participate in ATJ litigation and conform their behavior to Andean rules.
- (3) An international court can help to bolster and stabilize the rule of law in developing states by targeting particular state institutions in specific issue areas.

ATJ is 3rd most active Int'l Court: 1400+ preliminary rulings

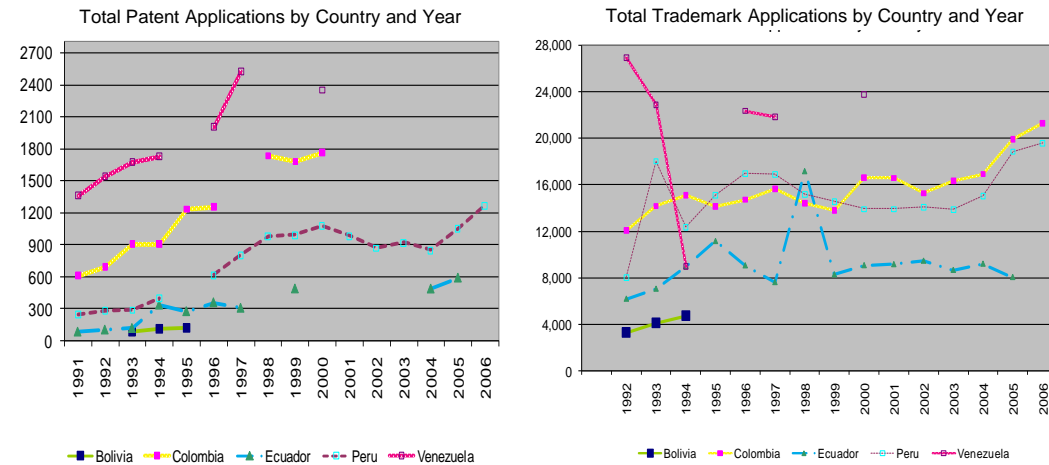
Number of ATJ Preliminary Rulings, 1987-2007



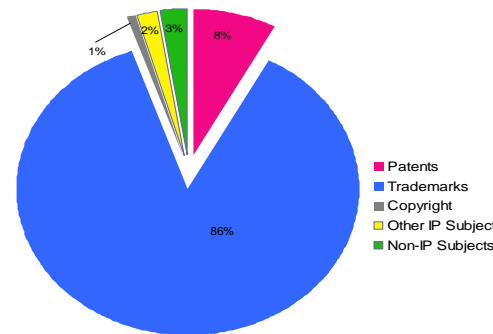
Finding (1): Within the IP rule of law island, the ATJ is active & effective

The Andean legal system creates economically valuable legal rights for a critical mass of private parties:

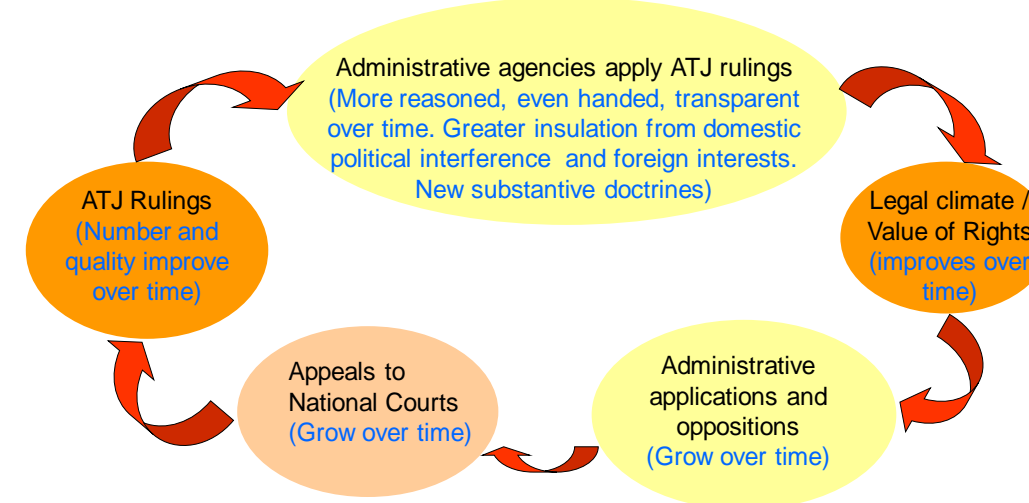
The demand for trademark and patent protection and oppositions in the Andean Community increased in the 1990s following the restructuring of domestic IP administrative agencies and the revision of Andean IP Decisions. A specialized bar devoted to IP has also grown.



An IP docket: Over 90% of the ATJ's rulings concern IP



Positive feedback mechanism that helped build an effective Andean IP rule of law: IP administrative agencies are key compliance constituencies



Finding (2): The ATJ acts as a bulwark against foreign interests that have pressured individual member countries to deviate from Andean rules and adopt higher standards of IP protection

National courts and IP agencies initially followed government decrees that violated Andean IP laws. The decrees were adopted due to bilateral pressure from the U.S. and multinational corporations.



ATJ found the decrees in violation of Andean law and ordered the agencies to reverse decisions based on the decrees. (E.g. "Pipeline" patent case, 1996; and the "Second use" patent cases, 2001)



ATJ rulings have made it more difficult for member states to defect from Andean IP policies in response to foreign pressure. The administrative agencies' actions, and settled rules and decision-making procedures increased the cost of noncompliance.



The Andean Community has maintained key elements of the region's distinctive and balanced approach to reconciling the social and economic needs of developing countries and consumers with the private interests of IP rights holders.

Finding (3): Why no spillover beyond IP? Lack of demand for and supply of ATJ rulings.

- No organized private actors whose professional interests motivate them to seek enforcement of Andean laws. Most administrative agencies in the region lack the autonomy needed to serve as compliance partners for ATJ rulings.
- Andean IP rules are more precise and detailed than other areas of Andean law.
- Outside of IP, the ATJ is unwilling to issue purposive interpretations that encourage private parties to litigate Andean rules in national courts.

Conclusion: Implications of the Andean Experience for the Increasing Judicialization of International Law

- ✓ The Andean experience provides insights for existing IR theories (i.e. institutional design, principal-agent and liberal theories) that seek to explain when international courts are effective.
- ✓ The case study demonstrates that administrative agencies may have an interest in enforcing international rules and international court decisions.
- ✓ For international courts to succeed, they need to identify domestic constituencies (such as autonomous administrative agencies) that will support international rulings.