Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice. By Karen J. Alter and Laurence R. Helfer. Oxford, UK: Oxford University Press, 2017. Pp. xxiv, 308. Index.
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If recent years have not witnessed a significant increase in the number of international courts,[1] there has been a welcome increase in the academic attention paid to the activity of these courts.[2] This attention raises questions not only about the dynamics of these courts, but wider ones about international law. Most of these courts are in the Global South. If they afford international law a wider vocal range, the nature of this contribution is still a mystery. These courts also raise important questions about the style, depth, and breadth of international institutionalization. Their spread has not been as extensive or as unproblematic as was perhaps promised by the initial expansion of these courts, particularly in the 1990s, with strong pushback against particular courts.[3]

The wonderful monograph co-written by Karen Alter, professor of political science and law at Northwestern University, and Laurence Helfer, professor of law at Duke University School of Law, captures these fault lines. In the best tradition of a case study, one learns a lot from it about the law and politics of an international organization, the Andean Community, and its court, the Andean Tribunal of Justice (Tribunal). The monograph also generates a range of significant, more widely generalizable insights that, for this reviewer at least, provoke reflection and doubt about the prospects of international courts. Before engaging with these, a few tributes are necessary. This book is a beautifully written account of the Tribunal. It achieves significant resonance through weaving together a story of judicial biographies, litigant stories, and analyses of particular judgments. It eschews the simple narrative of reducing the story of the Tribunal to a single independent variable, capturing, instead, the variety of factors that affect the court's authority and case law. Finally, this reviewer has spent time researching in both South America and South East Asia and has had to endure the frustrations of primary materials being much less accessible than in Europe or North America. In that context, the range and rigor of the research underpinning this study is something to behold. It is legal research at its most daring and most intellectually inquisitive.

The Andean Community is a story of a regional integration that struggles but endures. Established in 1969 by the Treaty of Cartagena, two of its most economically significant members, Chile and Venezuela, have left. Four members—Bolivia, Colombia, Ecuador, and Peru—remain. The limited faith in it has resulted in Bolivia being in the process of accession to the Southern Common Market (MERCOSUR for its Spanish initials),[4] and Colombia and Peru acceding to the Pacific Alliance.[5] The Andean Community has not realized its goal of a customs union.

[1] The most recent of note was established back in 2015, the Court of the Eurasian Economic Union. Treaty on Eurasian Economic Union, Art. 19, Annex 2 (2014).

[2] For collections, see THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds., 2013); Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *The Variable Authority of International Courts*, 79 L. & CONTEMP. PROBS. (2016); INTERNATIONAL COURT AUTHORITY (Karen Alter, Laurence Helfer & Mikael Madsen eds., 2018). *See also* Cesare P. R. Romano, Review Essay, *Legitimacy, Authority, and Performance: Contemporary Anxieties of International Courts and Tribunals*, 114 AJIL 149 (2020).

[3] A central concern of the United Kingdom government in its negotiations with the European Union on the terms of its departure from the latter was that the European Court of Justice should have no future jurisdiction over it. The South African Development Community Tribunal was disbanded in 2012 following a controversy regarding a 2008 judgment challenging the lack of legal process surrounding Zimbabwe's land reforms.

[4] The MERCOSUR was established by the Treaty of Asuncíon in 1991 to create a common market between Argentina, Brazil, Paraguay, and Uruguay. Venezuela acceded in 2013, but its membership was suspended in 2016 because of its democratic failings. A Protocol of Accession was signed for Bolivian membership in 2015, but it has still not been ratified by all national legislatures.

[5] The Pacific Alliance was established by a Presidential Declaration in 2011 between Chile,

In this unfavorable context, Alter and Helfer have set out a story of its court, the Andean Tribunal of Justice. They convincingly show it to be the most successful regional court outside of Europe. Between 2015 and 2019, the court has adopted between 479 and 734 judgments per year.[6] There is, overall, good compliance with its case law. It has a wide-ranging jurisdiction that is similar to that of the European Union's Court of Justice. Member states and the central Secretariat can bring member states before it for noncompliance with their obligations. National courts can refer questions concerning the interpretation and application of Andean Community law to it (preliminary references). Private parties can seek review of actions or omissions of the Andean Community. Its case law has, at times, been ambitious. It has developed the doctrines of primacy of Andean Community law over domestic law and direct effect so that parties can, therefore, invoke Andean Community law rights in domestic courts that will take precedence over domestic law.

Alter and Helfer observe, however, that these successes are qualified. In the thirty-year period of their account, one source of jurisdiction, the preliminary reference procedure, accounted for over 90 percent of its judgments. Over 90 percent of these are in one field, intellectual property. Furthermore, one state, Colombia, accounted for over 60 percent of the references, albeit significant numbers also came from Ecuadorian and Peruvian courts. Many of the Tribunal's judgments repeated previous judgments or were formulaic in nature. Finally, its authority ebbed and flowed. In the period between 2007 and 2014, the member state governments were far more ideologically polarized. This led, most notably, to defiance of key parts of Andean Community law by Ecuador between 2013 and 2015. It also increased the willingness of the member states collectively to revisit and overrule Tribunal judgments through passing Andean Community legislation.

Alter and Helfer set out a number of reasons why the Andean Tribunal has not been able to expand its authority. There were few legal constituencies willing to sustain repeated litigation before the Tribunal. Passive or resistant national courts were often unlikely to make referrals. An unstable political climate both hedged the Tribunal's room for maneuver and made the Secretariat less inclined to bring member states before the Tribunal for noncompliance with their obligations. The ambiguity and vague wording of many Andean Community laws induces judicial indecision out of a fear that ambitious interpretations will be judicially inappropriate.

These reasons are persuasive to a point. However, the ecumenical quality of this diagnosis leaves unclear what acts as the central restraint on the Tribunal: the Tribunal's own self-restraint, the legal milieu in which it operates, the wider politico-economic context, or some combination thereof. In addition, international court activity is still a limited phenomenon. There is none to speak of in Asia, the Maghreb, Australasia, or North America. The MERCOSUR, Southern African courts, and Central American courts have not been successes. The features limiting the Andean Tribunal's work are not omnipresent in other jurisdictions with international courts. This raises the possibility that there are further constraints, which may limit international court activity.

More interesting, to this reviewer at least, is what enables the Andean Tribunal to have the success it has, given the exceptional nature of this success and its unpromising context. Alter and Helfer tell a fascinating tale. They argue that central to the Andean Tribunal securing domestic demand for its service was its interpretation of the preliminary reference procedure to allow references not just from national courts, as is the case in the European Union, but also from national intellectual property agencies. Industries would typically challenge refusals by

Colombia, Mexico, and Peru, which was formalized by a Framework Agreement agreed at Antofagasta, Chile in 2012. A central objective set out in Article 2(1)(a) of the Framework Agreement is a "deep area of integration" in which there is progressive liberalization of the movement of goods, persons, services, and capital.

[6] Tribunal de Justicia de la Comunidad Andina, *Informe de Labores Gestión 2019*, 5 (2020).

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these agencies to register rights. The agency would then refer the point of law in question to the Tribunal.

The advantages of the Tribunal for the agencies, according to Alter and Helfer, was that it bolstered their attempts, particularly in Colombia and Peru, to give greater protection to consumer interests. It resolved disagreements between different units within the agencies, and therefore made coordination easier. Its reforms led to stronger governance and stronger legal cultures within the agencies. References were fast, which pleased business, with the Tribunal providing a welcome check on the power of the agencies.

The Tribunal and Andean Community law also sought to minimize potential disadvantages. The intellectual property rights in question were set out in both Andean Community and domestic law. Judgments were usually cautious in their reasoning. References were never refused. Professional contacts were cultivated between the Tribunal and the agencies.

This is a highly persuasive account. A caveat would appear to be that the reform allowing agencies to refer points of law to the Tribunal occurred only in 2007. There were high levels of references to the Tribunal from national courts on intellectual property rights prior to that date. Alter and Helfer provide additional convincing reasons for these as well. Most of the references, prior to 2007, came from Colombia. Colombian laws informed both Andean Community patent and trademark law. In addition, the central Colombian court, the *Consejo de Estado*, was staffed not by career judges but by people from a wide variety of backgrounds, notably academia, the administration, and politics. There was, in other words, a professional administrative class dedicated to making the system work. The success of the Andean Tribunal seems to have depended, in this reviewer's opinion, on two factors: the presence and cultivation of this class; and the establishment of institutional mechanisms, be these agencies or courts, open to hearing disputes and the demands of the Andean Community.

In that regard, intellectual property rights seem more susceptible to internationalization than many other economic laws. In the Americas, in addition to the Andean Community regime, the MERCOSUR has agreed to two draft Protocols on trademarks and the Caribbean Community is negotiating a common patent. In Europe, the European Union has harmonized a wide array of intellectual property rights: trademarks, industrial design rights, copyrights, patents, plant variety rights, geographical indications of origin, and data base rights. The Eurasian Union has a common patent regime. In Africa, the African Intellectual Property Organization (OAPI), comprising sixteen francophone Central and West African States, is the exclusive provider of intellectual property rights for these states, with these states having no independent domestic intellectual property rights of their own. The African Regional Intellectual Property Office (ARIPO) harmonizes the intellectual property laws of seventeen anglophone states.

Building on Alter and Helfer's account, it is worth pondering about factors that may have facilitated these regional moves, which fly in the face of well-known concerns about global regimes such as the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Intellectual property regimes are obscure to outsiders. They generate their own communities of practice and epistemic communities, marked by shared expertise, common ways of viewing the world, and parallel routines. This makes them less politically salient, as the issues are often obscure to outsiders. They are also less accessible as outsiders will struggle to couch their arguments in terms recognized by other protagonists.

This specialization may facilitate trust and establish a common vernacular but, alone, cannot explain why states would wish to cede autonomy over intellectual property rights. These rights do two particularly sensitive things: distribute wealth; and code social relations by deciding what can be owned, and what cannot, and, therefore, falls within the public domain.

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Three further drivers seem to have been central, reading between the lines in Alter and Helfer's work.

The first is a globalization narrative. The suspicion of this reviewer is that large transnational enterprises will push for regionalization not so much to facilitate transnational trade, although this is useful, but to facilitate foreign direct investment in the region. Regional rights are cheaper to obtain than different domestic variations on the right. They may be perceived as easier to capture or as generating more reliable protection. Transnational enterprises can game the system by seeking grants of the right in the domestic jurisdiction perceived as most friendly to their interests. Most importantly, regional rights allow control over regional supply chains by allowing enterprises to establish ownership over all the regional inputs that go into the manufacture of a product. The cases that come up in Alter and Helfer's study featured, therefore, numerous cases involving global multinational enterprises—Pfizer, Phillip Morris, Volvo, British American Tobacco, and Procter and Gamble—seeking to use the Andean Community to protect their positions.

The second is a counternarrative, which seeks regionalization to bolster capacity and provide a counterweight to these globalizing pressures. The Andean Community Institutions in the 1970s and 1980s, as these authors have noted elsewhere, saw Andean Community intellectual property rights as vehicles to limit the intellectual property rights of foreign investors by imposing transfer of technology requirements.[7] The Andean Community is not unique here. A rationale for ARIPO, for example, was to establish rights sensitive to the particular needs of its members and that would be free of the prior colonial systems of intellectual property rights.[8] If the Andean Community became more economically liberal over time, concerns about the negative consequences of economic globalization lingered in the Tribunal's judgments. Alter and Helfer tease out how the judgments were often keen to emphasize consumer interests and human rights, and to protect regional competitors from overextensive applications and interpretation of these rights.

These forces of specialization, globalization, and counter-globalization have led to the proliferation of regulatory agencies, which respond to particular local concerns.[9] A third factor appears to have contributed to the authority of the Andean Tribunal. There was a concern, particularly in Colombia and Peru, that external checks should be placed on the power of the agencies and that these agencies inculcate stronger governance processes and legal cultures. The activities of the Tribunal were central to this. It not only provided this, but, according to Alter and Helfer, the agencies largely welcomed its work as they felt it stimulated necessary legal modernization of their decision-making processes.

This raises a number of concerns. To be sure, it might be that the Andean Tribunal offers few insights into the success of international human rights courts. These might generate their own advocacy networks, which provide sustained demand for their services. Furthermore, the normative appeal and rhetorical resonance of human rights might allow these courts to be more resistant to domestic pressures. Beyond this field, the Andean Tribunal suggests that the conditions for international courts to thrive are very demanding. They require highly specialized fields marked by strong countervailing pressures of globalization and counter-globalization and concerns about the institutional robustness of other institutions. If this seems to be extrapolating too much from a single study, empirical work on the actors seeking preliminary references from the European Union Court of Justice suggest that these are confined to a discrete number of clusters, and the amount of EU law referred is, as a proportion of the whole, very small.[10]

[7] 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 AJIL 1, 9–10 (2009).

[8] Agreement of Lusaka Establishing an African Regional Intellectual Property Office, Art. III (1977).

[9] David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005).

[10] Damian Chalmers & Mariana Chaves, *The Reference Points of EU Judicial Politics*, 19 J. EUR. PUB. POL'Y 25 (2012).

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This is not entirely surprising. International courts have an expanded spatial reach compared to national courts insofar as their jurisdictions extend beyond a single territory. They have a mediated authority insofar as much of what they do is dependent upon being supplied and enforced by domestic courts. Even in these circumstances, they must, finally, compete for work insofar as they do not enjoy a monopoly of power but must demonstrate why they should be utilized instead of other institutional arenas. These conditions will only be met where there is a settled consensus among sufficiently powerful constituencies in an array of neighboring states that an international court offers such clear advantages over other institutions, and that these advantages override the risk of individual decisions or a line of reasoning that goes against the preferences of these or other constituencies.

What to make of this normatively?

First, it suggests that international courts are associated with the fragmentation of international law. The activity of even courts with general appellations, such as the International Court of Justice, has historically been strongly oriented around a relatively small number of topics, such as title to territory and maritime delimitation. This fragmentation raises questions about how generalizable legal principles developed by these courts should be. If developed in a particular sectoral context, there may be particular reasons why certain norms should be more central to that context than elsewhere, and, even if this is not so, this context will ensure privileged access to this process for limited groups of participants.

Secondly, the effects of international courts on international relations and globalization remain uncertain. To be sure, Alter and Helfer's work suggests that the Andean Tribunal gives greater voice to a wider array of interests and values than might have been the case otherwise. The Tribunal also induced the intellectual property agencies in the region to commit themselves more strongly to law observance and good governance. However, the extent of this is unclear. Moreover, it may also be that the Tribunal legitimizes an intellectual property regime that gives enterprises from outside the region freer sway and greater profits than many citizens of the region would be happy about. The case on that is also unproven.

If this sounds less than enthusiastic, it may be because the charm of international courts, outside the field of human rights, lies in modest ambitions. They offer an imperfect supplement and check where the other institutions that form the engine of international law—foreign ministries, regulatory agencies, or, as was the case with the Andean Tribunal, other agencies—are acknowledged as needing improvement. Their emancipatory potential lies in that desire for improvement. Sight must not be lost of that.

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Constitution-Making and Transnational Legal Order—edited by Gregory Shaffer, Chancellor's Professor at the University of California, Irvine School of Law, Tom Ginsburg, Leo Spitz Professor of International Law at the University of Chicago Law School, and Terence C. Halliday, research professor at the American Bar Foundation—builds on earlier work by Shaffer and Halliday in which they developed the theory of transnational legal orders (TLO theory).[1] TLO theory "defines a transnational legal order as 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions'" (p. 7).

Prior scholarship on TLO theory focused on business, regulatory, and human rights law. In this book, Tom Ginsburg, a leading comparative

[1] *See* TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).