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Exporting the European Model of International Courts

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Paper prepared for The Transform Power of Europe Conference
December 10-11 2009, Frei University Berlin

Since the end of the Cold War, the number of international courts (ICs) has increased dramatically. Most of these international courts are what I call "new style" international courts, international courts with compulsory jurisdiction and access for non-state actors to initiated disputes. These design features were once considered exceptional, something found only in Europe. Today, European courts—the European Court of Justice and the European Court of Human Rights- provide compelling templates that are emulated in other regions.[1] Indeed there are actually eleven ECJ clones, and three international human rights courts that explicitly copy from the ECHR model. Part I explains the origin of the European model of ICs, and what distinguishes the European model. Part II documents the trend of copying European-style ICs and offers a potential explanation of why copying European style ICs is attractive. Part III investigates three cases of ECJ copies in action, which are used to show that transplanting the structure of the ECJ does not per se transplant the politics of the ECJ. ECJ clones are not expansive law-makers, whereas ECHR clones may more likely to be law-makers [I don't develop this point, but the IACHR and ECOWAS courts have issued some amazing rulings!]. This reality forces one to question existing understandings of the factors contributing to expansionist law-making by international courts.

I. The Birth and Spread of European Style International Courts

The Project on International Courts and Tribunals (PICT) has documented the trend of creating international courts over time.[2] There are now twenty operational ICs, and eight more ICs that have been negotiated but are not yet in operation.[3] Of these twenty-eight, four are old-style courts lacking mandatory compulsory jurisdiction, and twenty four are new-style courts ICs with compulsory jurisdiction, access for non-state actors to initiate disputes, and an implicit if not an explicit intention that the IC help enforce international agreements. While new style ICs

[1] Alter, 2006
[2] Cesare Romano has developed a synoptic chart and website that documents developments regarding international courts. See: http://www.pict-pcti.org/ and Terris, Romano and Swigart, 2008: Chapter 1, Romano, 1999
[3] These courts are identified discussed in: Alter, Book manuscript in progress: Chapter 2

are not the same as European style ICs, it is fair to say that today's ICs are more likely to resemble European style ICs than the oldest model of an IC—the International Court of Justice.

Given these trends, it makes little sense to put Europe's ICs into a category of their own. At the same time, we need to understand what makes Europe's ICs unusual.[4] Design features we associate with European style courts—private access, compulsory jurisdiction and preliminary ruling mechanisms—are not unique to Europe's ICs.[5] The level of judicial activity (e.g. caseload) and judicial law-making of Europe's ICs, however, are in a class of their own. Between their founding and 2007, the ECJ (and its Tribunal of First Instance) have issued 13281 binding rulings while the ECHR has issued 13,564 binding rulings. While Europe's courts are older and today have a large number of states within their jurisdiction especially compared to their emulators, the ECJ and ECHR are still unusually active international courts. Graph 1 below documents trends in IC judicial activity since 1990, including only the most active and most well known ICs. The table reveals that IC activity in general is increasing, and that Europe's ICs remain outliers in terms of their level of activity.[6]

[4] Alvarez, 2003.
[5] Helfer and Slaughter, 1997, Posner and Yoo, 2005, Keohane, Moravcsik and Slaughter, 2000.
[6] The OHADA court is included because it is among the most active ICs, although it is little known. The Common Court of Arbitration for the Harmonization of Corporate Law in Africa hears appeals of national court rulings applying common business laws.

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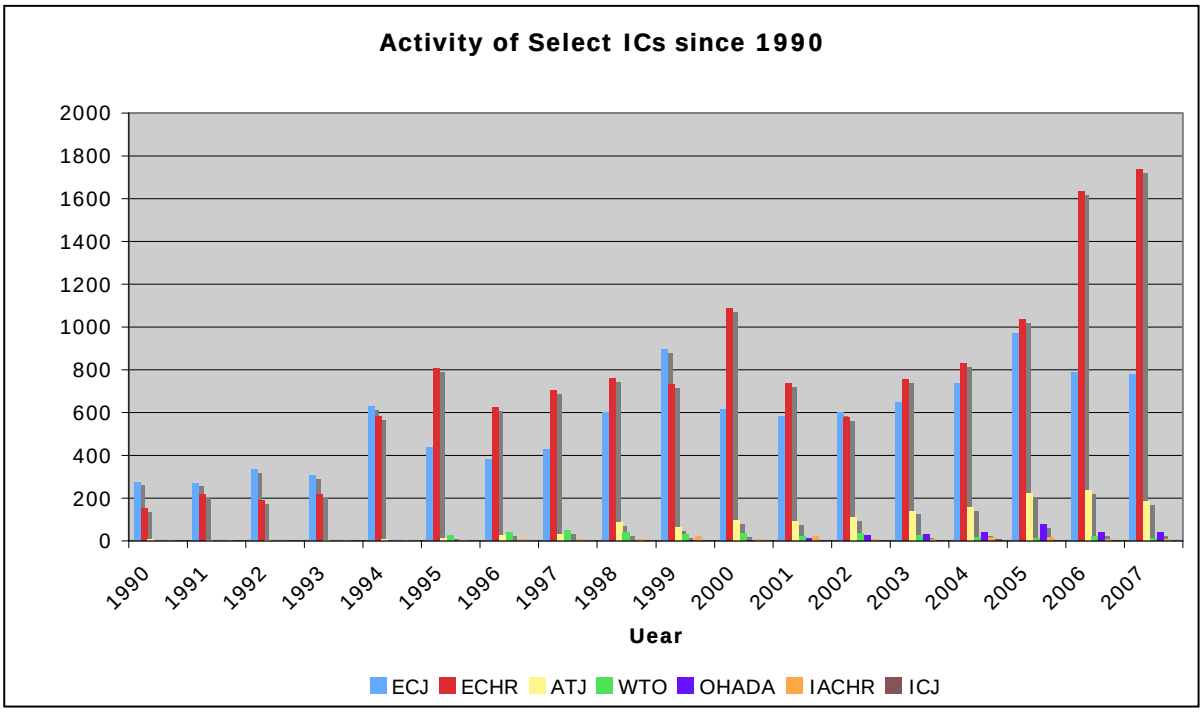
Graph 1: Activity of Select ICs since 1990, by year



What makes Europe's ICs so unusual? Europe's ICs are distinguished by both their level activity and their political relevance in European politics. Europe's ICs are regularly brought into legal and political debates, which is to say that they are regularly seized by stake-holders who seek a legal ruling that advantage their cause. To some extent, the design of Europe's ICs explains why Europe's courts are both active and relevant. Allowing private access leads to busier ICs because the pool of potential private litigants is far larger than the pool of state litigants and because private actors will raise cases that directly effect them whereas states and supranational prosecutors tend to settle out of court cases that are not substantively or politically far reaching.[7] It is also true that judicial activity and judicial law-making to some extent come as a package. When courts reward litigants with rulings that are helpful to their objectives, potential litigants are inspired to seek out judicial cases. By contrast, when courts create barriers to successful litigation, the number of cases raised diminishes.[8] One can clearly see how rewarding litigants gives rise to more litigation in front of the ECJ and the ECHR.[9] These two related phenomenon—private access leading to busier courts, and judicial law-making leading to busier

[7] Keohane, Moravcsik and Slaughter, 2000, Alter, 2006
[8] Alter, 2000
[9] Stone Sweet, 2004, Cichowski, 2007.

courts—have led scholars to conflate private access with judicial law-making leading to the prediction that European style courts are more likely to be law-making bodies. Here I want to be more careful in what I associate with the European model of an IC so that I can disentangle this conflation.

When I discuss European style ICs, I am going beyond the design features of new-style ICs, namely compulsory jurisdiction and access for nonstate actors to initiate litigation. The following additional design features distinguish Europe's ICs:

1) Europe's international courts are explicitly empowered to rule on state compliance with international agreements in cases raised by non-state actors (supranational prosecutors and/or private actors).
2) European style courts are embedded into national legal orders, which is to say that the laws these courts interpret are self executing and directly applicable within the domestic realm so that ECJ and ECHR rulings are directly applicable by national judges.

I want to keep this a discussion of both the ECJ and the ECHR—because I think that separating the two courts has undermined our understanding of what is a common phenomenon—the emergence of powerful supranational courts in Europe. That said, the ECJ had additional unique features that is emulators also adopt.

3) The European Court of Justice (ECJ) has a constitutional review authority, meaning the authority to review the validity of European law vis-à-vis higher order legal obligations (e.g. constraints of the Treaty and human rights obligations)
4) The ECJ has an administrative review authority, meaning the authority to review administrative decisions of the Commission and of national administrators.
5) The ECJ has a preliminary ruling mechanism that allows national courts to stop domestic legal proceedings to send questions of law to the IC. The IC then issues a binding ruling which the national judge applies to the case at hand. By contrast human rights courts have de facto appellate jurisdiction for national court rulings.

The first two features of the European model--access for non-state actors to initiate non-compliance disputes and the embedded nature of Europe's legal systems --were highly innovative and unique design features created by the ECJ's and ECHR's architects. To be European emulator, an IC must copy the first two features of the European model. ECJ clones also copy design features 3, 4 and 5, although they do so to differing extents.

This section first considers how Europe's special form of international courts were fundamentality different than existing models of international courts, and why Europe's supranational courts were given their unusual design. Part II will document the copying of the European model, and offer an explanation for the spread of the European model. The history leading to the ECJ and ECHR design, and the coping of ECJ and ECHR design features provide the foundation for considering how transplants operate differently from their European originators [though I ran out of time to fully develop this point].

Creating a New Type of International Court: The creation and transformation of the ECHR and the ECJ (1950-1970)

The earliest model of a permanent international court was the Central American Court of Justice (1907-1927), a court that could hear disputes between states and between private nationals and states. The court heard 10 cases in ten years, and was widely seen as a failure.[10] The next two international courts—the Permanent Court of International Justice (1922-1946) and the International Court of Justice (1946 to present)—created the model that European Courts implicitly rejected as insufficient to support a rule of law.

European courts broke from existing international judicial models in a number of ways. The first permanent international courts were designed primarily to be inter-state dispute resolution bodies that states could invoke when they wanted a third-party solution to a cross-border conflicts. By contrast, Europe's permanent international courts were intended to be judicial checks on supranational actors, and to work in tandem with supranational commissions to help monitor state compliance with international agreements.

The European Court of Human Rights (ECHR) was created by treaty before the ECJ, but ratification thresholds required before the ECHR could be created led to a delay so that the ECHR did not exist in practice until six years after the European Court of Justice (ECJ) opened

[10] See: http://www.pict-pcti.org/courts/CACJ.html. This court was resurrected in 1992. It does not copy the ECJ's style, although it still allows for a wide variety of disputes to be raised.

its doors for operation. The European Convention on Human Rights emerged out of dismay regarding the limited international efforts to promote human rights at the United Nations. Wanting to demarcate the Western European approach to protecting human rights from the Soviet practices in the East, the Council of Europe decided to create its own human rights system.[11] Any country that signed the European Convention for the Protection of Human Rights and Fundamental Freedoms agreed to let the European Commission of Human Rights to investigate complaints about human rights violations that were raised by other states. In this way, ratification of the European Convention signaled a commitment to international oversight beyond what existed in the United Nations. But a number of countries did not want a highly independent international oversight mechanism, which is why the right of individual petition and the compulsory authority of the ECHR were made optional.[12] Originally only Sweden, Ireland, Denmark, Iceland, Germany and Belgium accepted the right of individual petition and the court's compulsory jurisdiction, and a number of these acceptances were provisional, made for only a few years at a time.[13]

The European Court of Justice (ECJ) was created as part of the European Coal and Steel Community (ECSC). The main impetus for the ECSC was a concern that the United States intended to return to Germany full sovereignty over its coal and steel industry. France, Belgium, the Netherlands, Luxembourg and Italy feared that Germany would exploit its industrial dominance in coal and steel, putting its neighbors at a competitive disadvantage at a time that they needed to rebuild their industries and economies. At its core, the ECSC was a system of rules designed to help ensure that Germany's industrial dominance was not used to harm its neighbors. The High Authority was the main enforcement body. It could sanction countries and firms that violated common rules, and if necessary withhold communal support to punish actors that violated European rules.[14] The European Court of Justice (ECJ) was created as part of this system, but it wasn't an enforcement court. The ECJ was an administrative review tribunal that

[11] See: Madsen, 2009.
[12] Robertson and Merrills, 1994: 5-12, 295-296. Henry Schermers stated the dilemma: "proper human rights protection requires international supervisory organs. This, however, would be a further infringement of national sovereignty. The supremacy of national courts would be degraded if an international organ would be permitted to criticize their judicial decisions. For many states, this went too far. An inter-European commitment to protect human rights was acceptable, but a European court supervising the Convention would undermine the sovereignty of the state and could not be generally accepted." Schermers, 1999: 822.
[13] Robertson and Merrills, 1994: 13-14.
[14] Milward, 1984: 417-420, Diebold, 1959.

could hear complaints against the High Authority and arguments that the Community as a whole was exceeding its authority. As an administrative review body, the ECJ had compulsory jurisdiction and private access so that the individuals could challenge arguably illegal High Authority actions.[15] The ECSC system also had a novel preliminary ruling mechanism that allowed for national court cases involving questions about ECSC rules to be referred to the ECJ. The ECJ would interpret ECSC rules and return the case back to national judges to issue the final ruling.

Member states expected the ECJ to primarily act as an administrative review body, reviewing the decisions of the High Authority much as the French Conseil d'État reviewed the decisions of French administrative actors. This expectation explains why France and Italy refused to accept the compulsory authority of the ECHR let alone the right of individual petition to the European Commission on Human Rights, yet these same countries agreed to the ECJ's compulsory jurisdiction and to copying the Italian and German preliminary ruling system, thereby allowing private actors to initiate litigation in national courts with the understanding that legal cases could be referred to the ECJ for a binding preliminary ruling.

When European states chose to create a common market, they expanded the ECJ's authority. The ECJ was still expected to act as an administrative review body for decisions of the Commission (the High Authority's successor). In addition, member states authorized the ECJ to hear noncompliance complaints against states and constitutional review cases (e.g. challenges to the validity of European secondary legislation). The preliminary ruling mechanism was modestly expanded in the process. The ECSC preliminary ruling mechanism authorized private actors to raise in national courts interpretive questions about how European law was implemented by national administrators and the High Authority. The preliminary ruling mechanism of the Common Market also allowed private actors to raise questions about the validity of European law. The preliminary ruling mechanism was not, however, intended to allow private actors to raise question about the compatibility of national practices with European legal obligations. In

[15] Anne Boerger-De Smedt chronicles negotiations regarding the ECJ. One set of negotiators feared that ECJ judges would overly constrain the High Authority; another set feared that the High Authority would be too strong, and dominated by powerful states. The ECJ that was ultimately created reflected these opposing tensions. See: Boerger-De Smedt, 2008.

other words, the preliminary ruling mechanism was never intended to be a tool used by private actors to enforce European legal obligations via cases raised in national courts.[16]

The designs of the ECJ and the ECHR were sovereignty compromising. Unlike the UN human rights system, the European Convention on Human Rights bound European countries to international oversight in the form of the European Commission on Human Rights. The ECSC was also designed to be able to subjugate Germany's industrial autonomy to the regulatory authority of the High Authority. These were significant sovereignty compromising political developments, but they intentionally left political bodies in charge of overseeing state compliance with each agreement. In this respect, both institutions fell short of the aspirations of the architects of each system.

The founding fathers of the ECJ and the ECHR had far more grandiose ideas. Enthusiasts of European integration, the so-called *Mouvement Européen,* had hoped that the ECSC would be the launching point for further integration. European federalists also imagined that European Human Rights system would become part of a larger federal Europe united under the supreme authority of a European Constitution and a European Constitutional Court.[17] The first steps towards both groups' visions were the drafting of charters for the European Political Community and European Defense Community. The dreams of both federalists and the *Mouvement Européen* were dashed when the French rejected of the European Defense Community in 1954. In this sense, the 1958 Treaty of Rome, which created the European Economic Community, was a big disappointment.[18] Integration enthusiasts then watched in further dismay as French President De Gaulle led a successful full-on assault on the supranational elements of the Treaty of Rome, which culminated in the arguably illegal "Luxembourg compromise" where the mandated switch to qualified majority voting was derailed by political agreement.[19] De Gaulle's assault on the remnants of European supranational authority led activists to turn to a legal strategy to promote

[16] For more on how the jurisdiction of the ECJ changed in the 1950s, see: Alter, 2001: Chapter 1
[17] Friedrich, 1954: introduction.
[18] For more, see: Milward, 1992: 186-223. It makes sense to ask why states let fervent internationalists negotiate key founding treaties. The need to immediately find untainted political leaders led European states to draw on 'jurisconsult' elite that was themselves a fairly small set of personally and politically connected actors. These elite met across numerous venues of international negotiation, building a small world network of actors united in their internationalist ideals. Thus a fairly small set of elites participated in crafting the European Coal and Steel Community, the European Convention on Human Rights, the European Defence Community, the European Political Community, and the Treaty of Rome. For more see: Madsen and Vauchez, 2005, Cohen and Madsen, 2007, Sacriste and Vauchez, 2007
[19] For more on political reforms to European integration in the 1960s, see: Moravcsik, 1998: Chapter 3.

European integration.[20] The ECHR could not be a venue to promote their goals because key countries still refused to accept the ECHR's compulsory jurisdiction. The countries that did consent to allow private actors to petition the European Commission had also done so provisionally. These political realities led the European Commission on Human Rights to proceed with extreme caution, allowing only a tiny fraction of the cases raised to proceed to the ECHR for resolution.[21] With the European Human Rights system constrained politically, the ECJ became the focus of the emerging European legal field.[22]

The founding politics of these two supranational courts will become important in understanding the subsequent behavior of the ECJ and the ECHR. Scholars use the term "revolution" to characterize the ECJ's doctrines that created for the ECJ a constitutional legal authority that applied within domestic systems.[23] The Treaty of Rome was itself silent regarding the domestic legal affect of ECJ rulings. The ECJ used this silence, combined with the huge aspirations noted in the preamble to the treaty, to argue that member states must have wanted the European legal system to be effective. The ECJ argued that it was merely filling in the treaty, doing what governments must have intended all along. Of course European governments did not intend for the ECJ's authority to be so expansive. The ECJ orchestrated its revolution by forming an alliance with lawyers and judges within European member states.[24] Much more could be said about this revolution, but the key point is that it changed the way the European Community's enforcement system operated.[25]

For both the EEC and the European Convention on Human Rights, the main enforcers were supposed to be supranational political bodies—the EEC and human rights Commissions. Instead, the ECJ's legal revolution harnessed national courts as key enforcers of community legal obligations. National court enforcement has ended up providing a number of benefits. There were few international costs to ignoring ECJ or ECHR rulings, but ignoring national courts is

[20] Cohen, 2007.
[21] Only .5% of the cases raised by 1961 were referred to the ECHR, and the European Commission actively discouraged private actor complaints so that the actual number of cases filed was far lower than what it might have been. See: Schermers, 1999: 825.
[22] The legal field is a Bourdieusian notion. It includes judges, lawyers, law professors- everyone with a professional stake in the development of a legal arena. See: Rasmussen, 2008, Wilson, 2008, Cohen and Madsen, 2007, Sacriste and Vauchez, 2007.
[23] Stein, 1981, Weiler, 1991
[24] This key point is seriously underdeveloped here. For more, though still not enough, see: Alter, 2009: chapters 4 & 5
[25] For more on the factors leading to and following from this legal revolution, see: Ibid, Weiler, 1991, Stone Sweet, 2004.

politically more difficult.[26] National courts could also apply the same remedies for violations of European agreements as existed for violations of domestic law.[27] Allowing private litigants to challenge arguably illegal national policies in cases raised in national courts opened the door to transnational litigation politics in Europe. There was, of course, also a significant sovereignty cost to the transformed EEC system. Because the European legal system is embedded into domestic legal orders, litigants can turn to European legal institutions to pursue social, economic, and political objectives only distantly related to facilitating trade or stemming human rights abuses.[28]

The nationally embedded European legal systems took three decades to construct from the bottom up. In the 1960s the ECJ's legal revolution was primarily a matter of legal doctrine. Only in the 1970s did the ECJ begin to issue rulings with political resonance and consequence. These rulings, combined with social mobilization within European states, helped to create for the ECJ a broad(er) basis of support within member states.[29] By the 1980s, politicians were complaining about ECJ activism and lost sovereignty. But by then European leaders were also becoming concerned that economic competition from the United States and Japan would threaten the European economic model, which made European integration newly attractive.[30] Curbing the European legal system's perceived excesses would be a blow to European integration at the very moment that national governments were embracing the European integration as a central element of national industrial policy.

Changes in the ECHR came later. Starting in the 1980s, the European Commission on Human Rights started letting more cases proceed to the ECHR for adjudication. At the time, the ECHR was a part time court, meeting only a few weeks a year. By today's standards, a relatively small number of cases started reaching the ECHR for decision. But because the ECHR was a part

[26] Numerous scholars have commented on the contributions of national court enforcement. See, for example, Weiler, 1994. Alter (1998: 134) provides an early concrete example where the German government tried to ignore an ECJ ruling, instructing its judges not to follow the ECJ's ruling. But its national courts refused to follow the government's direction, forcing the German government to use a legal strategy to stem what had become a deluge of challenges to German turnover taxes.
[27] The ECJ's so-called Francovich doctrine does just this. It extends to European law financial penalties where states fail to implement European rules, and where state failures create costs incurred by private litigants. For more on national court based remedies for European law see: Hartley, 1998: 220-232.
[28] Chapter 6 provides an example; the EC legal system was used to challenge German prohibitions on women serving in military combat support positions.
[29] See: Cichowski, 2007.
[30] See: Moravcsik, 1991: 53, Hanson, 1998: 74-80.

time court, the trickle of cases gave rise to a growing backlog of unresolved cases.[31] In 1994, after years of studying problems in the system and after months of negotiations, a majority of European states agreed to accept Protocol 11 which abolished the European Commission on Human Rights, and required that all parties to the agreement accept what before had been optional: the ECHR's compulsory jurisdiction and the right to individual petition. Protocol 11 came into force in 1998. Formally speaking, the ECHR's power is much the same. The ECHR is empowered to issue binding interpretations of the European Convention on Human Rights, and award remedies to individuals harmed by human rights violations. Now, however, accepting the ECHR's binding authority is required for all signatories of the European Convention on Human Rights. Also, since private access would increase the ECHR's docket, the ECHR converted to being a full time legal body, and a new system of chambers was created. Since litigants must first exhaust domestic remedies before turning to the ECHR, the ECHR as become an appellate jurisdiction for national court protection of human rights and thus a sort of supreme constitutional court for Europe on human rights issues.[32] This evolution was clearly not what European governments expected when they first created the European human rights systems.

These transformed European legal systems, not the original systems, served as the template that was copied by others. The theoretical question that arises based on the spread of the European model is as follows. The experiences of Europe's international courts have given rise to a number of theories about the expansive nature of international adjudication. Most of these theories expect that wide access rules will enable self-interested litigants to bring cases to international courts that provide judges with the opportunity to expand the reach and scope of international rules. Theories expect international judges to be power-seeking by nature, so that wide access rules creates the key ingredients for expansionist law-making where ICs identify new legal constraints not found in treaty texts or in the intentions of their drafters, and where judge-made law meaningfully narrows states' discretion.[33] The prediction then is that the spread of European style ICs should lead to the spread of European style judicial politics.

[31] The problem was greater than having a backlog. Every country that is part of the European human rights system has a judge on the ECHR. To make ruling more manageable, the ECHR created a system of chambers to hear cases. Meanwhile early on, there weren't many cases to hear so ECHR judges could handle the case load during their regular meetings (ECHR judges were part time judges). As the European Commission on Human Rights referred more cases to the ECHR, the existing apparatus proved both overburdened and unwieldy. See Merrills, 1993: 6-8

[32] Helfer and Slaughter, 1997: 296.

[33] Alter and Helfer, Forthcoming 2010

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Part II: The Spread of the European Model of International Courts

The rest of this section documents the spread of the European model. I then turn to an explanation of why the European model spread. What I am calling the European model of an IC includes two essential features:

1) the ability of non-state actors (a commission or a private actor) to initiate non-compliance cases in front of an IC
2) the embedded (self-executing, directly applicable) nature of international rules within domestic systems.

The ECJ model has additional features:

3) Constitutional review authority for the IC
4) Administrative review authority for the IC
5) A preliminary ruling mechanism that allows for a direct dialogue between national courts and the IC regarding specific legal cases.

Borrowing legal transplants from Europe is hardly a new phenomenon. Indeed most domestic legal systems around the world are modelled on European systems.[34] Given the well-known success of Europe's international courts in facilitating larger objectives of the international systems in which they operate, it is not surprising that Europe's ICs loom large in the mind of the diplomats charged with designing international courts.[35] Table 1 draws from the universe of ICs those that have intentionally borrowed in whole or in part from the European model of an IC.[36] As far as I know, the OHADA court did not intentionally borrow from the European model, but it nonetheless contains the first two features of the European model of an IC. All of the courts listed below interpret law that is directly applicable in the domestic realm. There are 11 ICs that have copied having a supra-national prosecutorial type actor pursue enforcement actions. There are 10 ICs where national courts can stop proceedings to send a preliminary ruling question to the IC, which will then issue an interpretation. For nine of the ICs preliminary rulings are binding, for one they are advisory only. Even when IC rulings are not binding, allowing direct interaction between national courts and ICs—either through preliminary references or via appeals of national court rulings- contributes to embedding the international

[34] On the practice of transplanting legal institutions, see: Berkowitz, Pistor and Richard, 2003
[35] Alter, 2009, Stone Sweet, 2004
[36] This universe of international courts is discussed in: Alter *The New Terrain of International Law: Chapter 2.* I plan to post a working paper version of this chapter. This paper excerpts some of the material from that chapter.

legal order within the national legal system. Appeals and preliminary ruling references allow national judges to dialogue with international courts about specific cases. Also, IC precedent becomes directly applicable within the national legal order. The copying of these features of European ICs was intentional- designed to incorporate the very features that scholars see as critical elements of effective international legal orders.[37] Table 1 includes both human rights ICs (IACHR, ECOWAS, ACHR) and economic courts (the others, plus ECOWAS which has both a human rights and economic jurisdiction). For human rights, there is no other international judicial model to emulate. For economic courts, the alternative to the European model is the WTO model (adopted by NAFTA, MERCOSUR and ASEAN) which relies on ad hoc panels that are formed upon the request of state parties. I have included both human rights courts and economic courts in this paper, but I imagine I'll get push back to narrow the focus to ECJ emulators only!

[37] Op cit Helfer and Slaughter. See also: Hathaway, 2005.

Table 1 European Style ICs (ordered by year established) [table needs fact checking]

International Court	1) Supranational Commission can raise non-compliance suits	1) Private actors have direct access to initiate noncompliance suits	3) Explicit Constitutional Review Authority	4) Explicit administrative review authority	5) Preliminary ruling system of national court referrals	Alternative to preliminary ruling system: Appellate review of national court rulings
ECJ (1952)	X		X	X	X	
ECHR (1958)	Abolished 1998	Protocol 11, made mandatory in 1998				X
Benelux court (BCJ) (1974)				X	X	
Inter-American Court of Human Rights (IACHR) (1979)	X					De facto
Andean Tribunal of Justice (ATJ) (1984)	X	As of 1996	X	X	X	
European Free Trade Area Court (EFTAC) (1994)	X			X	Advisory Opinions Only	
West African Economic and Monetary Union (WAEMU) (1995)	X		X	X	X	
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (1996)	Advisory opinions only	Advisory opinions only				X
Common Market for East African States (COMESA) (1998)	X	X	X	X	X	
Central African Monetary Community (CEMAC)(2000)	X	X	X	X	X	
East African Community Court (EACJ) (2001)	X		X	X	X	By special protocol
Caribbean Court of Justice (CCJ) (2004)	Currently under discussion[38]	The CCJ decides on a case by case basis if a private suit is allowed	By optional protocol as a replacement of the Privy Council role	X	X	By optional protocol

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Court of Justice of the Economic Community of West African States (ECOWAS) (2002)	X	As of 2005, human rights cases only	X	X		As of 2005, de facto review in human rights cases only.
Southern African Development Community (SADC) (2007)	X	X	X	X	X	X
African Court of Justice (ACJ) (proposed)	X		X	X		
African Court of Human and Peoples Rights (ACHPR) (proposed)	X					De facto
Total ICs with this feature (excluding ECJ & ECHR)	11	6	8	11	9	

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The copying of the European model is not limited to the design of the court. For human rights courts, emulators adopted the system of ICs awarding compensation for human rights abuses. For economic courts, often the framework agreements of the common market are adaptations of the European Economic Community's Treaty of Rome, with provisions allowing for the adoption of directly applicable directives and regulations to implement the Common Market. The courts themselves also look to the ECJ to see how it handled similar legal issues, even citing ECJ precedents in their rulings.

There are some salient differences between the ECJ, ECHR and their clones. Most of the European Court clones were created after the ECJ's legal revolution, and thus they were created using twenty-twenty hindsight. Even though the Benelux Court (created in 1974) and IACHR (created in 1979) were copying fairly inactive European ICs, the creators of the Benelux Court nonetheless felt the need to state that the Benelux court could only respond to questions posed to it—in other words the court couldn't address issues that were not raised by national judges themselves. The IACHR copied the limited model of the ECHR, where only the Commission was allowed to bring cases to the court. It also copied the a la carte format where countries could choose whether or not they were subject to the IACHR's compulsory jurisdiction. But every country that accepted the Commission's authority accepted the right of individuals to petition the Commission.

Starting in the 1980s, emulators had an even better sense of the activism of the ECJ. Some of the emulators wrote into their court's founding treaties provisions designed to limit judicial activism. For example, the architects of the Andean Tribunal of Justice required that in preliminary reference rulings the ATJ speak only to Andean law, and thus not delve into the facts of the case. Also, the architects of the ATJ's non-compliance procedure did not allow private actors to bring violations of Andean law to the attention of the Junta. Both of these provisions hampered the ATJ's basic functioning they were changed in 1996. Today private actors can bring non-compliance suits to the Secretariat to investigate, and if they are displeased with the resolution they can bring a non-compliance case to the ATJ directly.[39]

Table 2 below identifies key differences in the design of the ECJ clones, focusing only on the preliminary ruling mechanism and the non-compliance procedure. [The table is not fully

[39] For more on these design changes see: Helfer, Alter and Guerzovich, 2009: 8. The Andean Court Treaty also allows private actors to raise noncompliance cases in national courts, but this provision requires domestic implementing legislation and it appears to be a dead letter.

complete—Also, I can add in differences re: constitutional and administrative review, but I think it gets more complicated if I do so]. Most of the innovations on the ECJ model are designed to protect national sovereignty. Some emulators have adopted designs that are in theory even more politically intrusive than the ECJ. The redesigned ATJ allows private actors to initiate non-compliance suits directly in front of the ECJ. The COMESA system explicitly allows its IC to review the validity of community *and* national acts, so that the COMESA court is in principle designed as a supreme constitutional court for the community.

Human rights courts are different. The IACHR was created in 1979, and it followed the ECHR model of the day. Newer ECHR clones follow the model of the post-Protocol 11 ECHR where private actors can directly raise complaints after domestic remedies have been adopted.[40]

Table 2: Design variations in translating European Model [table needs fact checking]

IC	Preliminary Ruling Mechanism	Noncompliance procedure
Benelux Court (1974)	National courts can refer questions of interpretation to the Benelux court, and courts of last instance must refer questions to the court. The Benelux court can only respond to the question posed to it.	Not applicable in part because all BENELUX states are in the EU
Andean Tribunal of Justice (1984)	ATJ's interpretation must be limited to specifying the contents and scope of the Andean legal provisions that apply to the case. Originally the ATJ was not to consider the facts of the case in preliminary ruling references. In 1996, Andean state added that the ATJ can consider the facts that are "essential for the requested interpretation" (article 34)	At first the Junta could only investigate complaints raised by other states. Since 1996, private actors are authorized to bring noncompliance cases to the Secretary General, and if necessary directly to the ATJ.
European Free Trade Area Court EFTAC (1994)	National court references give rise to advisory opinions only.	Same as the ECJ.[41]
West African	Same as ECJ[42]	Same as the ECJ[43]

[40] It is interesting to note that the remedies of the IACHR and the ECHR are different. The IACHR is more willing to demand that governments apologize, publicly atone, and change national practices, as well as provide compensation for the victims of human rights violations. The ECHR sometimes implicitly suggests that states change their national practices, but mostly compliance with ECHR rulings requires compensation for injured parties. The only ECOWAS human rights ruling I know about follows the ECHR model.This difference is explored in: Hawkins and Jacoby, 2009. For a general treatment of remedies in human rights litigation see: Shelton, 1999.

[41] The Surveillance authority can bring an action against an EFTA state if it considers that the EFTA state has failed to fulfill an obligation under the EEA Agreement or the ESA/EFTA Court Agreement, and the infringing state fails to comply after being duly notified by the Authority. The Surveillance authority is explicitly obligated to ensure that procurement rules, state aid rules and competition rules are respected (Articles 22-26).

[42] Article 8 of Annex 1 of Treaty Establishing the West African Economic and Monetary Union and Additional Protocol No. 1 relative to the Organs of Control of WAEMU (UEMOA). Done in Dakar, Senegal on January 10, 1994. Entered into force August 1, 1994. (Available in French only)

Economic and Monetary Union (WAEMU) (1995)		
Common Market for East African States (COMESA) (1998)	Same as ECJ[44]	A Council of States must agree before legal violations are referred to the Court (Article 25.3).
Central African Monetary Community (CEMAC)(2000)	Same as ECJ[45]	Same as ECJ. Also, any private actor with legitimate interests can also initiate a noncompliance case.
East African Community Court (EACJ) (2001)	National courts only need refer to the EACJ cases where it considers that an answer to the question is necessary for it to deliver a judgment (Article 34).	The Secretary General first refers noncompliance cases to a Council of States. If the Council does not resolve the matter, they will direct the General Secretary to refer the matter to the court. Member states can also raises non-compliance suits, without the step of obtaining the Council's assent.
Caribbean Court of Justice CCJ (2004)	National courts only need refer to the CCJ cases where it considers that an answer to the question is necessary for it to deliver a judgment. (Article XIV).	There is no noncompliance provision, although this system is new and evolving. The CCJ can agree to let private actors raise cases, but subject to conditions one of which is that member states declined to raise the suit themselves instead.
Court of Justice of the Economic Community of West African States (ECOWAS) (2002)	*No preliminary ruling system*	The Court treaty notes that the Executive Secretary's authority can be limited through adoption of a protocol.[46]
Southern African Development Community (SADC) (2007)	Same as ECJ.	Private actors can bring cases directly to the SADC court after domestic remedies are exhausted.

Emulation also takes the form of incorporating the jurisprudence of Europe's ICs. Erik Voeten is studying the citation practices of international courts. My material on this matter is more anecdotal. I turn to this issue in Part III.

[43] Article 15 (1) of Regulation No. 1/96/CM on the Procedural Rules of the Court of Justice of the West African Economic and Monetary Union.
[44] National courts can refer questions of interpretation to the COMESA court, and courts of last instance must refer questions to the court (Article 30). COMESA court rulings have precedence over national court rulings (Article 29)
[45] Article 17 CEMAC Court Treaty.
[46] Article 10 ECOWAS Court Treaty.

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Possible Explanations of the Spread of the European Model

We are at the early stages of explaining the proliferation of international courts. Here I offer the insights I have gleaned by looking at the trends of the spread of IC enforcement authority. I first talk about the spread of enforcement ICs, and then about the trend of copying the ECJ's constitutional and administrative review authority. These insights should be taken as educated hunches. A lot is known about the creation of the ECJ, ECHR, and WTO, and information is emerging about the Andean Tribunal of Justice. But we need historiographies of the creation of other ICs. Until these histories exist, it will be hard to really explain why the European model has spread.

Cesare Romano observed that the proliferation of ICs coincides with the end of the Cold War, and that regionalism seems to contribute to the proliferation of ICs.[47] These two trends clearly go together. The question then is why would the end of the Cold War be causally important?

My own research on ICs suggests that there were two critical junctures in the turn towards using IC to do more than optional dispute resolution among states. The first juncture was the end of WWII, which led to the creation of European style ICs. A traumatized European elite became committed to constitutionalism both domestically and internationally. This elite built the ECJ and the ECHR, and they contributed to the radical transformation of these fragile institutions into the institutions we observe today. Ironically, the Cold War contributed to their efforts. By making UN venues inhospitable to European efforts, European elites were forced to build their own institutions. Then, when De Gaulle and others blocked their efforts, these elites decided to use law to achieve what they were unable to achieve politically. The efforts of these committed European legal activists helps us understand why the ECJ became an extraordinary law-maker.[48] We are still missing the historiography about how the trauma of WWII combined with the onset of the Cold War created a tolerance for the emergence of a fundamentally different role for the judiciary in Europe. What we can say is that the Cold War gave Europeans time to develop their legal system, while freezing into place a set of global relations that limited the spread of European institutions.

[47] Romano, 1999

[48] There is a lot of new history coming out on this period. See: Rasmussen, 2008, Cohen, 2007, Vauchez, 2007, Madsen and Vauchez, 2005, Vauchez, 2007

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The end of the Cold War then unleashed the European model on the world. The end of the Cold War led Europeans to push through a series of changes in their own international legal institutions. The dismantling of the Soviet empire also unfroze the political dynamic whereby the Soviet Union and its satellites blocked global multilateral efforts and membership in Western institutions. Countries escaping from the Soviet orbit rushed to bind themselves to the international institutions of the West. In anticipation of expanding membership and expanding legal rules, states moved quickly to address longstanding problems in existing enforcement systems.[49] Reforming existing systems was attractive because current members were already bound by the economic and human rights commitments. It was better to reform these systems before enlargement, when negotiations would be easier and when new members could more easily be convinced to accept deeply encroaching international enforcement systems that were now a political fact of life in Western countries. Existing systems then became models for replication elsewhere.

The same force leading Europe to reform existing institutions also led to changes in the General Agreement on Tariffs and Trade (GATT) and thus the birth of the World Trade Organization. For the GATT system, the impetus to change the existing legal mechanism was the growing dissatisfaction with the US unilateral enforcement strategies combined with a desire to simplify and universalize the GATT system before membership expanded. Growing American trade deficits in the 1970s had led to the passage of the Trade Act 1974. Under Section 301 of this act, the United States Trade Representative (USTR) was to pursue the unfair trade practices of other states. The USTR fielded complaints by firms, and published a watch list of suspect behavior. USTR officials and diplomats invoked this watch list regularly. If foreign governments were not responsive to American political pressure, and if they blocked the dispute settlement

[49] For the European Community, the impetus to reform its system was a sense that compliance with EC law and ECJ decisions was uneven. To improve respect for European law, in the late 1980s and early 1990s member states streamlined the infringement procedure for enforcing European law, created a Tribunal of First instance to relieve the growing caseload pressure on the ECJ, and added to the European legal system financial sanctions for those states that persistently ignored ECJ decisions. For more on the addition of financial sanctions, see: Tallberg, 2003: 54-91. For the European human rights system, as mentioned the impetus to reform was a growing backlog of unresolved cases (even before the Council of Europe expanded to include form Soviet bloc countries. The problem was greater than having a backlog. Every country that is part of the European human rights system has a judge on the ECHR. To make ruling more manageable, the ECHR created a system of chambers to hear cases. Meanwhile early on, there weren't many cases to hear so ECHR judges could handle the case load during their regular meetings (ECHR judges were part time judges). As the European Commission on Human Rights referred more cases to the ECHR, the existing apparatus proved both overburdened and unwieldy. See Merrills, 1993: 6-8.

process of the GATT, the USTR threatened (and at times enacted) unilateral sanctions.[50] This Section 301 system (relaunched in the 1990s under the name Super 301) never worked very well and dissatisfaction with the status quo was widespread. The USTR was under significant pressure to pursue "unfair trade," but the unilateral nature of Section 301 created much disgruntlement among trading partners. The USTR sought a more effective trade remedy, and other states sought a reprieve from US unilateralism. In this context, revising the GATT's dispute settlement system became a least bad alternative for all involved.[51]

The Uruguay Round trade talks became the moment to make this change. With the dismantling of the Soviet trading system, many countries that had stayed outside of the GATT system now wanted access the West's preferential trading system. These new countries could be forced to accept the entire package as the price of admission. Meanwhile, given how long negotiations had already taken, existing GATT members realized that change would only be harder going forward, precisely because GATT membership was likely to expand.[52] States used the Uruguay Round to consolidate the many changes that had been agreed to during previous GATT trade negotiation rounds, and to create a single undertaking that would apply to old and new members alike. Reforming the GATT enforcement system was part of this change.[53]

We know about these changes, because we know the history of these institutions. Now we enter the realm of speculation. These post-Cold War changes in Europe and the WTO, I believe, propelled the spread of international legal systems into other regions and issues. When I look at the global spread of international courts, a few factors seem to matter. My sense is that the largest factor contributing to the spread of the ECJ model is the spread of the WTO system. The WTO system makes regional agreements especially attractive by allowing states to grant more favorable access to countries within such agreements.[54] The compulsory dispute resolution system of the WTO decreases the costs of adding compulsory enforcement to regional systems, and it arguably makes regional enforcement more attractive because states can put into place

[50] For an assessment of the effectiveness of this system, see: Noland, 1997. The US system also led firms to demand aggressive action, assembling cases that were constructed by in house lawyers and former USTR staff lawyers. See: Shaffer, 2003: Chapter 5/

[51] On the factors contributing to reforms in the WTO dispute settlement system, see: Barton, Goldstein, Josling and Steinberg, 2006: 67-73. Robert Hudec wrote about many proposed reforms that were rejected by GATT members in previous GATT rounds, and how US Section 301 contributed to changes under discussion in the Uruguay Round. See: Hudec, 1993.

[52] Barton, Goldstein, Josling and Steinberg, 2006: 160-178.

[53] On the Uruguay round, see: Ibid.: 90-152.

[54] On the relationship of the WTO and regionalism see: Mansfield and Reinhardt, 2003

political checks and require that members use regional systems instead of the WTO system. The WTO system also brings with it a boiler plate set of trade rules that already apply in the global realm. Indeed the WTO reforms indirectly contributed to activating the ATJ because they led to major reforms in Andean intellectual property rules, thereby triggering a stream of cases referred to the ATJ.[55] Regional agreements can make adhering to WTO rules easier for member states, providing an alternative venue to work out issues before noncompliance with WTO rules come to the attention of WTO trading states.

When adopting regional enforcement systems, states have two potential models to chose from the—the WTO model (adopted by MERCUSOR, and ASEAN), or the EU model. The EU model—a common market model—includes supranational legislative and administrative bodies that can pass secondary legislation to facilitate trade, and to implement WTO rules. States that adopt the common market model, as opposed to the free trade area model, are more likely to emulate the ECJ including the ECJ's constitutional review and administrative review authority. The question remains—why choose the EU model over the WTO model of an enforcement system?

One force that may propel the spread of the European model is isomorphic mimicry—the attempt to bottle success by replicating the structures of the EU and the European human rights system. The European model has a number of attractions. In the 1940s and 1950s, opponents of international adjudication used nightmare scenarios to suggest that creating international judicial oversight was a risky political experiment that should be avoided. But Europe's international courts have learned how to navigate political minefields and constructively contribute to the larger goal of encouraging respect for international rules and shoring up the rule of law domestically and within the European Economic Community. The European model suggested that international courts can contribute to the rule of law, and that international courts can usefully push states to keep their international (and domestic) commitments. Isomorphic mimicry is in itself a compelling reason to copy the European model of an IC. European countries add an accelerant to tip the balance in the favor of the European model. Aid from the EU makes embracing the European model attractive. The aid exists in multiple forms. The EU sends advisors, creates legal exchanges and organizes conferences among member states to help out fledgling regional institutions. I need to trace the money, but it is also clear that the EU, and

[55] Helfer, Alter and Guerzovich, 2009

European governments, provide funding for international courts. I cannot say whether the funding is more generous for European style courts compared to WTO style courts. European universities can also train lawyer in European integration law, and thus with the European model comes a system to produce quality legal reasoning and legal expertise.

A second factor propelling the spread of the European model is the overlapping nature of national, regional and international jurisdictions.[56] The least attractive enforcement system for international rules has courts in one country sitting in judgment over the behavior of actors in another country, which occurred when the US passed its 1974 Trade Act, when American and European courts started to assert universal jurisdiction over crimes committed in Latin America and Africa, and when the UN Security Council started creating ad hoc war crimes bodies. Because of these external assertions of enforcement authority, multilateral enforcement became newly attractive. And where multilateral systems exist, governments still prefer to resolve disagreements close to home rather than experience international adjudication, and thus multilateral enforcement gives rise to regional enforcement mechanisms, and to domestic enforcement of international rules so as to stave external assertions of authority.[57]

A final factor that may facilitate the spread of the European style model is the desire for success. Table 2 suggested that at first countries copied the European model of ICs but they wrote into the DNA of their courts political controls designed to limit judicial law-making. These controls seem to inhibit appeals to the ICs and hinder IC decision-making. But when international legal systems exist, we find that they tend to strengthen over time. One potential force leading to the strengthening of international legal systems is litigation.[58] Victims of illegal behavior can work to expand international oversight of national practices, and every legal victory encourages more legal activists to replicate a legalized enforcement strategy.[59] Losing a legal case can also generate an incentive for governments to find cases that they can win so that they can have a bargaining chip for future negotiations involving international law compliance.[60] But fears of legal overreach can exert a counter-force, a political backlash that discourages judicial activism. Also, litigation failures can dissuade potential litigants from raising more cases.[61]

[56] Alter and Meunier, 2009
[57] For more on how international regime complexity can generate its own dynamics, see: Ibid.
[58] Stone Sweet, 1999: 482, Keohane, Moravcsik and Slaughter, 2000.
[59] Harlow and Rawlings, 1992.
[60] Alter, 2003.
[61] On backlash as a reaction to rising legalization see: Alter, 2000, Helfer, 2002.

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Litigation is thus a dynamic for both the expansion and retrenchment of international legal systems over time. Probably the more important force of strengthening of international legal systems are political decisions. The EU is exceptional in that litigation drove the expansion of the legal system. For most of the other cases I have exampled, expansion of enforcement systems is a political choice. Over time, the constraints put on ICs tend to be relaxed because they undermine the effectiveness of international law enforcement. When governments recommit to the overall goals of the international political institution, they often reform existing legal institutions, and these efforts embolden ICs to fulfill their stated mandate. Indeed Table 2 shows that the COMESA, ATJ and SADC architects eventually went beyond the European model in an effort to create international legal oversight of state actions.

III. Does Cloning European ICs lead to European Style Judicial Politics?

The ECJ and ECHR are famous for being prodigious law-makers and transformative political actors. Both courts have developed significant bodies of legal doctrine, doing far more than filling in the details of vague texts. Indeed they have created whole bodies of law—such as the ECJ's doctrines regarding human rights, and most of the administrative law system of the European Community.[62] The willingness of the ECJ and ECHR to reward litigants with helpful rulings has contributed to social mobilization and litigation strategies aimed at prodding state and supranational policy-making.[63] The question for this section is whether cloning European style courts clones European style politics.

This quickly written section summarizes 3 studies of ECJ clones—my own work on the Andean Tribunal of Justice,[64] Anne Pieter Van De Mei's study of the East African Court of Justice,[65] and Derek O'Brien and Sonia Morano-Foadi's study of the Caribbean Court of Justice.[66] The ATJ comes the closest to the ECJ model both in design, and in the reality that the ATJ been given the opportunity to emulate the ECJ's style of expansionist law-making. The ATJ is the third most active international court, and it has contributed to developing Andean

[62] Bignami, 2005, Lindseth, 2002
[63] Harlow and Rawlings, 1992, Cichowski, 2007
[64] Alter and Helfer, Forthcoming 2010
[65] van der Mei, 2009
[66] O'Brien and Morano-Foadi, 2009

intellectual property law.[67] The EACJ has considered fewer cases, but it has had the opportunity to issue expansionist rulings. The CCJ is modeled on the ECJ, but it is still quite different from the ECJ. I include it here only because there is a recent study that actually compares the CCJ to the ECJ—so at least there is a little information about this court. The common feature in all 3 cases is that these courts have followed the ECJ only so far. They have emulated the ECJ's foundational doctrines—the direct effect and supremacy of community law. But they have been far more sensitive to the political concerns of states than the ECJ has been.

Why might the emulators behave so differently? First I give some hint of the different behavior that I, and others, have observed. Then I venture an explanation for this difference by combining the insights from Part I and Part II.

The Andean Tribunal of Justice (this is largely cut and paste—sorry)

For a series of papers, Larry Helfer and I coded all 1338 ATJ preliminary rulings available on the Andean Community website from the court's founding through 2007. Where the ATJ broke new legal ground, we analyzed its decisions in depth. We focused on preliminary rulings because most ECJ lawmaking occurred in such rulings. We also expected lawmaking to occur in preliminary rulings because the General Secretariat raises most noncompliance cases. We expected the Secretariat to be sensitive to state concerns, and to only allege noncompliance where violations were manifest. We also conducted over forty interviews with lawyers, judges, and government officials in Peru, Ecuador, and Colombia. In our paper *Nature or Nurture: Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice* we describe the ATJ's jurisprudential developments over time.

To summarize our findings: Early ATJ rulings mostly emulated key ECJ doctrines, making Andean law directly effective and supreme to national law and preempting national governments from enacting conflicting domestic legislation. The ATJ stressed that governments had agreed to these developments when they had created the ATJ, which by all appearances is true. The ATJ has also enforced clear Andean laws and has required national judges give priority to those laws, in particular in the area of intellectual property law. In these ways, the ATJ has generally followed in the ECJ's footsteps as a builder and strong defender of a supranational legal order.

[67] Helfer, Alter and Guerzovich, 2009

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In numerous other ways, however, the ATJ has exhibited far more deference to member state authority. It has reiterated that Andean legal commitments are a product of the member state consent and thus has scrupulously respected the discretion that Andean secondary law reserves to national governments. The ATJ has also eschewed opportunities to expand the reach and scope of Andean law. While the Tribunal formally treats the Cartagena Agreement as higher order law, it readily interprets collective decisions concerning the scope and pace of Andean integration as de facto amendments of Cartagena provisions. This position gives member states free reign to revise Andean rules to reflect the waxing and waning of their collective commitment to integration. Below are two examples, extracted from our larger analysis.

The first example compares the ATJ doctrine on preemption to the ECJ's doctrine of preemption. Without any textual support in the Treaty of Rome, the ECJ asserted that in fields such as the common commercial policy Community powers were exclusive and precluded member states from legislating regardless of whether their actions conflicted with Community law. In other areas regulated by European law, the ECJ concluded that member states could not legislate even where there is no Community rule on point. Not only do these rulings diminish state discretion, it is the ECJ that determines whether a particular EC rule or policy space is exclusive and preeminent.[68]

In an early ruling, the ATJ announced the principle of *complemento indispensable*: even in areas where Andean law clearly governs, member states may enact domestic laws necessary to implement a Community rule provided that the laws do not obstruct or nullify that rule.[69] Stated differently, whereas the ECJ both implied powers not explicitly delegated to the Community and asserted preemptive authority even where EC law is silent, the ATJ has not implied powers for the Andean Community, and it has allowed states to retain the power to legislate with the sole exception of national laws that directly conflict with extant Community rules.

In a 1990 ruling, the ATJ further cabined the preemption doctrine. Although citing ECJ case law to reaffirm that Andean laws can displace national rules, the ATJ also stressed that integration is a gradual, incremental process that limits the extent to which Community rules preempt national authority: "Especially, when dealing with complex and vast issues, such as

[68] On the ECJ's doctrine of implied powers, see: Weiler, 1991: 2415-17.
[69] ATJ ruling 2-IP-88: point 3.

intellectual property, . . . it seems logical that many of these diverse issues, even if they have to be a matter of common regulation in the beginning, are still within the competence of the national legislator for an indefinite time until they are effectively covered by the Community norms."[70]

The second examples involves the ATJ's development of the doctrine of the supremacy of community rules. In one of its earliest rulings, the ATJ incorporated the ECJ's supremacy doctrine, citing both the Costa v. Enel ruling and the ECJ's Simmenthal decision's key clause that created an obligation for national courts to enforce the primacy of Community law.[71] When the ATJ was presented with a case that called for the application of this doctrine, however, the ATJ was far more timid. In May 1991, Ecuador complained to the Andean Junta, arguing that municipal rules in Colombia impeded competition and discriminated against Ecuadorian alcohol products. The Junta settled the dispute out of court, but it reappeared in 1996 as a complaint by Venezuela. This time the Junta adopted *Resolución* 453, a legally binding decision that found fault with Colombian municipalities, and that required Colombia to fix the problem.[72] When Colombia ignored the Resolution, the General Secretariat (which by then had replaced the Junta) filed a noncompliance suit with the ATJ.[73]

Meanwhile, in 1997, a private citizen asked the Colombian Constitutional Court to review the state's alcohol monopoly. One of the plaintiff's arguments was that the monopoly was incompatible with the Cartagena Agreement as applied in *Resolución* 453. In its May 1998 judgment, the Colombian court declined to enforce the Resolution. It reasoned that, unlike human rights treaties that have quasi-constitutional status in Colombia,[74] Andean laws were equivalent to domestic legislation. Because such laws "and the Constitution do not share the

[70] ATJ ruling 2-IP-90: see point 1.
[71] See ATJ ruling 1-IP-87 (points 2 and 3.5). See the research note for an explanation of the reference system for ATJ rulings. Costa v. Ente Nazionale per L'Energia Elettrica (ENEL), ECJ Case 6/64, [1964] ECR 585, [1964] CMLR 425; Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II), ECJ Case 106/77 (1978) ECR 629; [1978] CMLR 263.
[72] This background is referred to in *Resolución* 453. GS resolutions are available on the same web portal as ATJ decisions.
[73] The case was referred on October 20, 1997. See 3-AI-97.
[74] The Constitutional Court ruling notes that international human rights agreements ratified by Colombia are part of a "bloque de constitucionalidad" which gives them a status superior to than national law. Article 93 of Colombia's 1993 Constitution states: "International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically." Colombian Constitutional Court, Sentencia C-256/98 of 27 May 1998, Section 3.1.

same hierarchy, nor are [they] an intermediate legal source between the Constitution and ordinary domestic laws, . . . contradictions between a domestic law and Andean community law will not have as a consequence the non-execution of the [domestic] law." The court also noted that Community law has "primacy" over conflicting national law—a concept that the Constitutional Court interpreted to mean that Community law "displaces but does not abrogate or render non-executable" conflicting national legislation.[75]

The ATJ issued its noncompliance judgment six months later. The situation was remarkably similar to the landmark *Costa v. Enel* decision, in which the ECJ asserted the supremacy of EC law. But there was a key difference. *Costa v. Enel* had been simultaneously referred to the Italian Constitutional Court and the ECJ. The Constitutional Court ruled first, finding that European law was inapplicable to the case at hand and not supreme over national law.[76] The ECJ, by contrast, found that European law is supreme and that national courts were obliged to apply it instead of conflicting national law, but that the Italian law at issue did not conflict with Community law.[77] The ATJ was less politically fortunate it in that the case involved a Colombian practice that had been challenged by two member states and condemned by a GS Resolution. Thus, whereas the ECJ found Italian law compatible with Community law, in the alcohol case the law and facts were such that the ATJ could not avoid ruling against Colombia.

In the noncompliance ruling, the ATJ went out of its way to agree with the Colombian Constitutional Court that there was no inherent conflict between the Colombian alcohol monopoly and Andean law. But the implementation of the monopoly was a different matter. Although the national government had tried to introduce a common system of alcohol taxation, the local policies that created barriers to trade persisted. Because of these municipal practices, Colombia remained in violation of Andean law.

The same litigant who had filed the Constitutional Court challenge later asked another Colombian court—the *Consejo de Estado*—to review the municipal policies. To nullify municipal acts, especially after the Constitutional Court ruling, would have been a radical step.

75 Ibid. Section 3.1.

76 Indeed initially the Italian Constitutional Court suggested that Italian statutes take precedence over the EEC Treaty. Costa v. E.n.e.l. & Soc. Edisonvolta, Italian Constitutional Court Decision 14 of 7 March 1964, [1964] CMLR 425, [1964] I Il Foro It. 87 I 465.

77 Costa v. Enel supra note 71.

National courts in Europe had taken just such a step when they embraced the supremacy of European law. But as of 1999 no court in the Andean Community had shown much willingness to overturn domestic statutes or doctrines to help enforce Andean law. The *Consejo* referred the case to the ATJ as required under Andean law. The ATJ reiterated that Colombia was obligated to modify practices that conflicted with Andean law.[78] Yet the ATJ refused to extend its earlier reliance on the European supremacy doctrine and, as the ECJ had done, instruct national judges to do whatever was necessary to give effect to Community law. Instead, the ATJ simply declared (again) what Andean law required without asking national judges to help it to enforce that law. Although the ATJ did not explain its reluctance to follow the ECJ, its ruling is difficult to divorce from the very real concern that national judges might find that they lacked the legal authority or the political will to heed the ATJ's request.[79]

The ATJ's refusal to help litigants achieve their goals set up a vicious circle that inhibits the filing of additional cases that might have expanded Community law. The abstract and repetitive nature of the ATJ's analysis also contributes to a sense among lawyers that preliminary rulings have little practical benefit. It is a striking fact that of the 1338 ATJ preliminary rulings between 1984 and 2007, only 35 involve subjects other than intellectual property.[80]

The East African Court of Justice

Anne Pieter Van de Mei observes the same tendency of the East African Court of Justice (EACJ) to develop ECJ doctrine quite differently so as to avoid confronting political actors. Like the ATJ, the EACJ directly incorporates ECJ doctrine, citing and quoting from ECJ rulings. But the EACJ innovates on ECJ doctrine so as to protect national sovereignty and avoid confronting member states. The EACJ has issued very few rulings, so Van de Mei mainly analyzes the five existing EACJ rulings.

One of rulings that Van de Mei examines involve the contested Kenyan election—and thus a high stakes political conflict. In this case, the EACJ treads carefully suggesting that integration requires that states cede sovereignty but noting that

[78] 29-IP-98.
[79] The Consejo de Estado found against the plaintiff in the case, and Colombia has remained in breach of Andean law. Decision of Nov. 11, 1999 regarding Decreto 244 of 1906. For more on national court reticence, see Helfer and Alter 2009: 900-911.
[80] We summarize in more detail the variations in preliminary ruling references in Helfer and Alter, 2009. On how "vicious circles" shut down entrepreneurial litigation strategies, see: Alter, 2000: 512-15.

"when the Partner States entered into the treaty, they embarked on the proverbial journal of thousands of miles which of necessity starts with one step. To reach the desired destination they have to ensure that every subsequent step is directed towards that destination and not backwards or away from that destination. There are bound to be hurdles on the way. One such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs in limited areas to enable them to play their role".[81]

In a later case, *East African Law Society and others vs. The Attorney General of Kenya and others*: The Legality of the Treaty Amendment, private actors challenged the legality of an amendment adopted without the input of key societal actors. While the EACJ agreed that the amendment process was problematic, it refused to invalidate the amendment in question. It found that the violation was accidental, unlikely to occur again, and not substantively significant enough. Thus it developed the doctrine of prospective annulment whereby the current amendment was allowed but future violations would be sanctioned.

Van de Mei is critical of this doctrine, blaming poor legal reasoning on the part of EACJ judges but also noting that the EACJ had come under a withering attack for its ruling in the Kenyan election disputes and that the EACJ does not enjoy the support of domestic courts in the region.

The Caribbean Court of Justice

The Caribbean Court of Justice is really quite different from the ECJ. Caribbean common market institutions are in flux, and at present there is no community Commission to help enforce common rules or to issue its own administrative rulings. For this reason, the CCJ lacks constitutional and administrative review authority. Meanwhile, states can opt to have the CCJ replace the role of the UK Privy Counsel, and thus to have the CCJ hear appeals of national court rulings on a variety of issues.[82] The CCJ has been invoked in a number of death penalty cases, which are cases that in the past would have been decided by the Privy Council.

While there is no supranational commission empowered to raise noncompliance suits, the CCJ can determine on a case-by-case basis whether or not private actors have standing to raise complaints against states. The CCJ must consider a number of factors in determining if private

[81] Anyang' Nyong'o and others: The Compatibility of the Kenyan Election Rules with Article 50 of the EAC Treaty discussed in van der Mei, 2009: 13-16
[82] Pollard, 2003

litigants have standing, such as whether the law in question gives rise to a right or benefit that the private actor can claim, whether or not the litigant has been denied this right or benefit, whether or not the litigant's government declined or omitted to espouse a claim on behalf of the private actor, and whether hearing such a suit is necessary for providing justice to the litigant. These provisions open the door for the CCJ to assert the direct effect of Community rules.

The CCJ has allowed litigants to invoke direct effect in direct appeals to the CCJ, but it has refused litigants the right to claim the direct effect of community rules in cases raised in national courts. The CCJ's decisions on this issue are replete with references to ECJ doctrines.[83] O'Brien and Morano-Foadi conclude that the absence of a Commission to raise suits will hinder the CCJ. They also predict that the CCJ's decision to deny private actors the avenue of raising noncompliance suits in national courts will inhibit the development of a working relationship between national judges and the CCJ.

They may be right, but the Andean experience suggests that direct access to the IC may be the most promising route for litigants in any event. While national courts refer many cases to the ATJ, mostly they refer narrow technical cases where the ATJ's authority is undisputable. National court-ATJ interaction remains highly circumscribed, with national judges being quite reticent to embrace any role enforcing the primacy of Andean rules.[84]

Explaining the different behavior of European Courts compared to their emulators

A number of contextual differences make it hard for ECJ emulators to copy the ECJ's practices.

One difference between the ECJ and its emulators is that the ECJ operated for many years outside of the serious scrutiny of national governments. Legal advisors of Member States did participate in ECJ legal proceedings, offering legal arguments that the ECJ went on to reject.[85] But for the most part national governments were not paying attention to the ECJ. Even though post-WWII Italy and Germany created constitutional courts with judicial review powers, European politicians were largely unfamiliar with the politics of judicial review. Tradition told them that courts generally do not make rulings that go against political interests. The ECJ

[83] O'Brien and Morano-Foadi, 2009
[84] Helfer and Alter, 2009
[85] Stein talks about member states arguments in the ECJ's foundational cases. See: Stein, 1981.

seemed to be no exception to this rule. The ECJ was audacious when it came to legal doctrine, but cautious when it came to ruling in ways that would upset member states.[86] And the European Commission on Human Rights was going out of its way to reassure states that international oversight would not be unduly sovereignty compromising.[87] Even when the ECHR case lad grew, the ECHR has benefited by having a plethora of uncontroversial human rights cases—which is one reason why the vast majority of its rulings are unanimous.[88]

Political inattention allowed the ECJ to develop its famous incremental style of decision-making where it would introduce legal ideas cautiously, suggesting that there were exceptions to the rule and ensuring that the new doctrines were not applied in ways that upset member states.[89] While politicians were otherwise occupied, the ECJ interacted with lawyers, legal advocacy networks, and national judges to develop and build support for its nascent legal doctrine. Over time, the ECJ became more willing to upset governments especially where ECJ doctrine was both clear and well accepted.

Laurence Helfer and Anne-Marie Slaughter point out the importance of incremental decision making for international judges trying to build their legal authority. They also acknowledge that the ability of international judges to build doctrine will be shaped by the cases that appear before them, and that it is easier to build legal doctrine in cases of low political salience. The nature of the legal violations an IC is asked to address are, by their own account, exogenous to their model of effective supranational adjudication.[90]

ECJ clones have had not had the benefit of anonymity, numerous low salience cases, and an active network of local legal supporters to facilitate the development of regional law. This difference may explain why ECJ emulators have not followed the ECJ in being an activist lawmaker. Instead, these courts hesitate to reward litigants with useful rulings, which in turn suppresses legal mobilization and thus the demand for judicial law-making.

A second difference is that the ECJ and the ECHR had a community of legal supporters who helped them develop their legal doctrines, and who championed these doctrines within their national legal systems. Elsewhere I document the role of jurist advocacy movements in

[86] For more see: Alter, 1998.
[87] Schermers, 1999.
[88] The vast majority of ECHR cases involve the slow administration of justice, which is uncontroversially true and problematic. For assessments of ECHR cases. Meanwhile, Erik Voeten has analyzed the number of split decisions of the ECHR, which are small compared to the total number of ECHR rulings. See: Cichowski, 2006, Voeten, 2008
[89] On the incremental style, see: Weiler, 1991: 2447, Burley and Mattli, 1993: 55.
[90] Helfer and Slaughter, 1997: 330.

facilitating bold decision-making by the ECJ, and show how the lack of a comparable legal community inhibits ATJ decision-making.

A third difference, related to the point above, is that neither the ATJ, the EACJ nor the CCJ can count on national judicial support in implementing their rulings.

In short, these ECJ clones lack compliance constituencies that will pressure governments to respect their rulings and that will come to the defense of the supranational court when its authority is seriously questioned.

ECHR clones, by contrast, seem to be more willing to develop legal doctrine. The IACHR has been quite bold in a number of its rulings, seemingly most effective and boldest when it is able to ally with sub state actors and transnational advocates who are committed to a similar cause.[91] The ECOWAS court has also issued a far reaching ruling in a case brought by a human rights advocacy group.[92] This difference suggests that the politics of human rights courts might be different than the politics of economic courts, if only because human rights issues connect both to domestic political priorities and strong advocacy networks of activists.

Conclusion

I'm out of time—but here are the take away points.

This paper has focused on documenting the trend of emulating European style international courts. I don't have the data I need to actually explain what is leading to the spread of European style courts, thus I was only able to suggest factors that contribute to the spread of European style ICs. Elsewhere I focus on explaining the divergent behavior of one ECJ clone—the Andean Tribunal of Justice. Here I supplement the Andean case with snapshot of evidence from the EACJ and the CCJ which suggests that copying the design of European style courts does not give rise to European style judicial politics.

This paper was not the format for testing these theories of how IC design influences IC policy-making, but the evidence we do have suggests that too much emphasis has been placed on the design of ICs, and not enough on how the political context shapes IC decision-making. My current thinking is that contextual factors—the existence of domestic and transnational compliance constituencies—shape IC decision-making. New historiography concerning the ECJ

[91] Cavallaro and Brewer, 2008
[92] Duffy, 2009

and the ECHR suggests that both of these courts benefited from the support of a transnational advocacy network of legal activists. In short, the disappointed of the creators of the ECJ and the ECHR led to the mobilization of a network of legal activists who created test cases, worked with ECJ and ECHR judges, wrote legal treatises, and worked within national judicial systems to build support for Europe's nascent international courts.

While the emulators of the ECJ and the ECHR could copy both the design of the court, and the case law of the court, they could not replicate the deep network of political support these courts enjoyed. Human rights bodies perhaps have a better chance of replicating the network of legal support. Economic courts, by contrast, have not been able to mobilize political supporters to the same extent.

I don't have evidence for these claims, so I'll have to scale back this paper in revisions. But I thought I'd put my ideas out there for now.

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