

Latin American and Caribbean International Institutional Law

Marco Odello · Francesco Seatzu
Editors

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Abbreviations

ACHR	American Convention on Human Rights
ACS	Association of Caribbean States
ACTO	Amazon Cooperation Treaty Organization
ADB	African Development Bank
AFTA	Asian Free Trade Association
AIS	Andean Integration System
ALADI	Latin American Integration Association
ALBA	Bolivarian Alliance for the Peoples of Our America
ALCUE	Latin America and Caribbean and European Union Summits
ANCOM	Andean Common Market
APC	Andean Presidential Council
ASA	South American-African cooperation
ATJ	Andean Tribunal of Justice
CA	Cartagena Agreement
CABEI	Central American Bank for Economic Integration
CACM	Central American Common Market
CAF	Andean Development Corporation
CAFTA	Central American Free Trade Agreement
CAN	Comunidad Andina de Naciones/Andean Community
CARICOM	Caribbean Community
CARIFTA	Caribbean Free Trade Association
CCJ	Caribbean Court of Justice
CDB	Caribbean Development Bank
CELAC	Community of Latin American and Caribbean States
CEPAL	Commission for America and Caribbean
CET	Common External Tariff
CFP	Common Foreign Policy
CJAC	Court of Justice of the Andean Community
CMC	Consejo del Mercado Común
CPC	Comisión Parlamentaria Conjunta
CSME	Caribbean Single Market and Economy

CSN	Comunidad Sudamericana de Naciones/South American Community of Nations
CU	Customs Union
EC Dollar/XCD	Eastern Caribbean Dollar
ECCB	Eastern Caribbean Central Bank
ECCBA	Eastern Caribbean Central Bank Agreement
ECCM	East Caribbean Common Market
ECCU	Eastern Caribbean Currency Union
ECLA	United Nations Economic Commission for Latin America
EU	European Union
FCES	Foro Consultivo Económico Social
FONPLATA	Fondo Financiero para el Desarrollo de los Países de la Cuenca del Plata
FTAA	Free Trade Area of the Americas
FTAs	Free Trade Agreements
GMC	Grupo del Mercado Común
GNI	Gross National Income
GOAC	Gaceta Oficial del Acuerdo de Cartagena
HDI	Human Development Index
IADB	Inter-American Development Bank
IBERPME	Iberoamerican Program for Inter-institutional Cooperation for the Development of Small and Medium-sized Businesses
IDA	International Development Association
IIRSA	Initiative for Regional Infrastructure Integration
ILC	International Law Commission
ILM	International Legal Materials
IO	International Organisation
JPC	Joint Parliamentary Commission
LAC	Latin American and Caribbean
LAFTA	Latin American Free Trade Association
MCC	Mercosur Commerce Commission
Mercosur	Southern Common Market
MIPYMES	Micro, Small and Medium-sized Businesses
NAFTA	North American Free Trade Association
OAS	Organization of American States
OECS	Organization of Eastern Caribbean States
Parlatino	Latin American Parliament
POP	Protocol of Ouro Preto
PYMES	Small and Medium-sized Businesses
RTA	Regional Trade Agreement
SACN	South American Community of Nations
SAFTA	South America Free Trade Area
SELA	Latin American Economic System/Latin American and Caribbean Economic System

SICA	Central American Integration System/Sistema de la Integración Centroamericana
SRDBs	Sub-Regional Development Banks
TCCJ	Treaty Creating the (Andean) Court of Justice
TFUE	Treaty on the Functioning of the European Union
TPR	Permanent Tribunal of Revision
TUE	Treaty of the European Union
UN	United Nations
UNASUR	Union of South American Nations
UNCTAD	United Nations Commission for Trade and Development
WISA	West Indies Associated States
WTO	World Trade Organization

Introduction: Mapping the Field of Latin American and Caribbean Institutions

Preliminary Remarks

The American continent represents a very interesting example of different forms of international organisations (IO) for different reasons. Historically, the continent has developed inter-state structures since the early nineteenth century. Over time various organisations have been created and replaced by other institutions both at regional and sub-regional levels.¹

The original historical evolution of Latin American cooperation developed during and after the independence process from Spain. Simon Bolivar, the leader of independence in Spanish Latin America, envisaged the political unity of Latin America as a means to defuse regional conflicts, to establish the predominance of a regional international law, and to reduce the vulnerability of the Latin American countries to the actions of some powers, in particular Spain, Great Britain and the United States of America (USA).² The initial inter-State cooperation took the form of regular congresses usually called Hispanic-American or Latin American Congresses,³ moved then into Pan Americanism, and finally to the present Inter-American System, represented by the Organisation of American States (OAS).⁴

The continent also shows different types of organisations that combine very different countries, often linked by geographical vicinity and cultural similarities, as in the case of the Andean Community or some Central American and Caribbean organisations. The presence of the USA is certainly a relevant factor in the

¹Mace 1988, pp. 404–427.

²See: Belaúnde 1967.

³This term was used from the First Congress of Panama in 1826, when still some American territories were under Spanish colonial domination, until 1889 when Brazil joined the meetings organised by Spanish-speaking American countries.

⁴See: Stoetzer 1993, Chapters 1 and 2; Ball, 1969, pp. 3–21; Inter-American Institute of International Legal Studies 1966.

development or failure of many forms of IOs in the continent.⁵ This element was in part based on the 1823 Monroe's Doctrine, and later reaffirmed by the USA foreign policy towards the continent and individual countries. However, the hegemonic role of the USA, with its economic and military power is not the only reason for some of the shortcomings of the various attempts to create functioning international institutions within the continent.

The approach of many countries in the region, including a strong nationalistic feeling, the protectionist economic policies of some governments, depending on the period of time, the political crisis and instability that affected several countries, particularly in the 1960s and 1970s, the military juntas which governed several countries in Latin America since the end of World War II until the late 1970s, are all relevant factors that have limited the forms of institutional cooperation, and have often undermined their development towards forms of stronger integration.

In this sense, if we compare the experience of several past and existing IOs in the Americas and the European continental experience, it is possible to see how European countries, which have many more cultural, linguistic and historical differences, have moved much faster towards forms of economic, political and legal integration. The main examples of the European Union (EU) and the Council of Europe (CoE), with the variety of institutions, courts and legal integration, including economic integration, are certainly unknown in the context of the American continent. Some examples of recent developments in the case of the Andean Community and the MERCOSUR may show some similarities with the developments of the EU; for instance the introduction of international adjudicatory bodies for dispute resolution and the introduction of the Andean Passport. However, despite the formal adoption of certain legal agreements and institutions, these developments look more as a copy on paper of the EU system rather than as an effective system of profound integration.

The present book addresses, from an international legal perspective, some of the relevant sub-regional institutions and organisations that are presently established in the Latin American part of the Western Hemisphere, following some criteria that are defined below.

Criteria of Inclusion and Exclusion

The original idea for this book was to develop a better understanding of the existing forms of institutional integration at the sub-regional level in the Americas. During the development of the project, some selection criteria have emerged, so that the book could take a more defined shape and offer the reader some understanding of the complex picture that is presently characterizing the various international institutions within the Latin American and Caribbean (LAC) parts of the continent.

⁵Langley 2010.

It has been relevant to identify more clearly the organisations and institutions that operate in the Western Hemisphere. The pan-continental organisation is the OAS which derives from an evolution of nineteenth century alliances and cooperation within the American continent, and includes today the great majority of States in the region, from North to South America.

However, the great experience and developments of the OAS have not been included in this study, as it may deserve a more specialist approach and also adequate space to properly address the various areas that are covered by its constitutive treaty and its various institutions and organs. For this reason, the OAS has been excluded *a priori* from this study.

If we look at the various institutions and organisations that are present in the Latin American part of the continent, we can find a great variety of examples over the past 50 years.⁶ First of all, they are all in the LAC part of the continent. The Latin American and Caribbean choice is based on the fact that the great variety of existing institutions is mainly developed in that sub-region. There are different names used to classify certain regions and sub-regions in the world. Certainly, in the Americas, the geographical locations of North, Centre and South are often used. However, there are also different ways to identify certain regions. We intend for Latin America the portion of the American continent, which for historical and geographical reasons has been identified from Mexico to south Argentina and Chile (*Tierra del fuego*), mainly the Magellan straight. The sub-region includes also the Caribbean and Central American sub-regions,⁷ which encompasses not only Spanish speaking countries, but also French, Dutch and British overseas territories. This definition is based on the Latin influence on the continent at the time of colonisation (Latin languages such as Spanish, Portuguese and then French), where the results of imposition of cultural and ideological models were certainly not autonomously developed, but reflected the influence of colonial powers in the region.⁸

In determining which institutions were to be included in this study, two main criteria were relied upon. The institutions included in this volume satisfy the following requirements. In the first place, all the organisations have, as their main purposes, the development of some or all of their member countries. Although some of the constitutive treaties are worded mainly in terms of economic development, others contain measures for social development as well. As will be seen in specific chapters, clear-cut separations between the two are almost impossible

⁶On the peculiar features of the LAC region, see among others: Centro Latinoamericano para la Competitividad y el Desarrollo Sostenible (CLACDS) del INCAE y el Instituto para el Desarrollo Internacional de la Universidad de Harvard (2000); Pennetta 2013; Schelhase 2011, p. 175 ff.

⁷On the peculiarities of the Central American sub-regions, see: Vuskovic 1983, p. 36 ff. For a full discussion of this issue, see: Woodward 1999, p. 20 ff, who also stresses the potential of the Central American states for political union.

⁸Zanatta 2010, p. 233 ff.

to draw and there is often a wide overlapping and interdependence between the two notions of development. Second, they are all established under international law, therefore they are international intergovernmental organisations and they have been created by states by means of international treaties, which are also their legal basis and confer upon them corporate personality. Therefore, other institutions, which are based on governmental departments, national public corporations, private multinational corporations and other forms of cooperation have been excluded from this book.

The main focus of this book is to deal with what is often referred to as International Institutional Law or Law of International Organisations.⁹ The different institutions and organisations are mainly examined from the legal point of view. The scope is therefore to provide the reader with a good panorama of the rules and principles that govern the structures and functioning of international organisations within the Latin American geo-political context. Therefore, this study does not address other issues that are often related to the analysis of international relations within the context of structured institutions, in particular the relationship and possible tensions between the institutions and their member States. Also, this work does not address the political, social and economic contexts where institutions are operating. This is a relevant element that can shed light on the potential success and/or failure of inter-state cooperation. However, it should be the object of a separate study. The aims, purposes and functions of the organisations under consideration are certainly taken into consideration, as they are a fundamental part of the institutional *raison d'être*, the justification, of each individual organisation. They are often part of the foundational charter or treaty which created the organisation and they are essential elements that provide the general guidelines and powers of individual organs of each organisation. However, a detailed analysis of the policies and functions of international organisations requires a different type of research that goes beyond the limits of the present work.

Organisation of the Volume

Not all the existing organisations that are presently active in Latin America have been included in the present work. Also, past organisations or others which are not any more active, but still formally existing, have not been considered in this work. Examples of these are the Rio Group, the Latin American Parliament (Parlatino) and the Bolivarian Alliance for the Peoples of our America (ALBA).¹⁰ The reason for this selection is that this book would like to provide the reader with an updated and useful contemporary study on the forms of international institutional organisations in the sub-region.

⁹See, among others: Schermers and Blokker 2011; White 2005; Amerasinghe 2005.

¹⁰See: Santulli 2012.

Apart from the mentioned criteria for selecting certain organisations, it is not always easy to further classify international institutions. Different criteria can be used, including chronological, historical, fields of activities, aims and purposes, etc. Therefore, the organisations that have been addressed follow certain criteria.

The main criteria for selecting existing organisations have been based on the number of member states, the extent of their aims, going from broader to narrower organisations. However, we are aware that this is not the only possible option, as other ways of organising the volume would have been equally feasible. The structure of the volume is as follows:

1. Latin American Economic System (SELA)
2. Latin American Integration Association (ALADI)
3. UNASUR
4. Latin American Sub-regional Development Institutions
5. Andean Community
6. Southern Common Market (MERCOSUR)
7. Pacific Alliance
8. Caribbean Community (CARICOM)
9. Organization of Eastern Caribbean States (OECS).

The volume is divided into nine main chapters, and this brief introduction focuses on individual Latin American sub-regional organisations. The editors have sought to make this work an integrated volume rather than merely a set of essays. In achieving this aim, they have circulated drafts of relevant papers to contributors when appropriate, during the process of revision, in order to facilitate cross-referencing and discussion on disputed concepts.

Chapter 1 looks at the Latin American Economic System (*Sistema Económico Latinoamericano*—SELA) which since 1975 includes 25 Latin American and Caribbean (LAC) nations which established a permanent system for intraregional economic and social cooperation, in order to coordinate and consult on the positions of those countries in relation to third countries and other international organisations.

Chapter 2 considers the Latin American Integration Association (ALADI) which replaced the Latin American Free Trade Association (LAFTA), the first incarnation of regionalized trade in South America, replaced by the 1980 Montevideo Treaty creating a new association, the Latin American Integration Association (LAIA or ALADI in Spanish), currently including 12 states of the region. This chapter considers that the integration envisioned by ALADI is challenging because it relies on other existing institutions, but without altering the pre-existing legal structure of trade relationships. It looks at the challenges of regional integration in Latin America and the possible legal structure that may implement economic integration.

Chapter 3 deals with the Union of South American Nations (UNASUR), which represents one of the most recent attempts of regional integration. The adoption in Brasilia, in 2008, of the Treaty establishing the UNASUR is the end of a process that led to the establishment of a framework of cooperation and integration among

several South American States. UNASUR opens a new phase in the efforts made by South American States to achieve some of the objectives that have been on the agenda of Latin American international relations. The relevance of UNASUR is that it tries to achieve a more comprehensive, legal, institutionalised and developed framework of cooperation. In particular, this new development of institutionalisation foresees a gradual integration process that also involves two major existing organisations, MERCOSUR/MERCOSUL (*Mercado Común del Sur*) and the Andean Community of Nations (CAN).

Chapter 4 considers the specific case of Latin American sub-regional development institutions. This type of multilateral organisation is playing a rapidly increasing role in the supply of development finance and technical assistance to the countries of the LAC region. Evidence is also to be found in the following two circumstances. First, like reserve pooling institutions sub-regional multilateral organisations in general and international sub-regional banks in particular are helping countries of the region to mobilize financial resources for productive activities. Second, and even more significantly, sub-regional multilateral development organisations are helping the LAC countries to increase their role and level of integration in international capital and financial markets while also strengthening their internal capital markets. For instance, they are improving their funding conditions and issuing bonds in Latin American currencies.

Jointly with global multilateral financial institutions, international sub-regional development banks are also supporting LAC countries in the current financial crisis by supplying liquidity. Therefore, for these and other reasons, the wealthier countries of the LAC region, such as Brazil and Mexico, have allocated and still continue to allocate increased resources to these organisations, and have also in several circumstances taken their views into consideration in their own action plans and programmes. However, though surprising, the wide and fast-growing role of sub-regional multilateral institutions in the international financial system has as yet received very little attention from an international legal perspective.

The overall goal of this chapter is to fill this gap, and therefore to critically review the experience of LAC countries with international sub-regional development and financial cooperation. Starting from the premise that this experience has been one of the most successful in the developing world (though uneven in terms of country coverage and services provided), the chapter will show that the Andean sub-region has been particularly successful in establishing sub-regional multilateral institutions in the fields of development and finance. The chapter will also indicate that development financing in the LAC region has been wider in scope than cooperation in monetary matters. In doing so, it will stress in particular that the two most successful sub-regional financial institutions, namely the Andean Development Corporation (CAF) and the Central American Bank for Economic Integration (CABEI), have shown the capacity to supply services to member countries in a timely way, with counter-cyclical effects and on a wider scale relative to other types of multilateral financing.

Indeed, the genuine sense of ownership of these organisations by member states, preferred creditor status, and professional management is reflected in

very healthy portfolios, even in the face of default by member countries. This is so even though the services of these institutions could be broadened to support also the growth and integration of the physical infrastructure and macro-economic policy coordination. Concerning its overall structure, this chapter is divided into two main parts. In the first part, it will ascertain and critically discuss and evaluate, from an international legal perspective, the relative position of international sub-regional financial institutions within the LAC region, focussing both on their financial role and on how they provide a set of tools to channel financial resources, technical assistance and knowledge to countries of this region. In the second part, through a consideration of the structure and functioning of the CABI and CAF the chapter will elaborate recommendations and draw some conclusions about the international sub-regional institutions in the fields of development and finance that operate in the LAC region, and how they can better enhance sub-regional cooperation and promote collective action.

Chapter 5 analyses the Andean Community (*Comunidad Andina de Naciones—CAN*). This quite unique example of integration process in the LAC region represents probably the closer type of international organisation with structures similar to the EU. The Andean Community is also the result of an evolution which originated with the Andean Pact and with subsequent amendments to the original treaty and protocols has become today the Andean Community. This organisation includes some elements of supranational bodies, a legal system and a specific judicial body, which provide a relevant example of legal structures which tend to go beyond the mere rhetoric of integration which is typical of other institutions in the region.

Chapter 6 addresses the ‘Common Market of the Southern Cone’, commonly known as MERCOSUR. This organisation, jointly with the Andean Community, includes the main countries of the region, and it has been for many years a good example of international cooperation among the countries of the Southern Cone (Argentina, Brazil, Paraguay, Uruguay) and Venezuela (since 2012). The first and main objective of MERCOSUR is trade liberalisation, more precisely the creation of a free trade area between its members and the implementation of a *sui generis* common market. This chapter takes the EU and the North American Free Trade Association (NAFTA) as points of reference, since a conceptual comparison between a MERCOSUR-type free trade area and a NAFTA-type free trade area or an EU-model customs union may demonstrate the relative uniformity of these types of trading conglomerates but also their functional and taxonomic diversities. The chapter assesses MERCOSUR’s main achievements and shortcomings in the areas of socio-economic cooperation and sub-regional integration, and the effective achievement of its objectives, including, from an international legal perspective, the latest developments within MERCOSUR.

Chapter 7 analyses the Pacific Alliance, the most recent tool of LAC integration, which was established by the so-called ‘Framework Agreement’ signed on the occasion of the 2012 Summit of Paran . The Alliance realizes a shift of focus in the economic strategy of integration applied for instance by MERCOSUR, which was grounded on the establishment of an outward-looking Common

Market. The inherent tension/contradiction between the normative institutional architecture and declared economic and social objectives has been the true ‘leit-motif’ of the Latin American and Caribbean experiences of integration since 1980 when the Latin American Integration Association (ALADI),¹¹ the first ‘real’ experience of integration in Latin America was pursued under the Treaty of Montevideo. This trend was confirmed by the Asuncion Treaty, which created the MERCOSUR.¹² Moreover, it was further confirmed by the 2012 ‘Framework Agreement’ which establishes the Alliance. All these agreements were aimed to establish areas of regional economic integration in Latin America. In the ‘Framework Agreement’, nevertheless, this incompatibility is more evident, because the economic commitment for creating a common space for the movement of goods, services, capitals and people has been more emphasized than on former occasions.

Chapter 8 is devoted to the Caribbean Community (CARICOM), addressing a specific organisation in the Caribbean sub-region. The Treaty of Chaguaramas, establishing the CARICOM became operative in August 1973; there were great expectations that at long last there was in place an institutional framework for economic integration in the Caribbean. This invariably implied that the challenge of market fragmentation would be an issue of the past and intra-regional commerce would also be enhanced. Forty years and more after the entry into force of the Treaty of Chaguaramas (and 12 years after the entry into force of the Revised Treaty of Chaguaramas), not much progress has been made in terms of the economic integration and de-fragmentation of Caribbean markets. Issues abound at present as to whether the CARICOM, one of the world’s oldest still-functioning regional economic institutions, would ever be able to survive and if it does, whether it would at last plug the Caribbean region into the grid of global commerce. This chapter holds that there are still some weak areas in the institutional and normative framework of the Revised Treaty of Chaguaramas that could not properly support market integration. It suggests that the CARICOM needs to play a greater role in ensuring that this weak framework is further strengthened.

The final chapter looks at the Organisation of Eastern Caribbean States (OECS) and at its institutional evolution. The 1981 original agreement was not conceived as a platform for a political or economic union, and consequently did not commit its member states to achieving such a union in time. By the year 2000, however, OECS states began to explore the fundamentals of some form of economic union, as well as a closer integration in other policy areas. In January 2011, this vision became a reality, with the entry into force of the 2011 Revised Treaty of Basseterre, which transformed the structure and operation of the union into a modern regional trade agreement (RTA), which may be viewed as a variant of the Treaty of the European Union.

¹¹See Chap. 2 of this volume.

¹²See Chap. 6 of this volume.

Final Remarks

On the basis of the findings described in the individual chapters a number of general considerations can be drawn. We perceive to be useful, at the outset, to briefly stress the variety of approaches in the field of institutional cooperation adopted by the main organisations, which is the central theme of this collective work, as developed in the single contributions.

There is a long and well-established experience in different forms of international institutional cooperation. This means that states in the LAC region are familiar with this type of international framework and the normative structures that are associated to these institutions, but still show underdeveloped forms of integration.

The Andean Community provides a good example of how Latin American countries can follow the path of gradual integration. This is true despite the fact that the Community is still a quite undeveloped model of supranational integration, at least if compared to the EU experience. In fact, the EU provides the most sophisticated example of existing integration process from a legal perspective.¹³

At this point it is worth asking whether the Andean Community might represent a model to follow for sub-regional integration in the LAC region. Our answer is positive, due to the fact that the Community has proved to be able to achieve some forms of integration through institutional cooperation.¹⁴ If generally adopted, this model would reduce the number of existing inter-governmental sub-regional organisations, which would be followed by adhesion of new members to the existing ones, or eventually to a possible fusion of the main sub-regional organisations, in particular the Andean Community and the MERCOSUR. If supported by the political will of individual states in the LAC region, this process would contribute to avoid an overlapping of institutions and structures, it might also rationalise the financial implications and, most importantly, ensure the efficient functioning of remaining sub-regional structures, as the EU example shows.

However, recent developments in the LAC region, such as the case of the Pacific Alliance, seem to go in the opposite directions due to the fact that the Pacific Alliance does not seek to create a customs union or a common market. Yet, the Alliance can mainly be considered as a free-market alternative to the less dynamic and rather protectionist MERCOSUR, a comparable organisation in terms of size and economic weight. Unlike the Andean Community, this new organisation established in 2012, does not adopt a supranational normative model leading to integration in a technical sense, but rather applies a more traditional

¹³See: Augenstein 2013; Biondi and Eeckhout 2012; Craig and de Búrca 2011.

¹⁴See, for instance: CAN, Andean Council of Foreign Ministers, Association of the Republic of Argentina, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, States Parties of MERCOSUR, with the Andean Community, Decision 613, Lima, 7 July 2005, at: <http://www.comunidadandina.org/ingles/normativa/D613e.htm>. Accessed 17 September 2014.

approach of inter-state cooperation under international law. In other words, the Alliance's approach is mainly inter-governmental and pragmatic.

Parallel to this trend we can identify a more integrationist attitude within the UNASUR framework, as evidenced in the Preamble to its constitutive treaty which states that 'South American integration should be achieved through an innovative process, which includes all the accomplishments and progress achieved so far by the MERCOSUR and CAN processes, as well as the experiences of Chile, Guyana and Suriname, going beyond the convergence among them'.¹⁵

Nevertheless, the integrationist approach of UNASUR is, in some way, narrowed by the reference, in the same Preamble of its constitutive treaty, to the 'unlimited respect for sovereignty and the territorial integrity and inviolability of States'.

The same treaty includes in its objectives and purposes a broad set of cooperation areas, from citizenship to energy integration and from financial integration to consolidation of a South American identity,¹⁶ however, there is no evidence of adequate legal and institutional support in the architecture of the organisation.

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¹⁵UNASUR Treaty, signed in Brasilia, 23 May 2008, entered into force on 11 March 2011, Preamble, at: <https://treaties.un.org/pages/UNTSONline.aspx?id=2>. Accessed 11 December 2014.

¹⁶UNASUR Treaty, articles 2 and 3.

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