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SUPRANATIONAL COURTS AS ENGINES OF DISINTEGRATION

The Case of the Andean Community

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1. Introduction [1]

From the moment Ernst Haas acknowledged the presence of diverging background conditions in the cases of the European Communities and Latin American integration schemes (Haas 1967, Haas and Schmitter 1964: 711, Mattli 2005: 339-40), incentives for using the latter as a setting for testing general proposition declined dramatically.

Against this background, the institutional reform of the former Andean Pact, established by the treaty known as the Cartagena Agreement,[2] went rather unnoticed. The newly founded Andean Community[3] emulated the polity design of the European Community. Supranationality was reinforced, and community organs were established with a striking resemblance to their European counterparts. A General Secretary was established as the executive organ of the Community, to supervise compliance with community law, make legislative proposals, and represent community interests. A Commission comprised of member states representatives was established as the legislature, through which general policies were adopted, and a Parliament was established with some deliberative powers, representing the peoples of the Andean region. The Andean Court of Justice (ACJ) was established on May 28, 1979, by virtue of the Treaty of Creation of the Court of Justice of the Cartagena Agreement, and began its work on January 5th, 1984, after a long process of national ratifications.[4] On the advice of European officials[5], the design of the new court was modelled on the European Court of Justice (Cruz Vilaça and Sobrino 1996: 20, Frischhut 2003: 274, Vigil Toledo 2004: 939)

As a consequence of constitutional cross fertilization (on the emerging phenomena of constitutional cross-fertilization and global judicial cooperation see Slaughter 2003: 195), the Andean Court applied a teleological interpretation of the Agreement and de-

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2 Hereinafter also the "Agreement".

3 *Comunidad Andina* established by the Trujillo Protocol of March 10th, 1996

4 On the process of ratification, and particularly the Venezuelan position, see Marwege 1995:104

5 On the advising role placed by officials of the European Community, among them *Pierre Pescatore* (by that time judge of the ECJ*), Gerard Olivier* (European Commission*), Maurice Lagrange* (Advocat General) y *Walter Much* (European Commission), see Frischhut 2003: 249

veloped in its jurisprudence the doctrines of supremacy of community law (*primacía*) and direct applicability (*aplicabilidad directa*) of its norms. According to the former doctrine, national law has to yield to community law; according to the latter, community norms do not need to be transposed into national law in order to be invoked before national courts by individuals. The fact that individuals could now invoke community law in national courts, empowered them to hold governments to their international commitments (Slaughter 2000a: 1105 makes this argument for the European case), and favour internalisation of international norms and rules into the domestic legal system. (Börzel 2002: 18)

Yet, the outcomes of regional integration have been disappointing. In the 27 years of the existence of the Andean Court, the Community has not been able to establish a customs union, which was repeatedly postponed by intergovernmental decisions,[6] and only in 1995 was an "imperfect customs union" announced.[7] As a result, the Andean Community has not been able to speak with one voice before the WTO. In addition, both Peru and Colombia have announced bilateral negotiations with the United States with a view to concluding a free trade agreement. Finally, in 2006 Venezuela gave notice of its formal desire to withdraw from the Community.

The divergence of integration outcomes, despite the convergence of institutional design, poses an interesting puzzle, which this paper seeks to address. What prevented the ACJ from becoming the engine of Andean integration? How have the member states as the "Masters of the Treaty" been able to defy the neofunctionalist logic of integration through law? Was Ernst Haas right after all when he argued that certain background conditions are *sine qua non* for any regional integration process?[8]
Based on findings in the Andean Community, I claim that supranational courts are not inherently expansive, and they do not necessarily seek empowerment. However rather than relying on a neorationalist approach that emphasizes the role of the courts as agents of the member states, I develop a hypothesis on constitutional dialogues. I as-

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6 For an overview of these decision and protocols that postponed the deadlines for the Andean Customs Union in 1976, 1978, 1987, 1996 and 1997 see Arellano (2004:7)

7 The current tariff scheme was established in 1995, but is considered an *imperfect customs union* by the Andean Community because of the numerous products that were exempted and the heterogeneous treatment given to the member states. On this issue see web site of the Andean Community <http://www.comunidadandina.org/comercio.htm>

8 For instance societal pluralism, high levels of economic development and ideological convergence. (Haas 1961; Rosamond 2005: 246)

sume that these are not a necessary effect of doctrines, such as supremacy and direct effect, nor do they emerge as a consequence of legal isomorphism rooted on preliminary rulings procedures (article 234 EC). Nevertheless, the absence of constitutional constituencies at national level can be a suppressing factor of judicial activism at the supranational level, even in cases of evident judicial cross fertilization. This is so because if the community attempts to take over a given policy field by means of judicial shirking,[9] it is necessary that comprehensive and abstract principles be previously shaped, so that they can be applied to a vast majority of cases and situations and have at the same time the ability to spill over to other policy fields. In turn, for these principles to trump state executives' policies, the court has to rule *against* member states and activate a constitutional dialogue with national courts that are willing to negotiate their influence on judicial outcomes at the expense of other relevant national actors such as governments, supreme courts, and constitutional courts.

This paper proceeds in the following way:
Part I will briefly describe the part of the EU-polity that was reproduced in the Andean Community, and is important for our analysis, namely the Court and the procedural law. Part II will focus on the performance of the Andean Preliminary ruling in two fields of case law:

a) The Andean Common Market through the Liberalization Programme, which was established by the Cartagena Agreement. I will use insights from neofunctionalism, which has had a growing influence in European case law, in contrast to principles of international law. I will also focus on the understanding of the method of teleological interpretation that the Andean Court of Justice allegedly used in its ruling, under the premise that this method allows the scope of European law to expand, and that this is apparently part of the strategy of supranational judiciary.

b) The Common Policy on Intellectual Property is clearly the field that has motivated the majority of preliminary rulings. We will unveil the real strategy of the Andean Court, taking stock of the teleological guise adopted by the supranational judge, in light of the European judicial saga.

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[9] I use this word with the meaning given to it by principal-agent scholars. (Tallberg 2002: 28)

Part III will propose some explanations that could give our data the necessary coherence in order to be understood.

2. The Neofunctionalist Approach to the Puzzle and the Engine of Integration

My work will focus on two areas within the jurisprudence of the ACJ, tracing a doctrinal line that might have been established by means of preliminary rulings. I will analyze the results of the repeatedly announced teleological interpretation of community law, and the particularities of the policy areas that seem to monopolize court activities in Quito, that is to say, Common Industrial Property Law (currently decision 486), as well as the doctrinal substance that may be found in the Court's resolutions in the area of common market formation. We will compare the results of the analyses with the initial goals in mind at the time of establishing the ACJ, i.e., giving the integration process the necessary momentum by means of consolidating Andean community law.

My approach will be neofunctionalist, as due consideration will be given to subnational actors – private litigants in particular – and, for the sake of analysis, member states will not be treated as unitary actors; on the contrary, such states summon a diversity of interests and players that do not necessarily match the interests of their governments (Stone Sweet 2001). Nonetheless, I will analyze the current explanations and assumptions that have been in place since many scholars revisited the role played by the ECJ in the European integration process. Finally, focusing on the role of supranational courts, it is my aim to search for causal mechanisms that could explain integration outcomes. Therefore I will analyze the normative content of supranational jurisprudence in the Andean Community. The dominant theoretical model among neofunctionalist scholars would expect the Andean Court to advance integration in cooperation with special interest groups and national courts, trying to maintain an aura of technical decision-making based on legal criteria, "masking" its true agenda, like the ECJ did in the European case (Burley and Mattli 1993). By mixing a *Court-devised Cocktail* of "expansive interpretation of community law plus direct effect doctrine" (Dehousse 1998), the supranational court would be expected to seek empowerment that allows judicial review of national law. But for this objective to be achieved, collaboration with national courts is essential. Therefore, necessary "constitutional dialogues" are expected to

emerge (Slaughter, Stone Sweet and Weiler 1998, Stone Sweet 2000) in which inter-court relationships are negotiated, thereby pulling member states into compliance with court rulings. This scheme is based on the general assumption that judges are interested in promoting their independence, influence, and authority (see a general theory of judicial interests in Alter 2001: 45), which would also be expected to be the case in the Andean Court of Justice.

By adopting a neofunctionalist perspective, I depart from Latin American academic traditions that have analyzed the evolution of integration in the light of strategies on how to achieve integration, from *cepalismo,* to structuralism and neoliberalism,[10] which have assumed that the relevant actors in the analysis – if not the only actors – are States (e.g. Blanco 1997: 137). Success or failure of regional integration is explained by the *political will* of the member states to advance integration in given periods of time.[11] This paper seeks to challenge this traditional state-centric view.

Based on findings made in the Andean region, we claim that the neofunctionalist analysis of European integration can be revised with the help of the comparative method. This is especially the case for the propositions that have been taken for granted in the European setting, like for instance the inherently expansive nature of community institutions and their preference for advancing integration (Mattli and Slaughter 1998: 187). After all, how can we be sure that rulings like, say, *Dassonville* or *Costa ENEL* are spawned by a strategy of a judiciary interested in promoting its independence, influence, and authority (Alter 2001), or that they are a product of legal path dependency (Stone Sweet and Brunell 2004), if we do not analyze these propositions? The use of the comparative method allows for systematic testing of hypotheses that claim to be of general validity (Ortiz 2004).

Moreover, a general theory should not only be in a position to explain why expected outcomes occur in some settings, but also why they do not occur in others. That is to say, a satisfactory explanation identifies the relevant factors that cause a phenomenon

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[10] In Latin American literature, it is often talked about inward integration "integración hacia adentro" based on solidarity (estructuralismo) and outwards integration "integración hacia fuera" assimilated to neoliberalism. Although I dissociate from this line of analysis, it might be clarifying to consult Blanco, Ronald (1997)

[11] Alan Fairlie Reinoso, for instance, argues that it is the chancelleries of the member states that were the principal elements in the stimulation of the governments' integration policies. (Fairlie Reinoso 1997: 184). Similar explanations in Arellano (2004:8).

and, at the same time, predicts its absence if – all things being equal - the relevant factors are not present. Therefore, we should not refuse to test the ability of a theory to be self-reflexive, since any comprehensive theory of integration should also potentially be a theory of disintegration (Schmitter 2003). Conversely, if the causal factors are present and the phenomenon is not, then the explanation is unsatisfactory, if not completely wrong.

As I show in this paper, all variables that have been deemed relevant in neofunctionalists' models, like for instance, policy biased institutions, commitment institutions, imperfect contracting, interest associations, shift of expectations, etc. are present in the functional equivalent. Further, and in contrast with other Latin American arrangements, indicators of progressive integration (Haas 1961: 367) are extremely high in the Andean Community due to the establishment of conflict resolution at the supranational level. However, the actors' strategies – particularly those of the Court - do not conform to the dominant model, and therefore something is likely to be wrong with the model.[12]

European integration - as a whole process - has been compared with other settings like Latin America before (Haas and Schmitter 1964, Mattli 2005), but the results have been far from conclusive, since these scholars ended up focusing on the diverging context rather than on the functional equivalent. However it has proved very fruitful to use neofunctionalism in a circumscribed manner in order to avoid syncretism (Rosamond 2000: 103). If neofunctionalism's core arguments are correct, they should also hold true for our comparative enterprise, since the relevant variables are present in both settings.

2.1. Coping with Integration through Emulation?

The creation of a supranational court of justice was heralded by many as an impulse to facilitate the integration process (JUNAC 1979: 15, 84) – the consolidation of what was considered to be the most important integration scheme among developing countries (Bondia García 1999: 111). Others saw in an Andean Court of Justice the missing element that was essential to any regional enterprise (Cruz Vilaça and Sobrino 1996: 92,

[12] Philippe Schmitter warned in his 'Neo-neofunctionalism' that if actors strategies were to change significantly in the absence of variation in the specified variables, something is very likely to be wrong with the model. (Schmitter 2003: 52)

Díaz Barrado 1999: 62), or the vehicle towards building a judicial discipline like that of the European Community (Weiler 1993: 421), especially since, to some Latin American scholars, the Cartagena Agreement appeared to be the constitutional charter of a community of law, just like its European counterpart (Montaño Galarza 2004: 969). This would especially the case, if the Andean non-compliance problem was assumed to be related to a cost-avoiding strategy of the member states (on non-compliance aproaches see Börzel 2002).

If the newly created Andean Court was already exhibiting a striking resemblance to the court in Luxembourg, it was procedural law that would have the most European influence. The Treaty Establishing the Court of Justice of the Andean Community (TCTJCAN) envisages: non-compliance procedures; nullifying procedures; a recourse of inaction or omission; preliminary rulings; and, from 1996 onwards, the Court has been granted competencies on arbitration and labour jurisdiction (Sánchez Chacón 2001: 41-3).

The goal of the founders of the TCTJCAN was to give the Court tools equivalent to its European counterpart,[13] and thus finally to achieve the dynamism that was deemed necessary for the Andean Group to succeed. Non-compliance by member states with the duties imposed by the Agreement was usually responded to with retaliatory action in the form of suspension and non-compliance by the contracting parties (Marwege 1995: 69). Additionally, the European judicial saga that had led to the establishment of the community legal system (Mattli and Slaughter 1996) was well known by the member states, as were the doctrines of direct effect (case 26/62 *Van Geld & Loos* [1963]*)* and of supremacy of community law (case 6/64 *Costa ENEL* [1964]). Those doctrines had been established through the mechanism of preliminary rulings, and, despite initial opposition from the member states, were incorporated into the *acquis communautaire*, labelling the Court the "engine of integration" (Schroeder 2004: 186).

However, implementation of this judicial mechanism within the Andean region has been far from successful. On the one hand, there is no consensus on the efficacy of Andean

[13] With the adoption of the Trujillo Protocol on March 10th, 1996, an institutional reform of the Andean Community was made. The Andean System of Integration (SAI) was established with the aim of reinforcing effective implementation of supranational norms (Secretaría General CAN 2006: p. 15)

community law, and on the other hand, 27 years after its foundation, the Andean Community has not been able to achieve its main goal of establishing a common market. Indeed, what exists today, is an imperfect customs union ("unión aduanera imperfecta"; Taccone and Nogueira 2005: 51).

3. The Andean Preliminary Ruling

Andean scholars seem to have a consistent view of the importance of this mechanism. Uribe Restrepo confidently states that without this preliminary mechanism community law would have virtually no chance of functioning adequately (Uribe Restrepo 1993: 19). Likewise, Luis Sáchica argues that legal integration is only possible as long as national judges give direct effect and prevalence to community law over national law (Sáchica 1985: 150).

From a neofunctionalist perspective, by means of a strategic use of preliminary rulings actors can further their individual interests (Stone Sweet and Brunell 2004: 52-5, Stone Sweet 2001: 17). The actors come before the community judge and exert influence on the policy-making process, with the aim of changing less favourable norms into more favourable ones (Stone Sweet 2001: 8).

This in turn sees a flourishing of constitutional dialogues, through which national courts bargain their final position at the macro-level (Slaughter, Stone Sweet and Weiler 1998).

Why, then, have the goals of the common market not been accomplished, if the Andean Community has shaped a polity design equivalent to that of the European Community, with a supranational court that has the ultimate power to interpret community law, which in turn should have a direct effect as well as supremacy, just like the Luxembourg Court?

3.1. Establishing the Common Market by Expansive Interpretation

In *L'esprit des lois,* Charles Montesquieu described judges that did not work creatively to interpret the law; according to the Roman tradition, their function was to serve as mere mouthpieces of the law, either absolving or convicting defendants (Montesquieu 1748: 82). Nonetheless, analysis of the role of the ECJ in the integration process suggests that the framework treaties allow plenty of scope for creativity in choosing from among different possible interpretations of the law (Dehousse 1998: 72); and the ECJ has not missed the chance to attempt an extensive interpretation of community norms whenever the text lacks specificity. In the *Dassonville* ruling (case 8/74 [1974]), the Court expanded the meaning of article 30 of the Treaty, reasoning that "banning discriminatory measures" should be understood as prohibiting any norm capable of impeding directly or indirectly, actually or potentially, intra-community trade. According to this interpretation it is not so relevant whether a given national measure is overtly discriminatory in nature or not; what is relevant is the impact of this measure on intra-community trade (Dehousse 1998: 74). Nevertheless, the Court did not *why* it made this choice. We will come back to this issue.

Andean case law found itself confronted with similar questions, since article 41 of the Cartagena Agreement established a programme that pursued the progressive dismantlement of trade barriers, namely the *Programa de Liberación de la Comunidad Andina.*[14] Nevertheless, article 55 of the Agreement allowed a list of exceptions to liberalization, with goods that were considered sensitive for the economies of member states.[15] However, the text of the Agreement was not explicit about the nature or the scope of these exemptions, and this provided a perfect opportunity for the Court to fill in the gap.

In case 1-IP-90 on preliminary ruling, the plaintiffs Aluminio Reynolds Santo Domingo and the Sociedad Aluminio Nacional S.A. sued the Colombian Government, claiming the annulment of a governmental decree – Ley 75 of 1986 - that imposed a tax of 18

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[14] **Acuerdo de Cartagena Artículo 72 (ex artículo 41).-** *El Programa de Liberación de bienes tiene por objeto eliminar los gravámenes y las restricciones de todo orden que incidan sobre la importación de productos originarios del territorio de cualquier País Miembro*

[15] This article was amended by Decision 217 of the Commission, and ratified as an amendment of the Cartagena Agreement by virtue of the Quito Protocol of the 12th of May, 1987. Today it has been abrogated.

per cent on the CIF value of aluminium imported from Venezuela. The claimants requested that the Cartagena Agreement be interpreted teleologically, thus vindicating the goals of the integration process. Although article 55 and its list of exceptions to liberalization could not force member states to reduce existing tariffs on these goods, this position prohibited both *raising* current tariffs levied on them and taxing them with any additional duty. Thus, the existence of lists of exceptions to liberalization should be interpreted as a mere delay in the process of dismantling trade barriers, something the member states had committed themselves to through the Liberalization Programme.

In light of neofunctionalism, this should not surprise us, considering that in 1988 the Court had highlighted the teleological interpretation of Andean community law, which had its foundation in community primary law and served the integrationist common purpose (*propósito común integracionista*)[16]

On the other hand, the Colombian government fiercely opposed this position, claiming that the Andean Commission itself, i.e. the legislative body, had decided to amend article 55 of the Agreement introducing the lists of exceptions by decision 217 – secondary community law - arguing that "*systematic interpretation* [is] *the only valid source when it comes to norms that are part of a coherent legal body like the Cartagena Agreement*"[17]. The defendant added that the text of the Cartagena Agreement should be interpreted as obliging States to refrain from raising tariffs *only* on those goods expressly listed in the Liberalization Programme of article 41; it follows that the programme cannot be applied to a comprehensive[18] set of goods, either currently or in the future.[19]

In its national stage, the case came before the highest Colombian Administrative Court (*Consejo de Estado de la República de Colombia*) which referred it to the Andean Court requesting a preliminary ruling on articles 45 (today 76) and 55 (today abrogated)

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16 "*En cuanto a la interpretación del derecho comunitario, ratifica el Tribunal en esta oportunidad los criterios establecidos en anterior sentencia, dictada en el Proceso No. 1-IP-87. Se aplica los métodos de hermenéutica jurídica generalmente aceptados, pero corresponde, llegado el caso, el empleo preferente de los métodos funcional, sistemático y teleológico. La utilización de este último tiene su fundamentación en el mismo Tratado de Creación del Tribunal, ya que sus atribuciones derivan de la necesidad de contribuir a la consecución del propósito común integracionista.* (case 1-IP-88)

17 "*interpretación sistemática como la única válida tratándose de normas que hacen parte de un cuerpo legislativo coherente como es el Acuerdo de Cartagena"* (case 1-IP-90)

18 "universal" in the words of the Colombian government

19 **Acuerdo de Cartagena: Artículo 76.-** *(antiguo artículo 45) El Programa de Liberación será automático e irrevocable y comprenderá la universalidad de los productos, salvo las disposiciones de excepción establecidas en el presente Acuerdo, para llegar a su liberación total en los plazos y modalidades que señala este Acuerdo*

of the Cartagena Agreement, and adjudication on the matter of whether member states should retain the right to raise tariffs on goods that were listed as exceptions to the Liberalization Programme.
The Andean Court was confronted with two contradictory interpretations. On the one hand there was the expansive interpretation, in the style of *Dassonville*, in which the consequences of additional taxation on imported goods were taken into consideration; on the other hand, there was the restrictive interpretation demanded by the Colombian government, claiming that if the text of the Agreement did not specifically prohibit raising tariffs, it should be understood that member states retained their right to do so.

The Court accepted the latter argumentation, and pointed out that in this case a norm that restricted the freedom of member states was at stake. This meant, according to the Court, that this norm was also subject to a restrictive interpretation, and that member states were free to decide for themselves on matters of tariffs and restrictions related to these exempted goods;[20] therefore the Cartagena Agreement by no means prohibited them from levying new taxes or giving these goods favourable treatment.[21] The Court went on to state: "*it must not be forgotten, finally, that norms that limit freedom must be interpreted restrictively, as the exception to the general rule they are, according to a universally accepted principle of interpretation"*[22]*.*

This restrictive interpretation was considered by the Andean judges to be compatible with article 3 of the Cartagena Agreement, which states that in order to achieve the objectives of the Treaty, a more advanced trade liberalization programme should be used than the agreements reached in the Treaty of Montevideo of 1980. While it must not be overlooked that the Court had previously accepted the Liberalization Programme as the most important mechanism to achieve the common integrationist goals, its restrictive reasoning indicates that the Andean Court yielded to the position of international law that stands against eventual loss of sovereignty of the States (Weiler 1982: 270).

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20 "…*los países miembros son autónomos para decidir sobre gravámenes y restricciones en relación con productos reservados o exceptuados…"* (case 1-IP-90)

21 "… el *Acuerdo de Cartagena en ningún caso les prohíbe imponer nuevos gravámenes o conceder dichos productos un tratamiento más favorable*" (*Ibid.)*

22 "*No debe olvidarse, finalmente, que las normas que limitan la libertad deben ser interpretadas restrictivamente, como excepción que son a la regia general, según un principio de interpretación universalmente aceptado*". (*Ibid.*)

Although preliminary rulings on the issue of the Liberalization Programme are scarce, the doctrine of restrictive interpretation was again invoked in the discussion of case 3-IP-93, which was initiated by the *Sociedad de Aluminio Nacional* against the Colombian Customs Authority (*Dirección de Aduana de Colombia*), on the same grounds and directed against the same decree, namely the *Ley 75* of 1986. In this case, the Court came back to the precedent and pointed out that restrictive interpretation should be used when it comes to Liberalization Programme "…*since the clear goal of those norms is that of limiting the freedom which governments initially have for the purpose of levying taxes, in accordance with their loyal knowledge and understanding"*[23]

The Court once again discarded any expansive interpretation.[24] Consequently, member states retained the right to impose taxes and other duties on imports coming from the region, as long as they were listed as exemptions to the Liberalization Programme.

From the point of view of a contributing towards the consolidation of a common market, this interpretation goes clearly in the opposite direction (for the same argument, see Marwege 1995: 250). Moreover, it strengthens the decision-making capacities of the member states in the field of taxation of goods.

If we take a look at the European situation, we see that the ECJ has been confronted with the possibility of restricting community policies for the sake of the freedom of member states, but has interpreted differently the Treaty's objectives concerning restrictions of the relevant policy, and hence the latter has had to yield to the former. In the case of *Continental Can 6/72,* (paragraph 24) the ECJ ruled that eventual restrictions imposed on competition policy find their limit in the general principles of the legal order, contained in articles 2 and 3 of the Treaty (Anweiler 1997: 211). Moreover in case 3/62 *Commission v. Luxembourg*[25] the European Court used the teleological in-

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23 "…*ya que el claro objetivo de dichas normas es el de limitar la libertad que inicialmente se encuentran los gobiernos para imponer gravámenes según su leal saber u entender*" (case 3-IP-93)

24 *"El Programa de Liberación, como se ha visto, se refiere a una "universalidad" relativa de productos y no a la totalidad de los originados en la Subregión."...* (case 3-IP-93, citing case 1-IP-90)
"Este principio de hermenéutica viene en respaldo de la interpretación de los Artículos 45 y 54 del Acuerdo de Cartagena, adoptada por el Tribunal según las consideraciones que anteceden, ya que el claro objetivo de dichas normas es el de limitar la libertad en que inicialmente se encuentran los Gobiernos para imponer gravámenes según su leal saber y entender. Tales limitaciones, que obviamente requieren de consagración expresa, han de ser interpretadas restrictivamente, como en este caso lo ha hecho el Tribunal." (case 3-IP-93, citing case 1-IP-90)

25 "…it follows, then, from the clarity, certainty and unrestricted scope of articles 9 and 12, from the general scheme of their provisions and of the treaty as a whole, that the prohibition of new customs du-

terpretation and ruled that restrictive interpretation was to be used in those cases where the question at stake was about eventual exemptions to the policy of free movement of goods (Anweiler 1997: 232).

It has been argued that this dynamic approach can be found in periods of inertia and stagnation of the Commission and the Council of the EU (Rasmussen 1986: 178) which in turn reminds us that, within the Andean Region, the deadlines for the establishment of the Customs Union have been repeatedly postponed by intergovernmental decisions.

3.2. Common Policy on Intellectual Property: the Case of the Patents

Regulation of industrial property rights, especially those related to patents, belong to the competencies of the Andean Community. This has also been the policy field that has demanded the most jurisprudential activity in Quito. For instance, during the period 2004-2005, preliminary rulings related to the common policy on industrial property amounted to 92% of the total sum of preliminary rulings from that period of time (TJCAN 2005: 7).

3.2.1. Decision 85 and the Stauffer Chemical Doctrine

The Andean Commission approved decision 85 (5th of June 1974) with the name "Regulation for the Applicability of Norms on Industrial Property"[26]. Its source of inspiration was Colombian law, which it followed almost to the letter.[27] This decision coined a remarkable phase in Andean jurisprudential history, since it was under its rule that the doctrines of Supremacy (*Preeminencia;* case 2-IP-88) and Direct Applicability (*Aplicabilidad Directa:* case 1-IP-88) were established. Decision 85 sought to give uniformity to national regulations on the concession and protection of rights stemming from

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ties, linked with the principles of the free movement of products, constitutes an essential rule and that in consequence any exception, which moreover is to be narrowly interpreted, must be clearly stipulated" ECJ case 3/62: p. 432

26 *Reglamento para la aplicación de las normas sobre propiedad industrial*

27 The ACJ recognized this fact in case 3-IP-88.

trademarks, patents and licenses. But its most remarkable feature was its article 5, c).[28] This disposition prohibited national authorities from granting patents of invention to pharmaceutical products, medicaments, therapeutically active substances, beverages and food, all of them for human, animal, or vegetal use. The rule was coherent with the import substitution policy of that time; it must not be forgotten that the Agreement considered technological development as a crucial mechanism for the subregion's development (Article 3 letter a) *bis*, Agreement of Cartagena).

The first ruling in this saga became known as the *Stauffer Chemical* ruling (1-IP-88) based on decision 85. In this process the Stauffer Chemical Company filed a lawsuit against the Industrial Property Division of the Colombian Regulation Authority for Industry and Trade (*Superintendencia de Industria y Comercio de la República de Colombia*) because the latter failed to register a patent for the invention of a herbicide presented by the former. The authority's refusal motivated the company to file a judicial action before the Supreme Administrative Court (*Consejo de Estado*) to declare the decree of refusal null and void, since herbicides were not mentioned by article 5 c). That decree of refusal, *Resolución 322*, apparently violated community law. The *Consejo de Estado* in turn, acknowledging that the question was a matter of community law, requested a preliminary ruling on the matter of whether herbicides should be understood as being included in the list of non-patentable products, despite not being expressly mentioned by article 5 letter c).

The Andean Court again invoked teleological interpretation to assess the question raised, and argued in favour of "the preferential use of the functional, systematic and teleological interpretation. The use of the latter has its foundation in the Treaty of Creation of the Court, since its attributions stem from the need to contribute to the common integrationist purpose". [29] It follows then, that the concession of industrial property rights should not become an obstacle to the proliferation of technology within the Andean region. According to the Court, a patent configures a monopoly over the exploita-

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[28] "Artículo 5.- No se otorgarán patentes para: (…) c) Los productos farmacéuticos, los medicamentos, las sustancias terapéuticamente activas, las bebidas y los alimentos para el uso humano, animal o vegetal".

[29] "*…el empleo preferente de los métodos funcional, sistemático y teleológico. La utilización de este último tiene su fundamentación en el mismo Tratado de Creación del Tribunal, ya que sus atribuciones derivan de la necesidad de contribuir a la consecución del propósito común integracionista"*. (case 1-IP-88; emphasis added)

tion of an invention. In the words of the Court: "*the system of patents must not hinder the Andean Community's process of development, but on the contrary, it must constitute a coadjutant factor*".[30] In other words, herbicides should be allowed free use within the Andean region. Thus, they were considered to be included among the exemptions to patentability listed in article 5, letter c) of decision 85 – teleologically interpreted.

Nevertheless, a seed that would grow with considerable consequences had been planted by the supreme interpreter. The Court briefly revealed what it really understood by teleological interpretation: it reasoned that it considered that teleological interpretation had to conform to the goals carried in mind by the organ that generated the norm rather then the goals of the Treaty itself.[31]

The doctrine established for *Stauffer Chemical* was reaffirmed in the rulings for *Ciba Geigy A.G.,* cases 3-IP-89 and 7-IP-89. In those processes the plaintiff, *Ciba Geigy A.G.* judicially proceeded against an administrative act of the Colombian Industrial Property Division, again based on the fact that this authority refused to register the claimants' invention: a herbicide. The Industrial Property Division argued that a herbicide was by nature a "medicament with vegetal use", and therefore one of the exemptions considered in article 5 letter c) of the decision 85, in the terms stated for *Stauffer Chemicals*. The case was referred again to Quito for a preliminary ruling.

The Andean Court came back to the importance of using the teleological interpretation over other forms because it was more consistent with communitarian nature than any other method of interpretation,[32] and it consequently drew attention to the historical background of decision 85. This had been discussed in an earlier case 7-IP-89, between identical parties, in which the Court had implicitly referred to the "dependence theory"[33]; that is to say, laws on industrial property rights had been established by the developed countries in times when the Andean countries had not yet become industrialized and the possibilities of technology-creation were practically non-existent. Moreover, offering protection to exploitation monopolies – the actual goal of such a system,

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30 "*el sistema de patentes no debe entorpecer el proceso de desarrollo de la Comunidad Andina sino, por el contrario, debe constituirse en un factor coadyuvante*." (Ibid.)

31 "*teniendo en cuenta la finalidad perseguida por el órgano generador de la norma*" (case 1-IP-88)

32 "*Esta interpretación, de otra parte, debe atender al elemento sistemático y al teleológico, de preferencia a los elementos gramatical, idiomático, técnico o lingüístico, ya que esa es, precisamente, la hermenéutica que mejor se aviene a la naturaleza propia del derecho comunitario*" (case 3-IP-89)

33 In Spanish "*teoría de la dependencia*"

the Court argued - produced undesired effects on the region's economy and favoured the capture of markets by foreign products.[34] The countries belonging to the Andean group, were "victims of their dependency on industrialized countries and therefore extremely vulnerable, requiring an institutional framework that would protect them".[35] The Court also elaborated on the limits of this protection, which were outlined by the general goal of the Agreement (Article 2), consisting of the promotion of a balanced and harmonious development of the member states[36]. Therefore – according to the Court - herbicides were included in the exemptions to patentability listed by article 5 of decision 85.

3.2.2. Decision 344 and the Change of Paradigm

Decision 85 – secondary community law - was in place for 17 years, motivating profuse case-law decisions in the Andean Court of Justice, and was replaced by subsequent short-lived decisions[37] until decision 344 was approved on October 21st, 1993 by the Commission of the Cartagena Agreement in Bogotá,[38] and came into force on January 1st, 1994.

Decision 344 – also secondary community law - contained a substantial amendment: the Andean Commission had cut away the controversial letter c) of article 5 (now article 7), and the prohibition for patenting pharmaceutical products was no longer in place.

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34 "*Las leyes de propiedad industrial, inspiradas en las necesidades e intereses de los países desarrollados habían sido implantadas en los países de la región en momentos en que el desarrollo fabril no había realmente comenzado y la posibilidad de creación tecnológica era inexistente. La protección a los monopolios de explotación, objetivo fundamental de estos sistemas de patentes, producía efectos no deseables para la economía de la región y favorecía la captura de los mercados para los productos extranjeros, la tenencia de las patentes por los agentes de la economía transnacional, la ninguna o escasa vinculación de la inventiva local con el proceso productivo real, el entorpecimiento del flujo tecnológico externo por la imposición de cláusulas restrictivas, la posibilidad de fijar precios monopolísticos del aprovechar la patente para eliminar la competencia, etc.".* (case 7-IP-89)

35 "[*Los países del grupo Andino,] víctimas de su dependencia frente a los países industrializados y extremadamente vulnerables, requieren de un marco institucional que los defienda*" (Ibid)

36 "[*Las disposiciones de la Decisión 85] tienen como objetivo fundamental establecer una relación de consecuencia directa entre el desarrollo socio-económico, en especial el tecnológico, y los derechos que se conceden a los particulares. Es decir, que la protección de estos últimos tiene su justificación moral, económica y jurídica en que los mismos sean mecanismos que promuevan el desarrollo equilibrado y armónico de los Países Miembros y el mejoramiento persistente del nivel de vida de los habitantes de la Subregión"* (case 3-IP-89).

37 Decision Nº 311 of 12th of December 1991; Decision 313 of 6th of February, 1992. Significant jurisprudence has not been found, which might be explained by the short time they were in place.

38 Published on the Official Journal Nº 142, 29th of October 1993

This new regulation was clearly less favourable to the Andean pharmaceutical industry, which had made profits by trading pharmaceuticals without being bound to pay any patent duties or fees to extra-regional companies. According to the assumption that private litigants are rational self-interested actors, it would not be long before private litigants would make strategic use of preliminary rulings as a mechanism to reinforce their preferences, by means of reasserting the goals of the Treaty as guidelines for the interpretation of decision 344, especially since the Court of Justice had upheld the importance of the "common integrationist purpose" (ruling 1-IP-88).

The expected action came in the form of case 6-IP-94. The actors were a group of Ecuadorian laboratories that filed a lawsuit against their government for having dictated decree 1344-A, which regulated at domestic level the above mentioned decision 344, because it allegedly violated Andean community law. The presidential decree now facilitated the concession of patents for those inventions that had been prohibited for registration under decision 85.[39] Moreover, this measure directly affected the interests of the pharmaceutical companies, who argued in their claim that the Ecuadorian pharmaceutical industry would disappear, that it would be ostracized from the integration process, and therefore the spirit of the Cartagena Agreement would be violated.[40]

The case was referred to the Andean Court of Justice, summoned to adjudicate on matters concerning the "spirit of the Agreement". In its final ruling, the Court starts by acknowledging "the welfare of the Andean inhabitant as being the first goal of the

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[39] *Los artículos controvertidos del Decreto 1344-A:*
*"**PRIMERA.-** Se concederán patentes para todos aquellos inventos cuya patentabilidad no estaba permitida antes de la vigencia de las Decisiones 311, 313 y 344 de la Comisión del Acuerdo de Cartagena cuando se hubiere obtenido patente en cualquier país extranjero. El plazo de concesión de la patente será igual al que falta para completar el plazo de vigencia de la primera patente solicitada en el exterior, para cuyo fin se presentará copia de la primera solicitud en el exterior y de la patente concedida. En ningún caso el plazo de concesión será superior al de veinte años contado desde un año después de tal primera solicitud. Las solicitudes deberán presentarse en el Ecuador dentro del plazo de un año desde la vigencia de la Decisión 344."*
***"SEGUNDA.-** De igual modo se concederán patentes para todos aquellos inventos cuya patentabilidad no estaba permitida antes de la vigencia de las citadas Decisiones, si es que se hubiere solicitado la concesión de patentes en el exterior y se presentaren las solicitudes en el Ecuador dentro del plazo de un año desde la vigencia de la Decisión 344 sin prejuicio de lo dispuesto en el art. 12 de la Decisión 344 y 10, inciso segundo de este Reglamento. Si se llegare a conceder patentes para los inventos referidos en este inciso, sus titulares tendrán los derechos que prevé el inciso segundo del Art. 51 de la Decisión 344 y, en general, gozarán de los derechos pertinentes derivados de las disposiciones de la Decisión 344 y de la Ley de Patentes de Exclusiva de Explotación de Inventos."*

[40] *"[d]esaparecería la industria farmacéutica ecuatoriana, quedaría al margen de la integración andina y se violaría el espíritu del Acuerdo de Cartagena*." (case 6-IP-94).

subregional agreement, according to article 1 of the Cartagena Agreement, the first community norm that guides the very philosophy of the integration mechanism".[41] However, the Court continues by stating that the Andean Community had been striving for common rules that would allow its incorporation - under equal conditions - into a world that did not develop uniformly. Therefore "prohibitions regarding pharmaceutical patents that were in place before the validity of decision 311, 313 and 344, that is to say, those contained in article 5 of decision 85, those prohibitions ceased to be legally effective with the new Andean legislation, and so it follows that the prohibitions in article 7 of decision 344 are still valid today".[42] Moreover, this interpretation of decision 344 would be harmonious with the Paris Convention on the protection of Industrial Property and the Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPS). "All of them [are] consistent with the common spirit of defence and protection of rights emerging from intellectual property, and in order to be applied within the Andean group must therefore show absolute accordance with the spirit of decision 344 of the Cartagena Agreement".[43]

The analysis shows that the ACJ draws the principles of Andean community law from the will of the legislator – in this case the Commission - and not actually from the founding goals of the Cartagena Agreement, nor from its declared spirit or philosophy of integration, since neither its goals nor its spirit could possibly have been mutated by the mere promulgation of decision 344.[44] It must be stated, nevertheless, that Latin American literature on Andean community law overwhelmingly agrees with the assumption that the Court actually followed teleological interpretation.[45]

If we compare this specific finding with the European situation, we see divergence among interpretation methods. Despite the fact that the ECJ has made use of the his-

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41 *"…el bienestar del habitante andino, primer objetivo del Acuerdo Subregional, conforme lo establece el artículo 1º del Acuerdo de Cartagena, norma comunitaria primaria que orienta la filosofía misma del mecanismo de integración"*(case 6-IP-94)

42 "*en lo tocante a las prohibiciones existentes sobre patentes farmacéuticas antes de la vigencia de las Decisiones 311, 313 y 344, o sea las que existían en el artículo 5º de la Decisión 85, dichas prohibiciones dejaron de tener vigencia a partir de la nueva legislación andina quedando establecido como lógica consecuencia, que las únicas existentes a la fecha, son las contempladas en el artículo 7º de la Decisión 344 hoy vigente*"

43 *"Todos ellos convergentes con el espíritu común de defensa y protección de los derechos emergentes de la Propiedad Intelectual y que para ser aplicados en los países del grupo andino, deben guardar absoluta concordancia con el espíritu de la Decisión 344 del Acuerdo de Cartagena." (*Ruling *6-IP-94: 17-8)*

44 This understanding is bolstered by the text of rulings 3-IP-94, and 6-IP-94 where the ACJ makes the *Ratio Legis* of Integration Law equal to the "will of the legislator"

45 For instance Sáchica (1985), (2001), Uribe Restrepo (1993) and Vigil Toledo (2004)

torical element to interpret some provisions of secondary community law, in case of conflict with the goals of the Treaty (EC) it is the teleological interpretation that must prevail (Anweiler 1997: 206).[46] As a result, secondary community law must necessarily be subordinated to the principles that spring from primary law, since otherwise the unity of the legal order would be jeopardized (Zuleeg 1969: 97). In other words, it is not credible to interpret primary community law according to its *ratio legis*, and simultaneously secondary law with historical-systematic tools of legal interpretation (see case ECJ C-300/89 Commission v. Council, and case 45/86 APS; Anweiler 1997). In addition, and due to reasons of legal certainty, the historical method of interpretation has been limited to those cases where the will of the legislator can be drawn from explicit documentation incorporated into the piece of legislation, like for instance, an annex or addendum (Schroeder 2004: 183).

In the long term, the jurisprudential line adopted by the ACJ allowed Andean law to make a smooth transit to the later decision 486. This piece of legislation came into force on December 1st, 2000, and replaced decision 344, as well as its successor, decision 85. With decision 486, the Andean Community adapted its Common Policy on Industrial Property to the TRIPS agreement, bolstering rights stemming from industrial property in accordance with multilateral treaties (Bianchi Pérez 2002: 103), and yielding to the interpretation that follows the will of the community legislator.

4. The Andean Dilemma and the Neofunctionalist-Intergovernmentalist Debate

If we carefully analyze the empirical data that we have found in the jurisprudence of the ACJ, we are *prima facie* tempted to admit the prevalence of explanations that are based on neorationalist intergovernmentalism rather than on neofunctionalism. In addition, the assumption according to which supranational courts are agents that serve the member states' interests, and that their effective authority depends on the acceptance of its rulings on behalf of the principal becomes plausible. This is because one of the

[46] For this stand Anweiler cites rulings on case C-215/88 (Fleischhandel), case 45/86 (APS), and C-300/89 (Commission v. Council). However, the author mentions an opposing current to what he categorizes as teleological-objective interpretation.

crucial neofunctionalist assumptions, namely the expansive nature of supranational courts, fails the test in the Andean case with no satisfying explanation. So if the court is indulgent with the member states, and these do not flout court's decisions or do not override court rulings through treaty revisions, then – according to the neorationalist argument - it should be assumed that member states' preferences are being served (Garrett 1995: 178). Nevertheless, this explanation also remains unsatisfactory in the light of principal-agent (P-A) approaches: First, P-A approaches insist that one of the purposes that lead member states to delegate authority to a supranational court is to solve monitoring problems (Garrett 1995: 172, Garrett and Weingast 1993). However, if we assume that the ACJ's decisions followed member states' preferences, and then realize that this court curtailed its own monitoring competences, then we face a contradiction, since the agent would have sought to leave the monitoring problem unsolved. Secondly, if the establishment of a court aimed at overcoming a credibility problem (Tallberg 2002: 29, Thatcher and Stone Sweet 2002: 4), it remains unexplained how it could possibly be in the interest of member states that the court ruled on the prevalence of secondary community law over treaty goals. If in the eyes of the court, states remain sovereign to alter the course of integration by means of secondary law, then the credibility gain is close to nil. Perhaps an eventual sovereignty loss might be avoided, but the act of delegation to a court would not make any sense if it is going to shrink its own competences. Thirdly, neorationalists have concurred with neofunctionalists that courts can be understood as a strategic rational actors. Courts preferences are to extend (European) community law and their authority to interpret it (Garrett 1995: 173). Simultaneously, courts allegedly seek to enhance their reputation through constraining the behaviour of a powerful member state, as long as they expect the government to accept their decision (Garrett 1995: 178, 80). But in the Andean case, we see that the court has undermined the scope of community law in the region, and it did so even in cases where the products subject to litigation corresponded to a minor sector of the economies, namely herbicides or aluminium.[47] In none of the exposed cases, which seem to be the most relevant in terms of doctrinal importance, did the court rule against any member state in order to enhance its reputation or legitimacy.

[47] According to current statistics (2006), imports of herbicide and unwrought aluminum account for less than 0,21% and 0,57% of total imports to Colombia. Source: UN's Economic Commission for Latin America, division of international trade and integration. <http://www.cepal.org/comercio> (ECLAC 2005)

So, since neither the neofunctionalist nor the intergovernmentalist approach seem to convincingly explain the case of the Andean Community, it becomes necessary to frame a new set of assumptions in order to overcome the flaws that have become apparent and to understand the choices made by the ACJ.

The two sets of data – on the issues regarding the common market and intellectual property rights, respectively - testify to two dilemmas with which the Andean Court was confronted.

In the case of the exceptions to the establishment of the common market –the *Aluminios Reynolds* case- the legal facts and argumentations show a conflict between a community policy, i.e. liberalization of the market on the one hand, and on the other hand a general principle like the freedom of the member states not to be held liable for obligations under international law unless the circumstances are clearly and expressly stated in any of the agreements in which they engage.

If we try to comprehend the dilemma, we are struck by the fact that the two arguments come from different arenas. Private litigants file their arguments from a private sphere, while member states refuse to abandon their status as subjects of international law. Each tries to force the contender to enter the arena from which they hold their own argument. There is disagreement as to which set of rules prevails in this situation: community law in its economic constitutional dimension, or international law with its view of the Cartagena agreement remaining a traditional international treaty. We should not be surprised by this, since it has often been the case in the history of European integration that actors engage in these conflicts with disparate normative expectation.[48] This is by no means alien to judicial developments. Legal arguments displayed by both litigant parties might seem very reasonable from a strategic point of view. Both member states and private litigants seem to have exhausted legal arguments that were at their dis-

[48] The ruling *Costa v. E.N.E.L* is a noted example for this. Responding to the Italian government's allegations that national courts are obliged to apply national law, the Court states settles the argument stating that "*[By] contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply".* (*Costa v. E.N.E.L. 6/64*). See also *Van Geld en Loos: "To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, he general scheme and the wording of hose provisions. The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states" (Van Geld en Loos 26/62*).

posal at that time, and I do not intent to focus on them here. Yet, a political scientific analysis should be able to take the debate outside its juridical dimension.

If we are to remain loyal to political reasoning, we should adopt a coherent framework before evaluating our data, or interpreting the significance of actors' choices. The first thing to do is to acknowledge that the legal dilemma of the ACJ is not identical to the political dilemma it was confronted with. What in the eyes of a litigation lawyer appears to be a conflict between (a) the efficacy of a given community's policies and (b) freedom of member states, is for political scientists rather a dilemma about the allocation of regulatory authority. In other words, the normative argumentation contained in the legal cases tells us little about the instrumental effectiveness of law for furthering integration.[49]

As was the case for European member states, the Colombian government's position appears plausible within a model in which there is a clear division between competences that belong to two different levels. In such a view, community competences are limited to those areas that have previously been assigned to it by the member states. Because these competences are being transferred gradually, it should not be assumed that states have renounced all competences from the outset. For every step towards further integration, a new dividing line between both fields of competence should be drawn by the member states through the intergovernmental community organ: the Andean Commission. If the matter *sub judice* is about goods that are listed as exemptions to liberalization or negative integration (Scharpf 1995), then it is a question that falls within the regulatory field of the member states. Because of this clear division of competences, it is for the states and not for the Court to decide *if* or *how* these exempted goods should be taxed. This model is very close to traditional readings of the treaties that we find in international law, that is to say, against eventual losses of state sovereignty (Weiler 1982: 270).

The position of the private litigants, on the other hand, corresponds to a different model inspired by the European experience. If member states commit themselves to found a

[49] Karen Alter makes a similar argument claiming that legal scholarship and political science correspond to different paradigms. The former tends to emphasize the authoritative content of texts, mainly due to the tradition of legal exegesis, while the latter focuses on puzzling behaviours, looking for plausible explanations that go beyond authoritative sources. (Alter, Dehousse and Vanberg 2002)

community with supranational attributes in order to establish a common market, then it can only be assumed that it is beyond the capabilities of individual member states to achieve this task on their own. By creating the community and establishing a commitment institution (Mattli 1999), the member states recognize the regulatory authority of the Community regarding transnational trade, and leave for themselves only specific items or exemptions that correspond to domestic rather than commercial criteria. Thus, since community law must be allowed to grow gradually, materializing through statutes that begin replacing national law, there is no dividing line separating the two fields of authority. When it comes to the common market, member states cede sovereignty to the Community, which in turn starts regulating a policy area. If the member states have decided from the outset that certain barriers should not yet be dismantled, then the Community must respect this. However, this does not mean that the states retain regulatory authority over these goods. On the contrary, they can only choose between using this privilege and renouncing it; they cannot regulate it. Therefore, every issue arising outside of specific exemptions, or every grey area that has not clearly been claimed by the member states, falls within the higher regulatory field of the Community. What the claim of the private litigants implied in political terms was that the Community should take full control of the regulatory authority that it was entitled to exert in this policy field, and that national regulation dealing with tariffs higher than those already in place at the moment when the list of exceptions was established should be replaced with community regulations: in this case the Court's criteria. This has been called the centralist model (Maduro 2002).

By representing the Andean dilemma through these two heuristic models, it is possible to identify a crucial difference between it and the experience made with the "Euro-law game". Concerning the establishment of the Andean Common Market – as opposed to a partial liberalization programme- there is no certainty as to *who* is the ultimate authority in policy making. In turn, if there is no certainty as to who should be in charge of the intra-community trade policy, it is unlikely that comprehensive and abstract doctrines will emerge, since such doctrines must be applicable to a majority of cases. If doctrines on Andean intra-regional trade law cannot be applied to all regional trade, they will be severely inadequate. We will return to this point later.

For this dilemma of institutional choice to be solved, considerable judicial discretion is necessary. In the cases exposed, the Andean Court was required to make a decision

with institutional repercussions, which demanded plausible justification. This is what MacCormik has called "second-order justification", giving reasons that justify choices between rival rulings (MacCormick 1978: 101, Maduro 2002: 20). In the case of *Dassonville*, the European Court of Justice did not justify its choice. Instead it resorted to what Poiares Maduro called formal reasoning, that is to say, syllogistic reasoning that presents the decision of the Court as the only possible legal decision. Yet, by doing so, the Court does not answer *why* this choice was taken, since it does not even acknowledge that a significant choice between two institutional alternatives was at stake. According to Poiares Maduro,

> "[T]he adoption of formal reasoning as a model of justification in the Court's decisions is, in part, a consequence of legal traditions in Member States that are, nevertheless, becoming outdated. For the European Court of Justice, the adoption of formal reasoning responded to the need to establish its judicial authority by preserving an image of neutrality and impartiality" (Maduro 2002: 22).

This brings us back to our finding once again. *Dassonville* was about non-tariff barriers to trade. The struggle over who was to be in charge of the policy domain of tariffs had been settled long ago, and now it was about shaping general principles within an economic constitution. The principal question was not about who governed article 30 of the EC Treaty, but rather which cases fell within the range of article 30.

Clearly the Andean Court would have had a more daunting task if it was to follow the footsteps of the ECJ. If the Andean Court was to perform any formal reasoning on which it could base a decision favourable to the private litigants on the road to an economic constitution, it had to settle a crucial question: who would have ultimate policy authority in the field of the common market? In other words, who would hold the governing stick of intra-community trade policy? The Community or the member states?

But if the Court had not been confronted with this vital dilemma up to that moment, how could it have framed the doctrines of direct effect and supremacy at an earlier stage? Firstly, the doctrines were shaped in a policy field that entirely belongs to the Community's competences: industrial property rights. Therefore, no takeover was necessary. Secondly, the rulings (*Stauffer Chemicals* 1-IP-88 and *Ciba Geigy* 3-IP-89) were not cast against a member state, but in favour of the Colombian government's position,

since they declared that herbicides were non-patentable products, a position defended vigorously by the member states. It can therefore be assumed that when member states decided to amend decision 85 in order to adjust it to multilateral treaties, the Court did not represent much of a threat to them. On the contrary, the judicial discourse had been clearly cooperative with member states and had so far undergirded the policy of import substitution. So, if the Court was to confirm the position of the member states, there was no chance for the national judiciary to defy the status quo of their relationship with their respective governments, nor was there any space for inter-court negotiation within a national-supranational framework as foreseen by neofunctionalism.

Now let us connect both policy areas, in order to put the problem into context. Just one year after the rulings on direct effect and supremacy were announced (both on the 25th of May 1988), the question of the common market came before the Court (ruling of 18th of May 1990). It is now clear to us that the Court did not have enough time nor leverage to favour the centralist model that claimed for regulatory authority to be taken over by the Community, since no judicial collaboration with national courts nor any genuine transnational constituency (as suggested for Europe in Slaughter 2000b: 248) had previously been established. Admittedly, it is impossible for us to know if the Court seriously considered this alternative of upholding the centralist model, but if it did, there was no realistic way to bring it about. Since the *Aluminio Reynolds* case could not realistically have had any other outcome than it actually did, the choice made by the Court is hardly surprising.

The consequence of not upholding the centralist model is that it becomes almost impossible for the Court to frame general principles in the policy field of intra-regional trade. As mentioned, if any given principle cannot be applied to all goods or cases –or at least a vast majority of cases- it renounces any claim of abstraction and remains specific to these goods; in turn, if a principle is not abstract enough to spill over to other policy areas, judicial discretion is severely curtailed. Further, the only doctrines that were actually shaped, namely direct effect and supremacy, were consistent with the interests of the other stakeholders, i.e. the member states. However, principles that are conditions and aims of the common market, like freedom of movement or non-discrimination (see the concept of "Basisfunktion" for free movement of goods in Frenz 2004: 13) are inherently abstract, and were therefore impossible for the Andean Court

to tailor for the area of intra-regional trade policy once the centralist model was discarded. Thus the Court's leeway became even smaller.

Under these circumstances, it is hardly surprising that on December 9th 1994, the ruling *Laboratorios vs. Ecuador* on the validity of decision 344 implicitly renounced teleological interpretation – insofar as any such interpretation was possible – and adhered to traditional patterns of international law.

5. Conclusion

This research has focused on Andean integration through an "European prism", taking into consideration the vast literature on European integration that has focused on the establishment of the European Community's legal order. It was not my purpose to find solutions to the problems experienced by the Andean integration process, but to highlight the divergence that exists in an area that should have precisely mirrored the European experience, i.e. the teleological method for the interpretation of community law.

I claim to have found a functional equivalent to the *Euro-law game*, based on matching polity designs, judicial cross-fertilization and similar actors. But at the same time there was no "court-devised cocktail" in the Andean case, that is to say no expansive interpretation followed by direct effect of community law (Dehousse 1998: 76). Neither has there been a stable set of practices (Stone Sweet 2001: 19)[50] despite the mimetic action of skilled social Andean actors. The judicial activism associated with neofunctionalist and supranational governance theories (Stone Sweet 2000) was lacking, and although there was explicit social demand for expansive interpretation, articulated by self-interested social entrepreneurs, the ACJ failed to supply it. (Couso 2004: 41, doubts that such supporting structures for legal mobilization from the bottom-up are capable of sparking a legal revolution by means of judicial activism in Latin American democracies). The alleged engine of integration has not seized power; despite the presence of almost all the conditions for constitutional dialogues. Considering that the strategy of our main actor – the ACJ - does not conform to neofunctionalist assumption,

[50] '*One way that institution-building episodes proceed is when actors decide to mimic what they perceive to be successful political models, borrowing elements that have proved useful in other institution-building projects*" (Stone Sweet 2001: 19)

something must be flawed with the theoretical model, since it does not include a reversal of doctrines among the possible strategies of the Court.

However, these findings do not necessarily contradict neofunctional readings of European integration. This would only be the case if constitutional dialogues had in fact been present in the Andean saga and the outcome had, nevertheless, remained the same. Constitutional dialogues between the judiciary should be less seen as a necessary consequence of doctrines, such as direct effect and supremacy, but rather as a necessary condition for judicial empowerment. In other words, isomorphism based on preliminary rulings procedures (article 234 EC) does not necessary establish vertical relations or exchange between supranational courts and national judiciaries. Neither can we assume that supranational Courts – no matter how similar to the ECJ- are inherently expansive institutions. Thus, if the success of European integration through law was the goal for the Andean Community, importing its polity design and its legal doctrines proved unsuccessful.

Finally, we are aware that neofunctionalism does not claim to be a general law, and most of its scholars warn that it simply describes the process of European integration, assuming that certain conditions are present. That has been the explanation given by some scholars when dealing with failure in other settings and the discarding of empirical testing, for instance, in Latin America. However, by reviewing the theoretical model used by most neofunctionalist scholars, we offer an alternative explanation for failure in integration, derived from the analysis of law, jurisprudence, and both national as well as sub national actors' strategies. It might very well be the case that the actor chosen to drive the process ahead, namely the ACJ, has brought it to stagnation. If scholars have historically discarded comparative analysis based on divergent background conditions and context, it might have been for the wrong reasons.

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