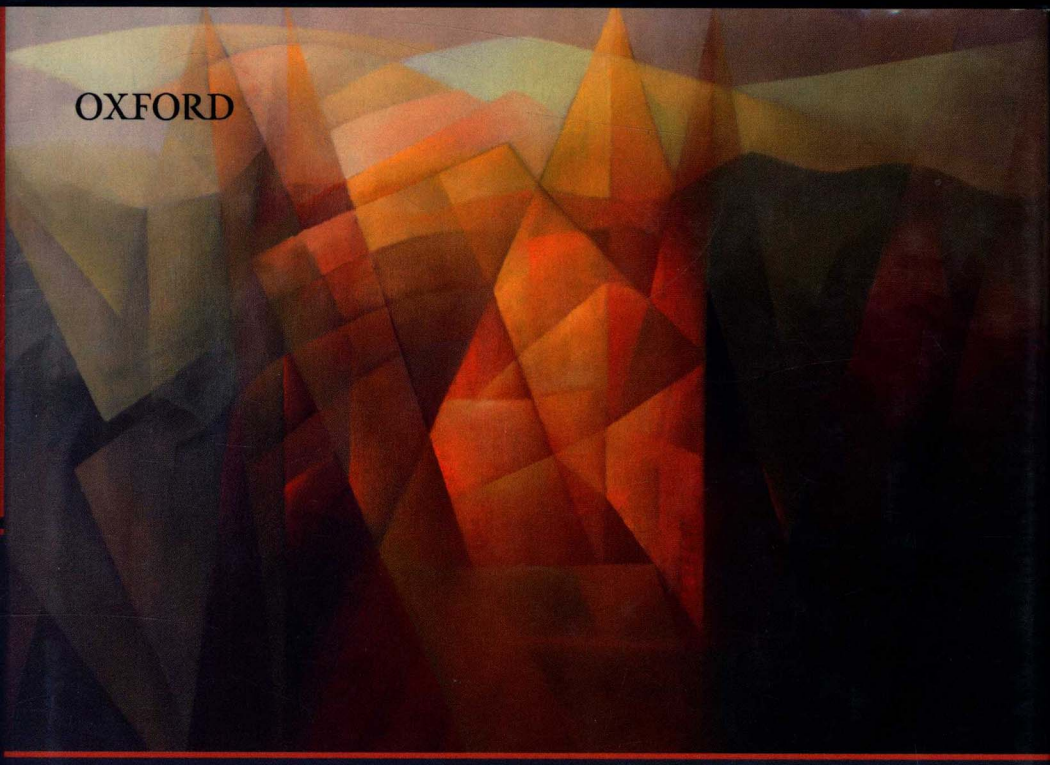

INTERNATIONAL COURTS AND TRIBUNALS SERIES

TRANSPLANTING INTERNATIONAL COURTS

THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE

KAREN J. ALTER AND LAURENCE R. HELFER

Transplanting International Courts

The Law and Politics of the Andean Tribunal of Justice

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OXFORD
UNIVERSITY PRESS

OXFORD
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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2017

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2017930884

ISBN 978–0–19–968078–8

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

INTERNATIONAL COURTS AND TRIBUNALS SERIES

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Transplanting International Courts

INTERNATIONAL COURTS AND TRIBUNALS SERIES

A distinctive feature of modern international society is the increase in the number of international judicial bodies and dispute settlement and implementation control bodies; in their case-loads; and in the range and importance of the issues they are called upon to address. These factors reflect a new stage in the delivery of international justice. The International Courts and Tribunals series has been established to encourage the publication of independent and scholarly works which address, in critical and analytical fashion, the legal and policy aspects of the functioning of international courts and tribunals, including their institutional, substantive, and procedural aspects.

Series Editors' Preface

Scholarship on regional international courts was until recently almost entirely focused on two courts in Europe: the Court of Justice of the European Union and the European Court of Human Rights. With few exceptions, there was little actual knowledge of how international courts in Africa, Latin America, and elsewhere operate in practice. This book, alongside other publications by its authors Karen J. Alter and Laurence R. Helfer, significantly closes that gap.

The book pulls together ten years of research to provide the first in-depth empirical analysis of the origins, evolution, successes, and failures of the Andean Tribunal of Justice. It shows how the Tribunal has developed from a little-known institution established by a small group of developing states in the Andean region to become the world's third most active international court.

Alter and Helfer also explore the connections between the European Court of Justice, set up in the 1950s, and the Andean Tribunal of Justice. The book's guiding research question is precisely the extent to which the Tribunal can be understood as a transplant—or clone—of the European Court of Justice. The Andean Tribunal borrows a set of institutional design features from the Court of Justice. Most significantly, it allows for preliminary references from national courts and administrative agencies and also provides other avenues for private litigants and supranational bodies to access the Tribunal to enforce Andean law.

Notwithstanding these institutional commonalities, the authors also clearly demonstrate that law and politics operate in a significantly different way in the Andean region than in Europe. A major finding of the book is that the Andean Tribunal has managed to emulate the success of its European counterpart only in a single issue area—intellectual property. The Tribunal has become a major institution in the development of intellectual property rules in the Andean region, but in practically all other areas of Andean integration law its activity and influence is limited. This identification of what Alter and Helfer aptly name an "island of effective international adjudication" is helpful for rethinking the differentiated pathways of other regional courts currently evolving in many corners of the world.

Alter and Helfer also analyze how the Tribunal navigates the moment when member states are deeply divided with respect to the goals and future of the Andean integration project. The book provides timely insights that apply to other regions, and that may provide fresh ideas for Europeans struggling with a similar set of concerns.

Professor Mikael Rask Madsen
Director, iCourts
University of Copenhagen
October 2016

Prologue

I first met Karen Alter when I was Secretary of the Court of Justice of the Andean Community (Andean Tribunal) in 2005 when she first visited me, guided by that inquisitive spirit that characterizes good scholars. A couple of years later I met Larry Helfer too when he and Karen decided to visit the General Secretariat of the Andean Community in Lima, Peru. At that time they were barely acquainted with the rather unknown field of Andean Community law. As someone who has been linked to this body of law for a long time, I found their academic curiosity very striking. Ever since, I have kept abreast of their research. It turns out that writing seriously about a topic that is foreign to one's own legal tradition and about which little has been written is not only complicated but also a quite audacious task.

Transplanting International Courts: The Law and Politics of the Andean Tribunal of Justice expresses the adventurous spirit of these two researchers. The book aims to introduce the reader to the intricacies of the practice of Andean Community law from the perspective of comparative law, to discover the similarities and differences between that system and European law, and to explain the successes and failures of the Andean Tribunal.

The book rightly states that the Andean Tribunal was designed and established to resemble the Court of Justice of the European Union. The authors refer to the most notable characteristics that the two tribunals share in terms of their powers, competences, and procedures. In this way, both courts must solve cases in which a Member State or a body or institution of the Community fails to perform a legal obligation, where the applicant seeks the annulment of a measure alleged to be contrary to Community law, where the Community body or institution fails to act when it is legally obliged to do so, and where litigants request a preliminary ruling interpreting Community law.

However, it must be borne in mind that the creation of the Andean Tribunal is not the result of a mere intention to mimic the European model, nor is it the outcome of an academic exercise for the sake of consistency with national models. The reasons that lead a group of countries to opt for a judicial mechanism to solve disputes between them at the regional level, having other alternatives available at their disposal, are the result of complex economic, legal, and political factors.

Among those reasons, I must highlight the conviction, shared by many in the Andean Community and certainly by its founders, that it is through a profound integration between our countries that we will be able to increase opportunities for commercial growth and economic development. Both multilateralism and bilateralism have proven that they can sometimes resolve favorably some of our needs but they usually tend to meet the interests of some rather than others. Learning from our history, it was equally clear, both in the initial design of the Andean Community and at present, that profound integration requires a guarantor who

shares similar characteristics. If the legal correlate of this ideal of profound integration is supranationality (the term being understood as a system of legal rules with direct application and direct effect in Member Countries), the legal guarantor of supranationality could only be a supranational Tribunal.

I must also emphasize the role played by democratic ideals—of the founders of the Cartagena Agreement, the Presidential Council, the Council of Ministers of Foreign Affairs, some national bureaucrats in charge of integration issues, and several officials of Andean Community institutions—in the design and functioning of the institutional model that the Tribunal reflects. In this way, the constitutional design of the Andean Community took into account that if a powerful Commission of Plenipotentiaries was to be established and charged with issuing legislation that would automatically be imposed in all Member Countries and supersede their own national legislation, it was also necessary to create other bodies responsible for balancing and supervising such power, ensuring the maintenance of a system of the rule of law. Since the executive branch of integration—that is, the General Secretariat—was partially subordinated to the Commission, the body created to strike such balance was the Andean Tribunal. It is necessary to bear in mind that for this reason, and to ensure compliance, membership in the Treaty Creating the Andean Tribunal and membership in the Cartagena Agreement are legally intertwined.

Subsequently, in the second half of the 1990s, these democratic ideals would become even more peremptory and present with the adoption of a political instrument of the first order: The Andean Democratic Charter, signed by the Presidents of all the Member Countries.

In sum, the creation and functioning of the Andean Tribunal is primarily the product of a political conviction of its own that legitimized a type of governance at the Community level for a given integrated territory. This conviction was not only reiterated but also amplified with the adoption of the Cochabamba Protocol in the second half of the 1990s, and I think it still remains today in the minds and bodies of many in the Andean Community.

Turning to the more concrete terrain of the Andean Tribunal's performance in the years since its creation, I must first of all concur with the authors in praising the authority that the Tribunal has succeeded in establishing in the field of intellectual property. According to the authors, this success can be attributed principally to the fact that the Tribunal has built key alliances with national administrative bodies responsible for granting this form of legal protection. The authors also explain this success by reference to the level of involvement of the Andean citizens in the matter and the degree of legal advocacy achieved.

That being so, let me emphasize, however, the decisive role played in this outcome by the General Secretariat of the Andean Community and before it, by the *Junta* of the Cartagena Agreement. These bodies developed a very detailed and in-depth common regime that internalized the characteristics of the region, created genuine cooperative links to national authorities, and responded to their needs in ways that in substance—except for the protection of pharmaceutical test data, which was modified due to the influence of free trade agreements—have remained

stable for decades until today. In addition, the General Secretariat and the *Junta* developed important legal concepts and doctrines in reasoned opinions issued prior to actions for alleged infringement before the Andean Tribunal. These concepts and doctrines were often taken up by the Tribunal in its judgments. Of course, I must also add, as do the authors, the important influence of the self-interest of citizens and lawyers to act in favor of development and dissemination of regional integration. This is something that in this field of law can be appreciated with much clarity.

Unfortunately, I also have to agree with the authors that, after thirty-six years of existence, the Andean Tribunal has not been able to assert its authority in other fields of integration law to the same degree as in intellectual property matters. According to the authors, the Tribunal's lack of performance in these areas may be explained by the difficulties of judicial action in environments characterized by political and economic instability, a culture of disrespect for the law, and the lack of independence of the judiciary from political power, among other reasons.

In my experience, however, it is true that some judges may feel the need to adjust their decisions to the circumstances of the moment, not necessarily as a result of corruption but simply because of the influence of a pragmatic necessity to survive in a hostile political environment in which prevalence of the rule of law is not yet common ground. Yet it is also true that similar challenges are faced by most national and international courts today, as the authors recognize, including those working in more politically and economically stable environments.

Besides, the Andean region has advanced a great deal in terms of democracy, macroeconomic stability, respect for institutions, and law enforcement, and so has the Andean Community. In fact, it must be recognized that Community law in intellectual property as well as in other areas has very often acted as a real retaining wall against external pressures of all sorts seeking to change or distort it to impose interests alien to those represented by the law, and that the Andean Tribunal's judges very often have well served the ideals of Andean integration. The degree of respect for law may be influenced by external conditions, but ultimately depends on the degree to which it has been internalized by the individual as a moral imperative and social value.

From a less philosophical but more functional perspective, a partial explanation of the sometimes variable performance of the Andean Tribunal can be found in the relative lack of specialized legal knowledge among national judges and most lawyers. Integration law is not normally included in the curricula of most faculties of law in the Andes, unlike European Community law in Europe. Likewise, there is insufficient dissemination of information about Andean integration among citizens and social actors, who are focused instead on other integration schemes and free trade agreements which, in turn, silently utilize and benefit from the ideas of Andean integration.

To conclude my remarks on the Andean Tribunal's performance, I must point out that I found refreshing the authors' demystification of certain conceptual premises and methodological generalizations that are the result of a Eurocentric and Westernized analysis of the law but that do not even apply in vast areas of the Western Hemisphere. One of these generalizations is that international judges are usually assumed to be creatures eager to expand their influence and authority through lengthy and complicated

judgments. In this vein, the authors point out that their comparative study leads them to conclude that this is not necessarily the case.

Experience shows that international judges are not towering sages imparting wisdom that all will respect, as many people imagine, but rather they are often cautious, conservative creatures who prefer to move within the safe limits of written law. This rather less glamorous description of the image of international judges that can be inferred from the findings of Karen and Larry's work is certainly much more human. This allows us to approach the study of judicial action with more realism, and to be surprised, from time to time, with pieces of jurisprudence that transcend the limits of written rules to actually create law. Along those lines, it is necessary to recognize that although the Tribunal's actions in areas of Andean Community law other than intellectual property have been much more discreet, its jurisprudence has nevertheless generated real progress in the conceptualization and practice of certain fundamental legal principles of the regional integration process. The overarching concept of "unjustified restriction to trade" to preserve the "free movement of goods" (known as the Trade Liberalization Programme in Andean jargon) or the very notion of "non-discriminatory treatment" as a general concept of Andean law where regulation has been very deficient, come to my mind as examples.

Even though the Andean integration process seems at times doomed to repeat the myth of Sisyphus, and even when local leaders, guiding or following their local bureaucracies, remain bitterly divided over continuing Andean integration or ending it, the Community has proven to be a necessary bridge that maintains the life of international political and commercial relations between the neighbors, particularly where bilateral relationships have been insufficient or unsuccessful. In terms of legal design and political modeling, the Community has also proven to be permeable to the needs of Member States to carry out legislative changes in their territories and to channel the implementation of projects that otherwise would be lost. Finally, exceptions aside, the Community has proven to be, both for Member Countries and for their citizens, an accessible forum in terms of availability, time, and money to resolve their controversies, representing, particularly for the private sector, the only direct conduit they have to seek legal remedies against the resistance of their own national authorities or those of the other Member Countries to comply with Andean-level commitments.

Based on what has been said, the reader will understand why Karen and Larry finish their work by concluding that the Andean Tribunal is the oldest, most active and in some respects the most successful regional court operating outside of Europe. For my part, I could not be more satisfied with their work. I wish you, dear Reader, a pleasant and challenging journey with the hope that this book will encourage you to further the work of the authors and perhaps to visit us.

Mónica Rosell*

* Mónica Rosell is Chief of the Legal Advising Service of the General Secretariat of the Andean Community. This Prologue is written in her personal capacity and does not necessarily express the views or opinions of the institution she serves.

Acknowledgments

This book—the product of nearly a decade of collaboration—is a deep case study of the most successful transplant of the European Court of Justice (ECJ). Our examination of the Andean Tribunal of Justice (ATJ or Tribunal) began in 2004, twenty years after the Quito-based Tribunal began to hear cases. We had certain presumptions when we began this project. We knew that the ECJ had served as the engine of legal integration in the European Community, and that the ECJ's legal and political authority was built upon its relationship with national judges. The same appeared to be true in the Andean Community, in that the vast majority of ATJ cases were preliminary rulings responding to references from national courts in the four Andean member states.

Karen Alter began to research the Andean legal system by asking Elena Herrera-Beaumont, her Spanish research assistant, to code the subject matter and origin of the cases available on the Tribunal's website. This coding revealed that most ATJ cases involve intellectual property (IP) law and originate in a handful of national courts. Unable to find literature on the cases or on the ATJ, Karen and Elena traveled to Quito to visit the Tribunal and its judges. She also spoke with Venezuela's ambassador to Ecuador, a founding ATJ judge, IP lawyers, and national judges responsible for most Ecuadorian court references to the Tribunal, and she met Mónica Rosell, then serving as the Legal Secretary to the ATJ, who generously agreed to write a preface to this book.

Karen's interviews generated some preliminary findings, but the reasons for the overwhelming predominance of IP cases on the ATJ's docket remained a mystery. This led Karen to contact Larry Helfer, an expert on international courts and international intellectual property law. Larry still recalls, from his first telephone conversation with Karen, the exciting prospect of studying an international tribunal whose rulings interpret a little-known body of regional IP law that seeks to strike a balance between the protection of patents and trademarks and other societal values, in particular public health and consumer protection.

This book, published nearly ten years later, is comprised of significantly revised, updated, and expanded versions of several journal articles that Karen and Larry published as their research on the Andean legal system unfolded. The publications were sequenced to first provide little-known empirical and historical information about the origins, evolution, and activities of the Andean Community and the Tribunal, followed by more focused explorations of particular theories and topics, and finally the drawing of general conclusions. The journal articles were structured to be cumulative, in that each article built upon the foundations laid by the prior publications.

Throughout our investigation, the ECJ was our primary reference point. This explains the book's empirical focus on preliminary rulings. In the European context,

preliminary rulings are the predominant mechanism by which the ECJ has developed its innovative legal doctrines. We thus can and have learned a lot about the Andean legal system by studying ATJ preliminary rulings, both individually and over time.

It turns out, however, that the noncompliance procedure (the Andean label for what in Europe is called the infringement process) is also quite important. As we explain in Part I of the book, in 1996 member states restructured the Andean legal system to give private litigants access to the ATJ (via complaints to the Andean General Secretariat) to challenge national laws and policies as contrary to Andean Community law. This access provides litigants with a way to avoid relying on national judges to refer cases to the Tribunal.

For this book, we asked research assistants to update our coding of ATJ preliminary rulings through 2014, and to code all ATJ noncompliance judgments. We have significantly revised our earlier research in light of this new material. Yet our analysis remains incomplete. The noncompliance procedure requires the General Secretariat to issue reasoned opinions in response to noncompliance complaints. Especially in the first fifteen years of the Tribunal's operation, these reasoned opinions were a key source of guidance on the content and political impact of Andean law—a source to which we have given insufficient attention, as Mónica Rosell rightly observes in her preface.

Our collaborative research has also expanded to include international courts in Africa that are based on the ECJ model, and we have benefitted tremendously from the wonderful research community at iCourts: The Danish National Research Foundation's Centre of Excellence for International Courts at the University of Copenhagen. Having studied other judicial transplants, we can say without hesitation that the ATJ is the most successful ECJ copy. The more we investigate the ATJ, the more we are impressed by what Andean judges and officials have accomplished—even as we acknowledge the limitations of the larger Andean integration project and of its legal system.

Comparing the Andean Tribunal to the ECJ provided a logical theoretical starting point for our research. But it also implicitly imported a number of assumptions and expectations about how the Andean legal system would operate. Exploring these assumptions, and revisiting their implications for our prior writings, proved to be as fruitful as our exploration of the Andean Tribunal itself. Karen went back to some of her unpublished European research, and began a dialogue with a group of young historians investigating previously unavailable archives on the ECJ's early years. Larry drew upon the Andean studies to reconsider his influential 1997 *Yale Law Journal* article, coauthored with Anne-Marie Slaughter, on what makes international courts effective. We feature our updated understanding of supranational adjudication in Europe in Part III of this book.

Any errors in this book are our own. We had invaluable assistance with coding and summarizing ATJ cases, which are available only in Spanish, from Isabella Bellera, Maria Borges, Daniel Echeverri, Flo Guerzovich, Gilda Anahi Gutierrez, Elena Herrera-Beaumont, Dominic Lerario, Juan Mayoral, Catalina Milos Sotomayor, Karla Quintana-Osuna, Rebecca Stubbs, Ryan Mellske, Osvaldo Saldías (also a

coauthor of Chapter 2), Alvaro Sanmartin Baez, and James Waters. Flo Guerzovich (also a coauthor of Chapter 5), Rachel Moscowitz, and Ioannis Panagis provided crucial technical help with our database of ATJ cases.

For financial and institutional support, we acknowledge and thank the Danish National Research Foundation Grant no. DNRF105, iCourts, the Buffett Institute of Global Affairs at Northwestern University, the Center for International and Comparative Law at Duke University, the Northwestern Dispute Resolution Research Center, and the Center for the Americas at Vanderbilt University.

Our works in progress benefited from comments and suggestions made at numerous workshops, conferences, and lectures, including at iCourts, Duke University Law School, the Fordham International Law–International Relations Colloquium, the Harvard Law School Faculty Workshop, the Harvard International Law–International Relations Workshop, the Oñati International Institute for the Sociology of the Law, the Texas Law School faculty workshop, the Tufts International Law–International Relations Seminar, the University of Illinois Urbana-Champaign's European Union Center, the U.S. Patent and Trademark Office Seminar on Specialized Intellectual Property Courts, and the Vanderbilt Roundtable on the Law and Politics of International Cooperation.

We also benefitted tremendously from the feedback of many colleagues, including David Art, Graeme Austin, Arnulf Becker Lorca, Gabriella Blum, David Boyd, Jamie Boyle, Anu Bradford, Curt Bradley, Rachel Brewster, Dan Brinks, Daniel Drezner, Martin Flaherty, José Augusto Fontoura Costa, Tom Ginsburg, Flo Guerzovich, James Hallock, Darren Hawkins, Leslie Johns, Alexander Krasteve Panayotov, Thomas Lee, Katerina Linos, Mikael Rask Madsen, Juan Mayoral, Ralf Michaels, Gerald Neuman, Sol Picciotto, Kal Raustiala, Morten Rasmussen, Diana Rodríguez Franco, Cesare Romano, Osvaldo Saldías, Antoine Vauchez, Christopher Whytock, and Ingrid Wuerth.

Every chapter in this book is either new or substantially revised and updated. Our thinking and writing has benefitted from the peer review, editorial feedback, and careful copy editing of earlier versions of the following chapters: Chapter 2, published in the *American Journal of Comparative Law* (60 (6): 709–744, 2012); Chapter 3, published in the *New York University Journal of International Law and Politics* (41: 871–930, 2009); Chapter 4, published in the *European Law Journal* (17 (5): 701–715, 2011); Chapter 5, published in the *American Journal of International Law* (109 (1): 1–47, 2009); Chapter 8, published in *International Organization* (64 (4): 563–592, 2010); and Chapter 9, published in Karen J. Alter, *The European Court's Political Power* (Oxford University Press, 2009). We have also benefited from the editorial support of Oxford University Press, especially Merel Alstein, Eve Ryle-Hodges, John Louth, Nancy Rebecca, and Janet Walker.

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Looking at the ATJ through the lens of the ECJ, and the ECJ through the lens of the ATJ, has taught us much. Perhaps most significantly for our future research, it has taught us that the ATJ's experience in adapting ECJ structures and doctrines to

the more politically, legally, and economically fraught contexts in the Andes provides fruitful guidance for other international courts around the world.

We employ multiple research methods in our empirical investigation of the law and politics of the ATJ. By definition, this means that ours is a rear-view mirror analysis. We finished this book during a moment of great uncertainty: the economic and political collapse in Brazil and Venezuela, the Brexit vote, the decision of several African countries to withdraw from the ICC, the election of US President Trump with a populist anti-globalization political agenda, and signs that nationalism and populism are on the rise in Europe. This global uncertainty makes this book even more important, because the ATJ has survived multiple rounds of legal, political, and economic turbulence. We draw many lessons from the ATJ's experience, but leave for future writings any investigation of the future of international courts in this brave new world we are now entering.

Karen J. Alter, Evanston, IL
Laurence R. Helfer, Durham, NC
December 7, 2016

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III. RECONSIDERING INTERNATIONAL ADJUDICATION IN EUROPE IN LIGHT OF THE ANDEAN EXPERIENCE