USING COMPARATIVE REGIONAL LAW TO IDENTIFY FUTURE DIRECTIONS FOR
THE CENTRAL AMERICAN INTEGRATION SYSTEM

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ABSTRACT

The Central American Integration System (SICA) is the latest integration enterprise in a long line of regional governance arrangements in the Central American region. SICA was founded in 1991 as a manifestation of a broader political movement to leave behind the region’s dictatorial regimes and gross human rights violations that marred the previous decades. The fundamental objective of SICA is to transform Central America into a region of peace, respect for democracy and social development, through the protection of human rights. It was therefore created to support the region’s states in their quest to promote social justice and deal with inequality, which was recognised as the source of violence, war and human rights violations. Yet, it has been unable to fulfil its objectives and purposes due to a series of challenges arising from its history.

Since colonial times, Central American governance, at both domestic and regional levels, has displayed two characteristics: first, executive state-led dominance and, second, susceptibility to external ideas and influences. These historical characteristics, or legacies, have manifested themselves in various ways in the many reunification and integration efforts of Central American states, and in their failure. These historical legacies continue to burden the latest Central American integration enterprise in various ways which have become inherent features of Central American governance. Today, they are reflected within the SICA legal regime at the conceptual, institutional and judicial levels.

To solve these challenges faced by the SICA legal regime, this thesis turns to comparative regionalism. This thesis draws on comparative constitutional law and comparative international law to determine a methodology for the emerging field of comparative regionalism. In this thesis comparative regionalism is used both as a critique and a solution to the current analytical approaches to Central American regionalism, which neglect the context of Central American governance within which regionalism operates. Thus, it offers a new approach to comparison across regional legal systems. The approach to comparative regionalism developed in this thesis draws on insights from other integration regimes around the globe. It takes the European and Southeast Asian integration experiences as case studies, which represent opposite spectrums of governance models, respectively. While Europe is the quintessential supranational model, Southeast Asia takes an intergovernmental approach to
integration. In comparative terms, Central America represents a middle point between them, with a model driven by intergovernmentalism with certain supranational features and institutions. As such, Central America is well placed to gain insights from both comparative case studies for integration governance.

This thesis shows how the study of SICA, and Central American regionalism more broadly, contribute to a new field of comparative regional studies, not only to address shared problems among regional arrangements, but also to understand the complexities and contest Eurocentric concepts of integration from a global perspective.
DECLARATION

This is to certify that:

(i) the thesis comprises only my original work towards the degree of Doctor of Philosophy;
(ii) due acknowledgement has been made in the text to all other material used; and
(iii) the thesis is fewer than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.
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CHAPTER 1.
INTRODUCTION

I. STATEMENT OF RESEARCH PROJECT AND RESEARCH QUESTION

In 1991, the governments of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama founded the Central American Integration System (SICA). The first expansion of its members happened a decade later in 2000, with the incorporation of Belize, and again in 2013, when the Dominican Republic joined the regional arrangement. SICA was created to assist Central American governments in their quest to use social justice to redress the historical injustices and human rights violations faced in the region during the 1970s. SICA is one of many regional arrangements that were created or modernized during the 1990s around the globe. Examples of new arrangements include the North American Free-Trade Agreement of 1993 (NAFTA) and the Market of South American States of 1991 (MERCOSUR), while examples of modernisation include the European Union, the Association of Southeast Asian Nations (ASEAN) and the Economic Community of West African States (ECOWAS). This wave of regional arrangements were characterised by their openness towards the international system and intensification of economic ties and liberal reform.

In Central America, SICA is the latest of many reunification and integration attempts since the fall of the Central American Federation in 1848. SICA stands out from other regional arrangements worldwide because of its deep historical roots and its fundamental objective to promote social justice and human rights. This thesis argues, however, that SICA has been unable to achieve the objectives and purposes that its member states set out to accomplish. This inability or failure is the result of a series of features arising from historical legacies that are characteristic to Central American regionalism and governance and which are reflected within the SICA’s legal regime. By drawing insights from

3 Söderbaum, above n 1, 26.
comparative legal method and comparative regionalism, this thesis proposes ways to improve SICA’s legal regime which would enable it to better support the original objectives of Central American regional integration.

Accordingly, and in the light of SICA’s historical and current context, this thesis poses the following central key question: *What insights for the future can comparative regionalism offer to improve the SICA’s legal regime, so it can better address the challenges it faces?* This research question requires that this thesis meet two primary objectives. The first is to identify the problems of SICA’s legal regime and their causes. The second is to identify potential solutions, including those that draw on comparative insights from the formations of the European Union (EU) and the Association of Southeast Nations (ASEAN), adapting these understandings in the light of Central American regional governance.

Before proceeding, it is important to outline some conceptual distinctions relating to the nature and definition of regional arrangements. This thesis defines regionalism as ‘a primarily state-led process of building and sustaining formal regional institutions and organizations among at least three states’.4 ‘Integration’ is an expression of regionalism in which states begin to ‘transfer at least some authority and sovereign rights to the regional level’, mostly to achieve economic objectives.5 The last concept is that of regional governance, which is understood as the organisation of a regional grouping on the basis of defined political, economic and social policies.6 SICA, although labelled an integration system, is more accurately viewed as a regional arrangement created with a regional governance intention. This is because it purports to establish new policies for the regional transformation of Central America beyond merely economic ends, and because it established new institutions aimed at accomplishing this transformation.

SICA was created as a product of a wider peace-building process in the region called *Esquipulas* which was designed to bring an end to conflict in and between the states. Launched in 1986, the *Esquipulas* process was the starting point for the region’s democratic transformation. It was a platform to bring peace to the region and to address

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4 Börzel and Risse, above n 2, 7.
5 Ibid 8.
the causes that led to the derailment of a previous integration attempt, the Central American Common Market in the 1960s. The primary causes were warfare, dictatorships and gross human rights violations in the previous decade. At the root of these causes is the failure to address inequality and promote social justice in Central America.7

The Tegucigalpa Protocol is the constitutive instrument of SICA, and it builds upon existing integration arrangements and regional institutions established during the second half of the 20th century. This protocol was signed in 1991 and displays the Central American states commitment towards transforming the region, particularly through its social justice and human rights inclination. This trait sets SICA apart from other integration regimes elsewhere, some of which are studied in this thesis. As such, the protocol established as the ‘fundamental’ objective of SICA ‘the realization of Central American integration to construct [Central America] as a region of peace, liberty, democracy and development’.8 To accomplish this fundamental objective, thereby furthering its commitment to regional transformation, the protocol set out the following purposes for SICA: the consolidation of democracy and strengthening of the region’s institutions based on universal suffrage and human rights; the creation of a new model of regional security embedded in the eradication of poverty, promotion of sustainable development, protection of the environment, eradication of violence and corruption; the promotion of freedom and liberties to guarantee the development of the individual and the society; the establishment of a regional welfare system embedded in social justice; the achievement of an economic union in the region and the insertion of Central America as an economic bloc in the international economy; the promotion of all forms of sustainable development, economic, social, cultural and political; and the creation of a new integration regime based on the rule of law.9

This commitment to social justice and human rights is further entrenched within the Tegucigalpa Protocol by the inclusion of specific principles that align with it. This clearly demonstrates SICA’s distinctive intent, viewed alongside other regional arrangements, and particularly in the Americas, declaring SICA more comprehensive than an economic reform strategy and not solely market driven. As such, for the realisation of these

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7 See discussion in Chapter 3, Title IV, subtitle B.
9 Ibid.
purposes, SICA institutions and member states are required to act in accordance with the following principles: the guarantee and promotion of human rights as the fundamental basis of SICA; peace, democracy, development and freedom as an indivisible and harmonious concept; the creation of a ‘Central American identity’ and ‘Central American solidarity’ as the expression of interdependence, common origin and shared destiny of the region; the gradual, specific and progressive nature of economic integration, embedded in regional harmony and equal development of all states; the multidimensional aspect of integration and democratic participation in all aspects of regional governance; juridical certainty; good faith; and respect for the United Nations and Organization of American States Charters.10

SICA is the regional arrangement of the latest Central American regional governance enterprise.11 Its legal regime comprises a series of intergovernmental and supranational institutions. For the purposes of this thesis, intergovernmental institutions are seen as bodies that assist states to act in cooperation within regional organizations, and to make decisions through a process of negotiation and bargaining with other states to achieve common goals.12 Supranational institutions are created by the delegation of state functions to regional institutions to support states to achieve their common goals, including, to some extent, states’ capacity for decision making and accountability.13 The Tegucigalpa Protocol establishes four intergovernmental institutions as part of SICA: the Summit of Presidents, the Council of Ministers, the Executive Committee and the General Secretariat.14 The Protocol also refers to the Central American Parliament (PARLACEN), Central American Court of Justice and the Central American Economic Secretariat (SIECA) as part of SICA, each of which has supranational traits.15 Each of these latter institutions are established by their own constitutive treaties, some predating the Tegucigalpa Protocol.

Notwithstanding the aspirational intent and policy agenda, after almost thirty years of SICA’s existence, the region still suffers from the same conditions that led to the demise of the first integration regime in the late 1970s, concerning the conflict, dictatorship and

10 Ibid, Art. 4.
11 Tegucigalpa Protocol Art. 2.
12 On other definitions of intergovernmentalism, see: Börzel and Risse, above n 2, 8; Künnhardt, above n 1, 33.
13 Börzel and Risse, above n 2, 8.
14 Tegucigalpa Protocol Art. 12.
15 Ibid, Art. 12 for PARLACEN and Central American Court of Justice, while 28 for SIECA.
human rights violations that were features of the Cold War era. Lacking capacity to address the issues of inequality, human rights and social justice at a regional level, SICA has been unable to fulfil its fundamental objective and purposes. Specifically, this failure stems from the fact that SICA’s legal regime has been unable to respond to the demands of integration placed on it by the historical and contextual circumstances of the region. This in turn is at least partly due to indiscriminate reliance on the EU as an integration model without recognition of the very different contexts.

II. ORIGINALITY AND IMPORTANCE OF THE RESEARCH PROJECT

Outside of Central America, relatively little is known about Central American regional arrangements in the spheres of international legal scholarship. This is in part because very few authors write about Central America outside of the region and Central American authors tend only to write in Spanish for a local audience. Many of the studies by Central American authors have Eurocentric undertones and assumptions, using the European Union as a model for integration, often without taking into account context as part of comparison. As other authors have argued, Central American legal scholarship tends to be ‘non-problem based’ or highly theoretical and conceptual and often lacks a solid


17 On fairly recent English language legal scholarship on Central America, see: Katrin Nyman-Metcalf and Ioannis F Papageorgiou, Regional Integration and Courts of Justice (Intersentia, 2005); Kühnhardt, above n 1; Cesare PR Romano, ‘Trial and Error in International Judicialization’ in Cesare PR Romano, Karen J Alter and Chrisanthi Avergou (eds), Trial and Error in International Judicialization (Oxford University Press, 2013); Angela del Vecchio, International Courts and Tribunals Between Globalisation and Localism (Eleven International Publishing, 2013); Salvatore Caserta, ‘Regional Integration through Law and International Courts - The Central American and Caribbean Cases’ (iCourt Working Paper Series, No. 87, Faculty of Law, University of Copenhagen, 2017); Olmos Giupponi, above n 17.

methodological base.\textsuperscript{19} As such, most legal integration scholarship has neglected to take into account the deep seated history, contextual features and transformative values of the SICA legal regime.

A similar tendency is observed in the practice of Central American scholars and judges of the Central American Court of Justice in transplanting foreign – exclusively European – doctrines. Accordingly, when transplanting foreign doctrines, not only is there neglect of the defining features of Central American regionalism and governance, but in addition, there is disregard of those intrinsic historical and contextual features of the regional arrangements from where these transplants are drawn. As this thesis explains, the result has been the creation of two conflicting and opposing representations of judicial concepts in the relationship between the SICA legal regime and domestic legal systems. One, interprets domestic constitutions and SICA treaty provisions to hold the SICA legal regime to be subsidiary to domestic legal systems and subject to constitutional review; this is sustained by domestic constitutional courts and chambers. The other, sustained by the Central American Court of Justice and legal integration scholars, holds that SICA treaties and norms are superior to domestic constitutions by reference to European doctrine. The effects have been twofold: a failure to establish a successful dialogue between the regional court and domestic courts; and strong backlash on the part of the latter to the rulings of the regional court.

In contrast, this thesis moves away from the descriptive and abstract accounts that prevail in the region and provides a problem-based account of the Central American region, by identifying the challenges that it faces as a result of its history and context. It also moves away from the Eurocentric focus of other studies of Central American integration, providing an innovative approach to comparison that draws on the distinctive insights offered by both Europe and ASEAN.\textsuperscript{20} In these ways this thesis moves beyond usual North-South comparisons by identifying its limits and perils, and more exceptionally, by constructing a South-to-South comparison. It is expected that this approach, which honours and is informed by context, could prove beneficial beyond Central America.


\textsuperscript{20} Frankenberg has written that: ‘by standing outside of their own legal system might . . . inspire students to learn more about and rethink the biases of their own [legal system]’. See: Günter Frankenberg, ‘Critical Comparisons: Rethinking Comparative Law’ (1985) 26 Harvard International Law Journal 411, 412.
This thesis is also original because it applies comparative study to the regional level, adapting methods and insights from Comparative Constitutional Law (CCL) and the newly developing study of Comparative International Law (CIL). The methodology of this thesis therefore contributes to the emerging field of legal comparative regionalism. This can be seen as a methodology that not only overcomes the existing methodological issues identified in this thesis, but is also applicable outside Central America.

In regard to the overarching significance of this thesis, the reform of SICA is long overdue. Early calls for the reform of SICA’s legal regime came in 1994, with the signature of the *Alliance for Sustainable Development of Central America* (ALIDES). This agenda promoted a new vision and cohesive role for the many SICA subsystems and institutions. Since then, SICA states and institutions have sought to alleviate fragmentation and institutional overburdening through many calls for reform. In 2010, as the latest action directed to reform, SICA heads of state opted for a relaunch of SICA.

This relaunch was based on five pillars: democratic security; climate change and disaster prevention and mitigation; social integration; economic integration; and institutional strengthening of regional institutions. With the relaunch, states intended to provide a new restructuring of the legal regime. However, despite many attempts and calls for modernisation and institutional rationalisation, no concrete action has been implemented. SICA continues to suffer from fragmentation and institutional over-expansion, as well as

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inconsistencies created by the judicial transplantation of foreign, non-contextualised concepts.

This thesis is particularly timely, as the SICA General Secretariat, under its new Secretary General elected in 2017, is undertaking a new review of the legal regime with an eye to reform. This review is intended to coincide with the Central American region’s bicentenary of independence as a Federation in 2021. As such, the General Secretariat has developed a new agenda for the strengthening of the SICA along the following lines: providing new effectiveness to the General Secretariat; achieving systemic coordination among SICA institutions (‘integrating integration’); establishing relationships with new partners; repositioning the SICA in the regional agenda (‘living integration’); and the inclusion of gender rights into the integration process.26

This thesis seeks to provide methods and findings that shed more light on the identified problems and help reform, in particular, the project of ‘integrating integration’ in the General Secretariat’s new 2021 agenda.

III. METHODOLOGY OF RESEARCH

This thesis draws on CCL and CIL to develop a comparative legal method to study regionalism. It also draws on international relations theory to provide a description and analysis of the underlying history and context of Central America’s regional arrangements. It employs the following research methods to answer the research question. The first objective of the thesis is to identify the problems faced by the SICA legal regime and their causes. In order to do so, this thesis analyses historical, legal and political sources to give an account of SICA. From this analysis it identifies the historical legacies of Central American regionalism and governance and their effect on the current SICA legal regime. It seeks to show a causal link between the Central American region’s executive driven bias and its vulnerability to external influence on the one hand, and the certain conceptual, institutional and judicial problems which SICA’s legal regime faces on the other. The thesis reviews constitutional and treaty norms specific to Central American integration, both historical and contemporary, in the broader historical and geopolitical context of Central America, in order to shed light on the unique nature of SICA.

In order to understand the nature of the SICA legal regime, the thesis also engages with international relations theory to explain why social justice and development through human rights are distinguishing features of Central American integration. This thesis utilises the methods of social-constructivism, which seeks to understand regionalism and regional integration through the development of the social constructs, institutions, norms, principles and procedures that enable, and/or constrain, actors to provide stability and benefits to the subjects of a legal system. As in constitutional theory, regional institutions, norms, principles and procedures make a normative claim to authority. Although regionalism may respond to certain universal tendencies and movements, as was the case with the regionalism waves of the 1960s and 1990s, it also emerges from particular intrinsic historical and social constructs and conditions. Consequently, regional theory, social constructivism, and constitutionalism all seek to study the conditions by which institutions and norms are legitimate, resulting in the determination of the conditions by which subjects should comply with them. In this sense, the regional integration system is dependent on socially accepted constructs and the normative objectives recognised by states.

The second objective of this thesis is to identify potential solutions to the challenges faced by the SICA legal regime. In order to do so, this thesis draws comparative insights from regionalism in the EU and ASEAN, adapting methods and insights from both CCL and CIL. The use of both fields of comparative law is necessary because comparative regionalism lies at the crossroads of CCL and CIL. Regionalism and regional theory reflect traits similar to international legal systems, in that they are legal systems created by international treaties and regulated, to different degrees, by international norms and

principles. Yet, in contrast to international law, regional integration systems have deeper roots in domestic legal systems and promote stronger interaction between its members.

CCL has attracted widespread study and attention from scholars since the end of the 20th century. In general terms, CCL focuses on the study of constitutional phenomena across jurisdictions in constitution-making and interpretation processes, as well as providing descriptive accounts and normative assessments of constitutional law and institutions. Therefore, CCL, as with general comparative law, is used not only for potential law reform, but also to understand the general nature of constitutions and constitutional interpretation. In addition, CCL has engaged with the topic of legal transplants and legal borrowing. It has studied how cross-jurisdictional transfers have taken place between different legal systems, and the effects of such transplants on the legal regime into which they are transplanted. CCL has also shown how concepts themselves change as they are transplanted across jurisdictions. Meanwhile, and in contrast to CCL, CIL is at early stages. Martti Koskenniemi, Anthea Roberts and others have started to detail a notion of CIL. Roberts et al have provided a definition of comparative international law as ‘identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply and approach international law’.

Early work on CIL has taken a sociological standpoint to the study of international law concepts by transnational actors. This thesis takes the sociological approach of CIL and applies it to regional constructs. Therefore, like the ‘comparative international law’ approach, this thesis analyses the interpretation, application, resistance and backlash of concepts across regions, by new regional and domestic actors.

34 Vlad Perju, ‘Constitutional Transplants, Borrowing, and Migrations’ in Michel Rosenfeld and Adrás Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) 1305.
The overall comparative approach taken in this thesis is a functional approach, in which this thesis looks to other regional integration legal regimes to identify shared challenges and possible solutions. Functional approaches to comparison aim to identify how similar problems are solved in different legal systems. This thesis uses comparison to identify solutions to the problems identified within the SICA legal regime. Yet, as scholars have pointed out, the functional method of comparison has several risks. One is the failure to engage with context. Functional approaches to comparison may presuppose that legal regimes and institutions have similar features and similar objectives. By doing so, functional comparison can concentrate too much on legal features and specific legal rules and avoid the study of social structures that may inform their creation, interpretation and application. Being overly concerned with establishing causal links between laws and their effects may also restrict looking towards new solutions or different case studies.

This aspect of functionalism leads to another set of risks. This concerns the use of ‘cherry picking’ and the allure of reputation. Cherry-picking is the selective use of case studies to provide solutions without proper justification or balanced methods of comparison. It becomes a risk when it is used to promote or manipulate favourable solutions without critical engagement. This comparative exercise can be associated with the allure of reputation, which can also affect the selection of case studies to draw potential solutions across legal regimes. The allure of reputation becomes a risk when borrowing is based solely on the status of the foreign law, doctrine or institution without paying attention to the contexts of both the exporting and importing legal regimes. From the viewpoint of the exporting regime, it can lead to a neglect of local conditions, culture and values, and understanding of why and how these laws, doctrines and their interpretation have been accepted within the specific context. From the viewpoint of the importing regime, risks

40 Husa, above n 37, 118; Danneman, above n 38, 404.
41 Husa, above n 37, 124–125.
42 Danneman, above n 38, 410.
43 Thomas Kadner Graziano, ‘Is It Legitimate and Beneficial for Judges to Compare’ in Mads Andenas and Duncan Fairgrieve (eds), Court and Comparative Law (Oxford University Press, 2015) 30.
arise when local institutions need to assert their legitimacy within their own societies to organically respond to local needs.46

This thesis argues that previous studies of integration have suffered from cherry picking, in particular from the European regional experience. Europe has been adopted as the global model for integration as a result of its success in creating a complex legal regime that has delivered deeper integration between its members.47 Due to its success, comparative regionalism scholarship has tended to present a bias towards it.48 As this thesis shows, this is also accurate for Central American integration scholarship.49 Central American scholars and the Central American Court of Justice have referenced Europe indiscriminately and transplanted European sources and doctrines via adjudication disregarding provisions of the Tegucigalpa Protocol, other SICA treaties, and defining features of Central American governance and regionalism.50 This has led to backlash against the Central American Court of Justice by domestic courts. The Central American Court of Justice opened its doors in 1994, with a constitutive statute.51 In its over twenty years of existence, the regional court has entertained over 70 cases.52 As the Tegucigalpa Protocol provides, the Central American Court of Justice has the duty to interpret the protocol and other regional integration treaties and norms and guarantee their application.53 Yet, as this thesis demonstrates, the formal comparative methods and Eurocentric case selection, in combination with a highly abstract and decontextualized approach to scholarship, have not been able to assist in solving the problems of the SICA legal regime.

50 See discussion in Chapter 5.
51 Estatuto de La Corte Centroamericana de Justicia [Statute of the Central-American Court of Justice], Opened for Signature 19 December 1992, 1821 UNTS 280 (‘CACJ Statute’).
52 Taken from the Central American Court of Justice’s case docket, see: Central American Court of Justice, Jurisprudencia [Jurisprudence], in http://portal.ccj.org.ni/CCJ2/Default.aspx?tabid=99.
53 Tegucigalpa Protocol Article 12.
This thesis addresses these methodological concerns with the functional approach to comparison by considering context as part of the transplant process and looking beyond Europe, namely to ASEAN. On the point of considering context as part of the transplant process, this thesis recognises that although Central America is different to other integration enterprises because of its social justice component, this does not make it incomparable.\textsuperscript{54} This thesis recognises the inherent value of comparative insights and the possibility of successful transplants across regions, where they are informed by local knowledge and culture. Transplants have already taken place in Central America and have been successfully reengineered\textsuperscript{55} and applied in the region for quite some time. These successful examples of transplants reveal a historically reflective and contextually informed approach to comparative method, which this thesis continues.

This thesis chooses two case studies to identify possible solutions to the problems of the SICA legal regime: EEC/EU and ASEAN. This selection is justified by the hybrid features of the SICA legal regime, which is composed of both intergovernmental and supranational institutions. This thesis argues that SICA occupies a middle-point between the two comparative case studies of EEC/EU and ASEAN. While the European experience presents itself as the quintessential supranational project, ASEAN is purely intergovernmental in nature. The difference is most apparent in the nature of their legal institutions. European integration, due to political outcomes and challenges, has experienced a judicial turn, with the European Court of Justice as its driving legal institution. ASEAN, in contrast, has no judicial structures, or any supranational governing body for that matter. It is driven by states’ diplomatic efforts to become a ‘production hub’ and a competitive economic actor on the international stage.\textsuperscript{56}

Central American regional governance can be seen as a mid-way point between the European and Southeast Asian regimes. On paper, SICA is an intergovernmental body with a supranational court, regional parliament and many executive committees. It accepts a degree of direct effect of regional norms even though, for the most part, these are situated below domestic constitutions and are subject to domestic constitutional review. While these features tend to present Central America as an integration system like

\textsuperscript{55} On reengineering of transplants, see discussion in Chapter 5, Title 3, subtitle C.
\textsuperscript{56} Siow Yue Chia and Michael G Plummer, \textit{ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions} (Cambridge University Press, 2015) 75.
that of Europe, member states’ attitudes and actions towards governance are more like that of ASEAN, which is closer to an international law regime. The easy dismissal of supranational hard solutions towards a more diplomacy-favoured mediation and the role of executives within the integration regimes show a more intergovernmental inclined focus to the integration regime.

This thesis is aware of, but does not specifically draw on, other Latin American or African regional arrangements. South American regional arrangements, such as the Andean Community and Common Market of South American (MERCOSUR), and African arrangements, like Economic Community of West African States (ECOWAS) and the African Union, reflect similar Eurocentric undertones. This is observed in the Latin American region with the Andean Community and MERCOSUR, which both adopt the EU’s classical form of governance, that of the old European Economic Communities (EEC). As such, both integration regimes have tended towards economic integration following the traditional EEC ‘Balassian’ model of integration and the use of supranational bodies for dispute resolution, with the Andean Community opting for a regional court, while MERCOSUR does so through panels and Permanent Tribunal.

Although regionalism and integration pursuits in Africa have been connected to the continent’s state-building efforts at the end of its colonial period, they still draw heavily on European influence. Since the 1960s and in the early African integration experience, such as the original East African Community, integration has focused on supranationalism. Today, Africa houses at least ten different economic integration schemes and initiatives, the most notable being the ECOWAS and the African Union.

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58 Finn Laursen, ‘Requirements for Regional Integration: A Comparative Perspective on the EU, the Americas and East Asia’ in Finn Laursen (ed), Comparative Regional Integration (Ashgate, 2010) 251.

59 Rita Giacalone, ‘La Integración Sudamericana -Entre Modelo Europeo y La Política Exterior Brasileña [South American Integration -between the European Model and the Brasilian Foreign Policy]’ in Eric Tremolada Álvarez (ed), Repensando la Integración y la Integraciones [Rethinking Integration and the Integrations] (Universidad del Externado de Colombia, 2013) 156.

60 Kühnhardt, above n 1, 230.

61 Fredrik Söderbaum, ‘What’s Wrong with Regional Integration? The Problem of Eurocentrism’ (EUI Working Paper RSCAS 2013/64, European University Institute, Robert Schuman Centre for Advanced Studies, 2013) 5.
In their institutional aspects, the African Union ostensibly follows the EU institutional structure, with a similar regulatory nature and powers. Meanwhile, the ECOWAS, in a range of reforms transformed its secretariat to a EU-style ‘commission’ and installed a parliament and a series of other supranational bodies to oversee and direct this African subregion’s integration. This gives African regional arrangements their Eurocentric bias, making them less useful for the purposes of the issues with which this thesis is concerned.

IV. STRUCTURE OF THE ARGUMENT

The purpose of this first chapter has been to elaborate the framework of this thesis, as well as to identify the research question and two objectives of the thesis in answering it. As earlier noted, these objectives are the identification of the problems of the SICA legal regime, and the search for possible solutions to those identified problems, drawing on the methodology of comparative regionalism and looking towards the EU and ASEAN. This chapter has also detailed the research methods used to answer the research question and meet the two objectives as well as outlined how this project engages with existing research.

Turning to the progression of the argument in what follows, the first half of the thesis is focused on the first objective, that is, the identification of the problems faced by the SICA legal regime. Chapter 2 provides a description of SICA, the reasons for its creation, its fundamental objectives and purposes. That chapter shows how social justice and human rights were the fundamental objective and purposes of SICA, in response to the conflict and human rights violations that occurred during the 1970s. It also shows how this objective was not only a platform for the birth of SICA, but also a catalyst for a complete constitutional overhaul of the governance of Central American states. The same chapter also shows how the SICA aligns with domestic constitutions in the region’s quest for social justice through human rights, which form the main values of the current Central American integration enterprise. As such, it characterises SICA as a ‘transformative’

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63 Masinde and Otieno Omolo, above n 61, 10.
64 Kühnhardt, above n 1, 258.
integration enterprise with the objective of assisting Central American states to deliver social justice in the region. That chapter also outlines the relationship between SICA treaties and norms and domestic state constitutions. It shows, through an outline of constitutional and treaty provisions and review of the jurisprudence, how domestic constitutional courts and chambers have interpreted the SICA legal regime as an extension of constitutional law and SICA norms, deeming it to have an inferior status to domestic laws and other international human rights instruments. The analysis made in this chapter demonstrates how weak the SICA legal regime currently is by showing its dependency on the executives of the region and its inclination towards domestic rule. This executive dependency has been the basis, as will be shown in Chapter 3 and 4, for the fragmentation of the SICA legal regime, without an overarching legal structure or guiding principles, over-expansion of institutions in an ad hoc way, and the failure to establish remedies at the regional level. It also imparts the defining features of the SICA legal regime, defined by constitutions, treaty provisions and jurisprudence of domestic courts, which subsequently have continued to be ignored by Central American scholars and the Central American Court of Justice when transplanting foreign doctrine. These matters are taken up in Chapters 4 and 5.

Chapter 3 reviews SICA in its historical and geopolitical context, on the basis of a prior explanation of why the SICA was created and its purposes. Chapter 3 shows how SICA is the latest of many regional arrangements formed in Central America since the fall of the Central American Federation in 1848. The chapter isolates two historical legacies of Central American governance and explains how they have affected, and continue to affect, the many Central American reunification and integration attempts, including SICA. These are Central America’s executive-led dominance and its vulnerability to external influence. Executive led dominance refers to the position held by executives within the SICA legal regime and their defence of autonomy within the integration process. The second legacy, vulnerability to external influence, has two facets. The first is the direct influence of strong extra-regional actors, such as Spain, the United States and the EU in moulding the Central American approach to regionalism. The second is the indiscriminate use of external ideas by Central American legal scholars without taking local features into account. The identification of these legacies is shown to become important as they inform the nature, defining features and challenges of the SICA legal
regime. They also inform the potential for insights to be drawn from comparative legal method and the selected case studies.

Subsequently, Chapter 4 demonstrates the ways in which these two historical legacies are reflected within the SICA’s legal regime, on conceptual, institutional and judicial levels. On the conceptual level, Chapter 4 shows how state executives’ fear of losing control of governance has led to the creation of a regional governance regime without any overarching legal design, through an ad hoc development, with no short, medium or long-term commitments to accountability. The chapter also shows how the lack of a clear overarching design pushes the willingness of Central American states to ratify extra regional free-trade agreements, such as the US-DR-CAFTA, which serve to create an economic scheme that competes with the SICA legal regime. On the institutional level, similar causes have led to the expansion of the regime without oversight. This has resulted in the institutional proliferation of SICA institutions and the failure to ensure effective remedies for breaches of law and individual rights by both regional and domestic actors. On the judicial level, this thesis identifies three problems affecting the new regional court: first, a constitutive statute that gives the court broad supranational powers, leading many states to refuse to ratify it; second, the adoption of a comparative legal method in relation to foreign transplants that conflicts with treaty provisions, the jurisprudence of domestic courts and other features of Central American governance identified in Chapter 2; and, thirdly, the failure to establish dialogue with domestic courts and other judicial bodies in moments of backlash.

Turning to Chapters 5 through 7, their focus is on the second objective of this thesis. This involves presenting insights that address the problems of the SICA’s legal regime identified in the earlier chapters. Chapter 5 undertakes to critique and present possible solutions to the comparative methods used by the regional court and Central American scholars when transplanting foreign concepts into the regional legal regime. The chapter identifies the underlying causes of this problem, which are informed by civilian engagement with law, and transplants that are abstract and highly conceptual. Chapter 5 argues that because of these traits of law in abstract and conceptual terms, these transplant exercises have failed to consider the context and distinctive features of Central American governance. The result has been a pushback against transplants by domestic actors. The solution recommended in the chapter is better comparative practice, and this proposal is
supported by examples of successful transplants that have considered context and values that prevail at different moments in Central American history.

Chapter 6 turns to the other identified judicial problems of SICA, namely the dysfunctionality of the new regional court’s statute and the court’s failure to establish dialogue with domestic courts. It also considers the institutional problem of a lack of remedies for individuals affected by breaches of law and individual rights. This is related to the Central American Court of Justice’s incapacity to establish a proper dialogue with domestic courts and to safeguard regional rights. To seek solutions to these problems, Chapter 6 looks to Europe for insights, but in an approach that is informed by contextual specificities. Europe represents a model of integration embedded in supranationalism. Its success has relied on judicial dialogue in the form of preliminary references and remedies. Despite reactions from part of some member states such as Germany, France and Spain, through this judicial dialogue the European Court of Justice has been able to assert doctrines of supremacy and direct effect, proclaim its authority, and determine the scope of its competencies. Through this dialogue process the region saw the consolidation of the European Court of Justice jurisdiction with the European Charter of Fundamental Rights and Freedoms, which is applied exclusively in relation to integration norms and gives the court a specialist jurisdiction over the European legal regime.65 This thesis draws attention to the European Charter as a potential exemplary model for consolidating the SICA legal regime and its regional court. A charter of this kind would not only reflect the rights-based nature of Central American governance but could provide the regional court with a platform to act, and specific competencies to review integration norms under recognised and specific regional rights.

After having addressed the judicial problems of SICA, it becomes the aim of Chapter 7 to address the conceptual and institutional problems of SICA. For this the chapter looks to the ASEAN case study and the Southeast Asian experience of regionalism. It is shown that in contrast to the European supranational model, ASEAN is a very different kind of governance scheme. ASEAN is by nature intergovernmental. As such, it is embedded in intergovernmental action and international law norms and what it calls the ‘ASEAN way’. The success of ASEAN is illustrated by the fact that, after its 2008 financial crisis, it has been able to integrate deeper to become a ‘global production hub’. It achieved this

65 See discussion in Chapter 6.
transformation through its ‘blue-print’ process, which consists of developing short, medium and long term ‘soft law’ objectives, capable of evolving and adapting to ASEAN member-states’ needs. The blueprint also offers an accountability regime through which ASEAN countries may be held accountable to others states in the region. This thesis considers a similar exercise is applicable in the Central American region, because its governance, like that of ASEAN, is deeply executive driven. As such, the blue-print model could come to alleviate the lack of short, medium and long-term objectives and insert a new accountability and dialogue processes to keep integration moving forward in Central America.

Based on the possible solutions identified here to the problems facing the SICA’s legal regime, the concluding Chapter 8 does the following. First, it accounts for how this thesis has answered the research question and achieved its primary objectives. Second, it provides direction on how to incorporate the proposed solutions to SICA’s identified problems. The chapter argues that by creating a regional integration charter of rights and blue-prints to provide short, mid and long term objectives for SICA and institutions, SICA could become competitive at a global scale. By becoming competitive, it would be better placed to deal with other economic competing legal regimes, such as that of the US-DR-CAFTA. Ultimately, Chapter 8 reviews the need for this thesis in the global legal literature, and its impact on Central American integration governance. In doing so, the chapter demonstrates how this thesis fills a gap in Central American integration and regionalism studies at the global level. More significantly, it illustrates the need to pursue these lines of research, not only to provide solutions to Central America’s regional governance issues, but to understand the nature of regional arrangements and regionalism more globally and comprehensively. As such, this investigation of Central American integration offers new ways to review and define regional arrangements and governance, in order to move beyond the traditional focus on Europe in regional integration studies.
CHAPTER TWO.

DEFINING FEATURES OF THE CENTRAL AMERICAN INTEGRATION SYSTEM

I. INTRODUCTION

The Central American Integration System (SICA) has been described as ‘the most politically advanced integration process in the Americas’. The purpose of this chapter is to outline the key features of SICA and its place in Central American governance. In doing so, this chapter explains why SICA was created, and describes its fundamental objectives and its relationship with the domestic legal systems of Central American states. This chapter is primarily descriptive, setting out the distinctive characteristics of the SICA legal regime and the domestic constitutional regimes of member states. Understanding and considering these characteristics is important to the analysis of the problems currently facing the SICA legal regime, and necessary for the successful implementation of any of the proposed solutions to these problems.

SICA was the product of a broader democratisation and peace-building process in Central America during the 1980s which sought to bring social justice through the promotion of human rights standards. This process was called Esquipulas. Through this process, not only was the SICA founded, but a series of new constitutions, constitutional reforms, treaties and regional declarations were adopted across Central American states, all with a ‘transformative’ nature to give effect to the Esquipulas process. These legal reforms are regarded as transformative because their goal was to provide a lasting solution to the causes of the turmoil, war and human rights violations experienced across the Central American region during the 1970s. This regional transformation underlies the distinctive character of SICA and Central American regional governance.

Transformative constitutionalism is a feature associated with the Global South, illustrated by developments in South Africa, India and Latin America. Transformative

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1 Ludger Kühnhardt, Region-Building (Berghahn Books, 2010) Volume I: The Global Proliferation of Regional Integration, 73.
2 These problems are outlined in Chapter 4.
3 For a discussion of the success of legal transplants, see Chapter 5, Title D.
4 This was the name of the city where the regional peace-building and democratisation commitments were signed.
constitutionalism is characterised by recognition of the need to deal with inequality and human rights abuses and by attributing to the state a key role in pursuing this goal. States, through their institutions, were deemed to be the primary actors for transformation to deal with inequality and development through human rights. Social and economic rights become key features of governance, and the activities of private actors – where they relate to public goods – become the object of regulation and scrutiny. Central America’s constitutional development during the 1980s started to reflect features of transformative constitutionalism by creating new constitutions and implementing reforms that gave human rights, and their accomplishment provided an overarching status in the region. SICA was a direct product of this constitutional wave, and reflected aspects of transformative constitutionalism.

By analysing the Esquipulas process and the transformative constitutionalism that underlies it in both the new domestic constitutions and regional reforms, this chapter explores the transformative features of the SICA legal regime, and the connections and tensions arising from the relationship between domestic and regional arrangements. Parts II and III describe how key features of transformative constitutionalism are reflected at both the domestic constitutional and regional levels. Part II concerns the social justice and human rights inclination of the SICA legal regime, and shows how it reflects this character from the domestic constitutions and reforms implemented across the Central American region during the 1980s. Part III discusses the region’s inclination towards executive rule, at both domestic and regional levels. It shows how executives have become the main architects of SICA and the direct link between the SICA legal regime and domestic legal systems. Part IV explains the status of SICA treaties and norms within domestic legal systems of Central American member states and the principles governing the relationship between domestic and regional law.

II. SOCIAL JUSTICE AND HUMAN RIGHTS

The 1980s Esquipulas process launched a new regional transformation process in the Central American region. This transformation was driven by the need to respond to the circumstances that led the region into turmoil, war and human rights abuses in previous

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Constitutionalism in Armin von Bogdandy et al (eds), Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune (Oxford University Press, 2017) 34.

6 von Bogdandy, above n 5, 34.

7 Hailbronner, above n 5, 528.
decades. During this period, Central American states enacted new constitutions and constitutional reforms and created a new regional integration regime to support the domestic transformation process. As a result, these new constitutions, reforms and the integration process share common features intended to address the causes of turmoil suffered in the decades prior to the *Esquipulas* process, namely to secure social justice through human rights at the domestic level. This part of the chapter shows how the promotion and accomplishment of social justice and human rights has become a defining feature of both the SICA legal regime and domestic legal systems in the Central American region.

A. Domestic Level

The new Central American constitutions and reforms enacted in the 1980s stand out from previous constitutions because they portrayed a strong invocation of social justice and human rights.8 As Nolte and Schilling-Vacaflor have noted, the new Central American constitutions were enacted to try to prevent any future national and regional conflicts.9 Therefore, all of the new Central American constitutions recognised the need to tackle the causes that led to war and dictatorship in the previous decade and inserted new provisions for the state and its institutions to strive towards social justice.10 For example, the Guatemalan constitution sets out ‘social justice’ as the guiding principle of its social and economic development regime.11 Similarly, the Honduran constitution recognises social justice as a fundamental principle of its economic regime.12 Another example is the Salvadorian constitution, which sets out as an objective of the Salvadorian state to ensure

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its inhabitants enjoy ‘freedom, health, culture, economic welfare and social justice’. Further, the Nicaraguan constitution provides that the state ‘shall promote and guarantee advances of social character […] to guarantee the common good’.

In order to prevent the human rights violations and dictatorships of the past, this new constitutional wave saw the introduction of a range of civil, political, social and economic rights charters within the newly enacted constitutions. Consequently, human rights, as set out in international instruments like the *Universal Declaration of Human Rights* of 1948, the *American Declaration of the Rights and Duties of Man* of the same year and the *American Convention on Human Rights* of 1969 became the language by which constitutions defined, limited and provided accountability in the exercise of public power.

One explanation for this similarity in language concerns the role of international human rights bodies, particularly the Inter-American Commission on Human Rights, in providing exposure and redress of the human rights abuses by states. As Huneeus and Rask Madsen have argued, during the 1970s international bodies used international human rights as a means of imposing diplomatic pressure on authoritarian regimes by name-shaming them. Because of their nature as international norms, human rights were not capable of being derogated by states or their authoritarian rulers, and were able to attract public support of civil society. As a result, human rights in Central America acquired a superior normative claim against dictatorial states. Because of this exposure

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and name-shaming aspect, international human rights have become an essential part of democracy and state-building in the Central American context.21

International human rights instruments were incorporated into domestic state law as the language used to draft the new constitutions.22 Reflecting the loftier normative claim of international human rights law, constitutions handed international human rights instruments a special recognition, or granted them a high degree of openness, imparting direct effect and superior hierarchical status over other domestic laws. This newfound status is reflected in the three different ways that international human rights instruments are incorporated in domestic constitutions. The first approach, seen in the Constitution of Nicaragua,23 expressly provides that particular human rights treaties have constitutional rank. The second approach, taken in the Dominican Republic,24 Guatemala25 and Honduras,26 introduced a constitutional clause that provides that human rights treaties are superior to domestic law. The third approach, taken in Costa Rica, recognised international human rights instruments as superior to the domestic constitution.27 The Costa Rican Constitutional Chamber has interpreted this provision and recognised that those human rights treaties that provide higher safeguards and protection for individuals shall ‘prevail over the constitution’.28

21 Ulate Chacón, above n 8, 26.
23 Constitution of Nicaragua Article 46.
26 Constitution of Honduras Article 18.
28 Sentencia No 3435-92 (Judgment) (Unreported, Sala Cuarta de la Corte Suprema de Costa Rica)
Human rights and social justice came to provide new rationales for regional integration, as portrayed in the many constitutional texts of the region. As such, domestic constitutions began to subject the integration process to human rights standards. One example is the Constitution of El Salvador, which provides that the country ‘shall encourage and promote human, economic, social and cultural integration with the American republics and especially with the Central American isthmus’.\textsuperscript{29} It also provides that any type of integration should be based on ‘democratic and republican principles and the individual and social rights of its people’.\textsuperscript{30} Another example is the Constitution of Honduras, which gives the President the duty to ‘support the policy of economic and social integration […] which tends to enhance the life conditions of the Honduran people’.\textsuperscript{31} Moreover, the Guatemalan Constitution cites the need to promote deeper economic and political integration in Central America ‘on the basis of equality’.\textsuperscript{32} Additionally, the Constitution of Nicaragua states that ‘Nicaragua defends firmly Central American unity, supports and promotes all efforts to achieve political and economic integration and the cooperation of Central America, as the efforts to establish and preserve peace in the region.’\textsuperscript{33} While the Dominican Republic was not part of this constitutional movement, its current constitution prescribes that it should ‘favour integration […] and sign international treaties in order to promote the common development of nations, which assures the welfare of their peoples.’\textsuperscript{34} To contextualise the last of these examples, Belize is similar to the Dominican Republic in the sense that it has not shared much of the history of Central America, although it suffers from the regional features of high inequality and violence. By entering SICA, Belize recognised the values to promote social justice that underlie the SICA legal regime.

These constitutional provisions are important because they give the regional integration process and governance scheme its social justice identity and connotation at the domestic level. These provisions are the constitutional basis on which the Central American integration process is built. They set out the fundamental basis of human rights and social justice against which the integration process can be constitutionally reviewed, including judicially at the domestic level, as shown later in this chapter. Therefore, constitutional

\begin{enumerate}
\item[29] Constitution of El Salvador Article 89.
\item[30] Ibid.
\item[31] Constitution of Honduras Article 245, section 34.
\item[32] Constitution of Guatemala Article 150.
\item[33] Constitution of Nicaragua Article 9.
\item[34] Constitution of the Dominican Republic Article 26.5.
\end{enumerate}
rights provide an additional guide for how domestic actors ought to conduct themselves on the regional plane in pursuit of the goals and objectives of regional integration.

B. Regional Level

The regional transformation process was formally initiated by the *Esquipulas I declaration*, signed in 1986 by the Presidents of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. This declaration introduced the values of social justice and human rights for the first time within the new transformative regionalism movement. It states that ‘peace in Central America can only be the result of an authentic democratic pluralist and participatory process that involves the promotion of social justice, respect for human rights, sovereignty and territorial integrity’. As a symbol of this transformation, Central American states agreed to create a regional parliament, called the Central American Parliament, or PARLACEN.35 This new institution was not intended to become a regional legislature but rather a platform to gather the experiences and knowledge of Central American states in their pursuit of peace.36

A year later, in 1987, a subsequent *Esquipulas II declaration* was signed. This expanded the initial declaration and provided an action plan for the democratisation and peace-building in the region. This second declaration stated that:

> [t]he governments [of Central America] are committed to advance an authentic democratic pluralist and participatory process that acknowledges the promotion of social justice, the respect for human rights, sovereignty, territorial integrity of the states and the right of all nations to determine freely and without foreign intervention of any kind, their economic, political and economic model and will realise, in a verifiable manner, the conducive measures for the establishment and perfecting of their democratic, representative and pluralist systems and the effective popular participation in the decision making and guarantee free access and diverse flows of opinion in honest and continuing electoral processes, founded on the full respect of human rights.37

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35 On the history of this institution, see Chapter 3, title IV, subtitle B.
The *Esquipulas II declaration* of 1987 emphasized that the PARLACEN was to become ‘the symbol of the freedom and independence of the reconciliation’ of Central America.38 This new institution represented the launch of a new integration process to help accomplish this transformation towards peace and social justice through human rights, set out by the *Esquipulas declarations*.

The two *Esquipulas declarations* became the platform on which the new Central American Integration System, SICA, was launched in 1991. These values of social justice were incorporated in SICA’s constituting treaty, the *Tegucigalpa Protocol*. The *Tegucigalpa Protocol* inserts these values as ‘purposes’ to be achieved by the new integration process. As such, the *Tegucigalpa Protocol* assigns to SICA, as one of many, the purpose of:

establishing a new model of regional security, sustained by a reasonable balance between [armed] forces, the strengthening of civil power, the overcoming of extreme poverty, the promotion of sustainable development, the protection of the environment, and the eradication of violence, corruption, terrorism, drug and weapon trafficking.39

The *Tegucigalpa Protocol* also asserts as a purpose of SICA to ‘achieve a regional welfare system and economic and social justice for the Central American peoples’.40 In fulfilling these purposes, the *Tegucigalpa Protocol* requires that SICA states should be guided by the ‘fundamental principle’ of ‘the tutelage, respect and promotion of human rights’.41

The Tegucigalpa principles were expanded over the course of the 1990s with the signature of a new integration treaty on social integration and a new regional declaration on sustainable development.42 These later instruments came to develop and determine the SICA’s identity as a regional governance scheme embedded in social transformation and promotion of human rights. The *Treaty of Social Integration*, signed in 1995,43 recognised the need for deeper social integration and to place the individuals at the heart of the

38 *Esquipulas Declaration II*, Preamble.
40 Ibid Article 3.d.
41 Ibid Article 4.a.
42 However, it is to be mentioned that the *Treaty on Social Integration* was one of other integration treaties and protocols created expanding the SICA governance. See discussion in Chapter 4, title II, subtitle A.
integration regime. Thus, this treaty enshrines the right to social development as a ‘universal right’, while additionally promoting healthcare, education and ‘dignified’ labour. In 1994, SICA member states signed the *Alliance for Sustainable Development of Central America* (ALIDES). Following the *Treaty of Social Integration*, this declaration expands on the notion of the individual as the main focus of Central American integration. The *ALIDES* promotes a view of integration as a framework that encompasses economic, social and environmental principles and objectives. As such, it defines sustainable development as:

> a process of progressive change in the quality of the human being, which places him at the centre and as the subject of development via economic growth through social equality and the transformation of the means of production and consumption patterns, and which sustains ecologic equilibrium and the vital support of the region.

Human rights language and provisions have also been adopted at the regional level. Yet, SICA does not include an actual regional charter of human rights. The statute of the Central American Court of Justice clearly states that the regional court does not have competence in ‘human rights matters’, which involve the exclusive competence of the Inter-American Court of Human Rights. As such, the Central American Court of Justice has been clear from the beginning that it cannot review the potential violation of civil and political rights recognised under the *American Convention of Human Rights*. However, the regional court has assumed the existence of ‘communitarian’ rights associated with integration and the necessity of their protection against state interference. It has held that it can determine and provide redress to violations of human rights within the SICA legal regime, since SICA institutions and norms are not under the jurisdiction of the Inter-American Court of Human Rights. The Central American Court of Justice

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44 Ibid Article 6(b).
47 *Alianza para el Desarrollo Sostenible de Centro América*, signed in Managua 12 October 1994, ‘Concepto de Desarrollo Sostenible [Concept of Sustainable Development].
48 Ulate Chacón, above n 8, 26.
49 *Estatuto de La Corte Centroamericana de Justicia* [Statute of the Central-American Court of Justice], Opened for Signature 19 December 1992, 1821 UNTS 280 Article 25 (‘CACJ Statute’).
50 *File 10-05-11-1996 (Judgment)* (Unreported, Central-American Court of Justice, 5 March 1998) (‘University Title Recognition Case’).
51 *File No 31-11-01-08-2000 (Judgment)* (Unreported, Central American Court of Justice, 24 October 2000) (‘Viquer v. Nicaragua Case’); More on this case and how the Central American Court of Justice has
has held that member states are obliged to ‘repair’ damages caused to individuals as a consequence of their violation of SICA norms. Later, the Central American Court expanded on this, stating that a finding that a state has violated ‘communitarian rights’ of individuals is not a mere declaratory finding, but that the regional court has the capacity to order restitution for damages and to declare the action creating this damage without effect. This shows that human rights has a strong influence on integration norms, deriving from both the domestic and regional legal regimes.

Social justice and human rights compose the cornerstone of both the new Central American constitutions and the SICA legal regime. As such, the accomplishment of social justice and human rights has been enshrined as the fundamental objective of the SICA legal regime, as recognised in many of the SICA treaties and instruments. At the same time, the SICA legal regime has no human rights charter or mechanism to uphold human rights at the regional level. Rather, the SICA treaties and instruments were designed to support the protection of rights at the domestic level by reflecting, at the regional level, the states’ commitments towards protecting and promoting human rights.

III. EXECUTIVE DOMINANCE

Executive dominance is a historical feature of Central American governance. However, after the Esquipulas process, executives gained new obligations and powers to accomplish the social justice and human rights purposes recognised in the new Central American constitutions. This executive dominance is also reflected within the SICA legal regime, while executives play the main role in promoting social justice and human rights at the regional level. Part III demonstrates how executive dominance is an intrinsic feature of Central American governance and how executive’s function as the main link between the SICA legal regime and domestic legal systems.

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52 University Title Recognition Case, Considerando II.
53 File 75-02-11-08-2006 (Judgment) (Unreported, Central American Court of Justice, 11 August 2006) Considerando XVI (‘Ex-President Portillo Case’).
54 Ibid.
55 On this problem, see Chapter 4, Title III part C.
A. Domestic Level

Central American states are executive-led systems. Presidentialism is, in the words of the Central American Court of Justice, a defining trait of the region and part of its legal culture. The Central American Court of Justice has recognised via jurisprudence this executive-led feature as part of a Central American *jus cogens* of democracy, based on Montesquieu’s traditional doctrine of separation of powers. Jus cogens refers to the nature of international norms from which no derogation can be permitted and which only can be modified by a subsequent norm of similar status. On Montesquieu’s traditional doctrine of separation of powers, powers are divided into Legislative, Executive and Judicial branches. The doctrine establishes that there must exist equal control between these three branches in order to prevent any unlawful concentration of power and its abuse by public institutions.

Constitutions prescribe how domestic public actors, including executives should act, and set out their obligations to respect the constitutions in all their acts. The new constitutional wave in Central American in the 1980s came to detail carefully and categorically the functions of the executives in the region. This was done to avoid any repetition of the authoritarian regimes of the previous decade. Nevertheless, the new constitutions gave executives primary responsibility and power for the transformation of the state, and public power in the states of the region remains concentrated in the executive branch. The role of executives encompasses the capacity to initiate legislation, veto bills passed by congress, enact executive decrees to give effect to congress’ laws as best seems fit, declare states of emergency and suspend fundamental rights and

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56 Ulate Chacón, above n 8, 26.
57 *File 69-01-03-01-2005 (Judgment)* (Unreported, Central-American Court of Justice, 29 March 2005) [40] (‘President of Nicaragua v. National Assembly of Nicaragua’).
58 Ibid.
61 Equally citing from Montesquieu: Rodríguez Vargas, above n 60.
guarantees;\textsuperscript{63} and, of most relevance to the integration process, exclusively direct all foreign relations.\textsuperscript{64} From these provisions and from a constitutional standpoint, executives are the key link between the Central American integration process and domestic states. They are also the only actors who can execute regional norms.

\textbf{B. Regional Level}

Consistent with the emphasis on executive-led action in domestic constitutions, the \textit{Tegucigalpa Protocol} reflects the new agency and role of executives at the regional level. This is illustrated by the many layers of involvement of the executives at SICA. SICA is executive driven in every aspect of its governance. SICA gives executives, through the many SICA bodies created within the \textit{Tegucigalpa Protocol}, a primary role in decision making and implementation. Executives therefore not only create norms but establish the directives for their execution. They also have direct oversight of the composition and roles of the other regional bodies established within the Protocol.

The Protocol establishes the Summit of Presidents as the ‘supreme body’ of SICA.\textsuperscript{65} This is an intergovernmental institution composed of the ‘constitutionally elected’ president of each state.\textsuperscript{66} The Protocol assigns to this body the duties to: define and direct Central American policy by establishing the directives by which integration should be carried out; harmonise the foreign policies of the member states; strengthen ‘Central American identity’; reform the \textit{Tegucigalpa Protocol}; and decide on the admission of new members.\textsuperscript{67}

Another body composed of executive functionaries is the Council of Ministers. The Ministers of each member state compose the entities of this intergovernmental institution on the basis of the integration topic they are dealing with, be it economic, social, security, or other policy.\textsuperscript{68} As such, there are many Councils of Ministers, each specializing in their...
topic of governance. The main duty of the Councils of Ministers is to give effect to the decisions made by the Summit of Presidents. In order to do so, the Councils have been given norm-making capacities to execute the directives given to them by the executives. These two intergovernmental bodies – the Summit of Presidents and the Council of Ministers – have the sole powers to enact laws within SICA that have effect within domestic legal systems.

Other institutions mentioned in the Tegucigalpa Protocol in which executives have direct power are the Executive Committee and the General Secretariat. The Executive Committee is another intergovernmental body composed of members directly named by the member states through their Foreign Ministries. This committee has the functions of assuring the efficient execution of the decisions made by the Summit of Presidents; assuring the provisions of the Tegucigalpa Protocol and norms created by the Summit or Councils are executed; providing the Council of Ministers with proposed regional policies for later discussion; submitting to the Council of Ministers the yearly financial budget of SICA; proposing to the Council the creation of new secretariats for the fulfilment of the purposes of SICA; approving rule of procedures for the functioning of the many secretariats of other regional bodies; and reviewing the activities of the General Secretariat and presenting their findings to the Summit of Presidents. Meanwhile, the General Secretariat is a regional body, led by the Secretary General who is appointed by the Summit of Presidents. The General Secretariat has duties to: represent SICA at the international level; coordinate the execution of the directives given by the Summit, Council and Committee; subscribe, with previous approval of the Council of Ministers, to international instruments and cooperation schemes with other international actors; participate with a voice, but no vote, at the meetings of the Summit of Presidents; assure the execution of the decisions made by the Summit, Council by all other SICA bodies; and call upon other SICA bodies on any situation where they may act contrary to the execution of SICA purposes as determined by the Summit and Councils.

69 Ibid.
70 Ibid Article 22.
71 Ibid Article 24.
72 Ibid.
73 Ibid Article 25.
74 Ibid Article 26.
A last example that displays this executive dominance is the PARLACEN. As previously noted, the PARLACEN was created to help Central American states in their pursuit of peace-building within their own domestic settings. The regional parliament is composed of former heads of states, as well as other elected members from each member state, in order to bring their knowledge and provide advice to the other states in dealing with their own peace-building processes. Therefore, the regional parliament was intended to promote cohesion and peace within the states by providing them with comparative insights. However, its role has been confined by constitutions of member states. Although some domestic constitutions, such as Nicaragua and El Salvador, recognise PARLACEN’s right to initiate legislation regarding integration matters, at the regional level only executives have the capacity to enact norms within the SICA legal regime.75

Executives are the key link between the SICA legal regime and domestic legal systems. At the domestic level, executives hold the exclusive authority to determine the foreign relations of SICA member states. They are also in charge of implementing SICA treaties and SICA derived norms. At the regional level, executives have nearly exclusive control over regional decision-making processes and enactment of norms.

Constitutional and regional arrangements gave executives a new responsibility and power for the transformation of the region. Executives became the main vehicles for the implementation of the new constitutions and architects of a new regional governance regime.76 As such, executive dominance became a defining feature of the new Central American governance movement.77 The Esquipulas process became a multi-level legal arrangement, where domestic constitutional legal systems and a new regional legal regime were aligned with common values, objectives and principles. Within this new regional arrangement, executives became the key links between the new regional arrangements and domestic legal systems in the promotion of these new objectives, including the promotion of social justice, sustainable development, and respect for human rights.

75 Constitution of Nicaragua Article 140.4; Constitution of El Salvador Article 133.5.
76 Chapter 3 details how this trait is a historical legacy of Central American regionalism.
However, the executive dominance feature of SICA has created a dependence of the legal regime to the activity of domestic executives in the region. This dependency exhibits the weakness and incapacity of the SICA legal regime to react to executive backlash, showing the limits of SICA. At one point, this dependency has led the SICA to be almost completely abandoned by its member states searching for new avenues to consolidate trade and foreign investment individually.78

IV. THE LEGAL RELATIONSHIP BETWEEN DOMESTIC LEGAL SYSTEMS AND THE SICA LEGAL REGIME

This final part of the chapter explores the place of the SICA legal regime within Central American governance and its relationship with domestic legal systems. Central American states are legal monist states. Legal monism refers to the recognition of international law sources as part of the domestic legal system.79 One of the attributes of legal monism is the direct effect of international treaties and norms within domestic legal systems without the need to be implemented via Congress. This means that international human rights treaties are treated as sources of law that do not need to pass through a stage of ‘domestication’ by legislatures, as in dualist legal systems.80 Monism is not unique to Central America. However, Central American states have developed a singular understanding of the relationship between international and domestic law informed by monism and the Kelsenian model of legal hierarchies.81

Within the domestic legal system, the Kelsenian model of hierarchy places constitutions at the top of the sources of law, meaning that the constitution cannot be derogated by any other source of law.82 Laws passed by Congress occupy the second position on this scale.

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78 See discussion in Chapter 3, Title V and Chapter 4, Title II, subtitle C.
80 A further review of this monism application of human rights law, see: Carlos Arturo Villagrán Sandoval, ‘Una Reflexión Sobre El “dualismo Dentro Del Dualismo” En La Interacción Del Derecho Internacional Con El Derecho Doméstico En Guatemala [A Reflection on the “Dualism within Dualism” in the Interaction between International Law with Domestic Law in Guatemala]’ in Juan Inés Acosta López, Paola Andrea Acosta Alvarado and Daniel Rivas Ramirez (eds), *De Anacronismos y Vaticinios. Diagnóstico sobre las Relaciones entre el Derecho Internacional y el Derecho Interno en Latinoamérica* [Of Anachronisms and Prophecies. Diagnosis on the Relations between International Law and Domestic Law in Latin America] (Universidad del Externado de Colombia, 2017).
because Congress is conceived to be the democratic component of states and the main source of laws regulating society.\textsuperscript{83} Below Congress, the Executive is positioned as a source of law via its decrees, which are meant to only give form to the implementation of congressional acts.\textsuperscript{84}

In Central America, this hierarchy is made more complex by the incorporation of international and regional laws. Currently, Central America presents a ‘multi-layered’ governance scheme, where the division between international, regional and domestic institutions’ competencies and norms are becoming difficult to draw.\textsuperscript{85} The Kelsenian model of hierarchy has become outdated in dealing with these new forms of interaction between these various levels of legal systems. This is because the Kelsenian model was created to deal with state-centric hierarchy of norms and before the development of regional organisations and later developments of international law. As such, ‘multi-layered governance’ augments the Kelsenian model by understanding the legal relationship between different levels of governance.\textsuperscript{86}

Multi-layered governance draws on federalism theory, which seeks to regulate the interaction between federal and state levels of governance.\textsuperscript{87} Drawing from federalism, multi-layered governance theory reviews the interaction between different levels of regulation, including the international, regional and domestic levels.\textsuperscript{88} Therefore, multi-layered theory has as objective to understand and develop new ways to determine the allocation of power, competence of institutions and application of norms across these different levels of governance.\textsuperscript{89} The following chart presents a visual representation of this multi-layered hierarchy of norms in the Central American region.

\textsuperscript{83} Ibid 224.

\textsuperscript{84} Ibid 229.


\textsuperscript{89} Cottier and Hertig, above n86, 301.
The chart shows that in Central America the hierarchy of laws places international human rights instruments at the apex, together with (or in the case of Costa Rica, superior to) domestic constitutions. The second tier consists of general international instruments, including SICA treaties and SICA complementary treaties. The third tier comprises domestic legislation passed by Congress. The lowest level contains acts of executives and SICA derived norms.

The remainder of Part IV explains each of the four tiers detailed in the hierarchy chart, and how domestic courts have developed judicial concepts to resolve conflicts of law between SICA laws and domestic laws.

A. Tier I: Domestic Constitutions and Human Rights Treaties

The Kelsenian model of hierarchy of law places constitutions at the top of the sources of law. As such, constitutions cannot be derogated by any other source of law, and can be only changed according to the procedures set out in the constitution. However, following establishment of the feature of social justice and human rights of Central American constitutionalism by the Esquipulas process, the new Central American constitutions and constitutional reforms led to recognition of a distinctive monist relationship between international human rights norms and domestic constitutions. This relationship is distinct as it is a legal phenomenon observed in Latin America and certain parts of Europe. Based on constitutional recognition of the superior claim of

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90 Kelsen, Above n82, 21.
91 On this legal phenomenon, see: Góngora Mera, above n 27; von Bogdandy, above n 5.
international human rights law instruments, and their later interpretation by courts, international human rights laws are given direct effect and superior hierarchical status over domestic laws. International human rights do not need to be incorporated into legislative decrees to have effect, but instead need only executive signature. International human rights norms are superior to legislation and can override domestic laws in domestic proceedings.\(^92\) As such, most of the Central American legal systems, except for Belize, recognise international human rights treaties as part of their domestic systems and give them equal or superior status to the domestic constitutions.\(^93\)

A relevant example of this monist relationship was the ad option of the Constitutional Block doctrine.\(^94\) Also called ‘law of the Constitution’ – *Derecho de la Constitución* – in some countries including Costa Rica, this doctrine came to recognise international human rights treaties as part of the constitution, giving them constitutionally equal or superior status and direct effect within the legal systems.\(^95\)

Because constitutions and international human rights laws sit together at the apex of the hierarchy of laws, all SICA treaties and derived norms, as well as domestic legislation and executive acts, must comply with constitutions and international human rights. Domestic courts in Central America, on numerous occasions, have reviewed laws and actions of domestic and regional authorities for compliance with constitutions and human rights. For example, in reviewing acts of domestic and regional actors, the Constitutional Court of Guatemala and the Constitutional Chambers of the Supreme Courts of Costa Rica and El Salvador have made it clear that transferral of competencies is defined and limited by their respective constitutions. In the Guatemalan case, the Constitutional Court emphasized that the constitution recognises ‘exclusive and excluding’ delegation or conferral of powers to regional bodies in relation to ‘economic and political’ integration and ‘territorial’ affairs.\(^96\) In the example of the Costa Rican Constitutional Chamber, it

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\(^{93}\) An example of this trend, see the Salvadorian Constitutional Chamber recognising the jurisprudence of the Inter American Court of Human Rights as its own: *Inconstitucionalidad 44-2013/145-2013 (Judgment)* (Unreported, Sala de los Constitutional de la Corte Suprema de Justicia de El Salvador, 13 July 2016) (*El Mozote Amnesty Case*); On a general account of the supremacy status of international human rights instruments in Central America, see: Castillo Amaya, above n 64.

\(^{94}\) This thesis also uses this doctrine as an example of successful transplants in the region. See discussion in Chapter 5, title III, subtitle D.

\(^{95}\) See more on this concept in Chapter 5, title III, subtitle D, part 1.

\(^{96}\) *File No 482-98 (Advisory Opinion)* (Unreported, Corte de Constitucionalidad de Guatemala, 4 November 1998) paras [30-32].
has required that conferral of competencies to regional bodies must be in accordance with constitutional provisions.\textsuperscript{97} The Chamber held that prior to the signature of any instrument that would transfer competencies to a regional body, the provisions must be analysed for compatibility with the domestic legal system.\textsuperscript{98} It also held that the transfer of competencies must be stated in clear and express terms and contained within a legal instrument.\textsuperscript{99}

For its part, the Honduran Supreme Court has interpreted the limits of attributions and powers of regional bodies in relation to fundamental rights recognised in the Honduran Constitution. One case involved a regional body alleging immunity, which sought to appear in domestic courts in order to resolve a retirement pension dispute. In this dispute the Supreme Court of Honduras denied the immunity claims of SICA institutions on the grounds that the fulfilment of labour rights is not undeniable and is ultimately afforded by the Honduran constitution.\textsuperscript{100} In a similar situation, the Nicaraguan Supreme Court upheld certain constitutional requirements for the application of regional law. The case involved a decision by a domestic executive to modify the list of products to be included in a special free trade regime within Central America without publication or enactment of a decree. The Court held that such decisions were without legal effect until the executive made it public via an executive decree.\textsuperscript{101} The Court resolved that regional law was subject to constitutional law and principles, such as the principles of ‘legality’ and ‘publicity’.\textsuperscript{102} The Court came to this conclusion by citing the principle of public legality in article 32 of the Nicaraguan constitution, and its national Civil Code, which denotes that ‘law does not oblige only when in virtue of its formal promulgation’.\textsuperscript{103}

As a last illustration involving El Salvador, the Salvadorian Chamber, in its case No. 29-2000-2002, reviewed the implementation of SICA norms of domestic executives.\textsuperscript{104} The

\textsuperscript{97} Proceso de Amparo No 2013-003655 (Judgment) (Unreported, Sala Cuarta de la Corte Suprema de Justicia de Costa Rica, 15 March 2013) Considerando II.

\textsuperscript{98} Ibid.

\textsuperscript{99} Ibid.


\textsuperscript{101} For a transcript of the case, see: Ibid 508.

\textsuperscript{102} Ibid.

\textsuperscript{103} Ibid.

\textsuperscript{104} Perotti, Salazar Grande and Ulate Chacón, above n 95, 341.
chamber reviewed whether a regional institution, in this case the Council of Ministers, had the capacity to attribute a new function to the executive – creation of a new tax – and if such new function violated constitutional provisions. The court held it was unconstitutional for the regional body to mandate the Salvadorian executive to create a new customs tax on imports. In its judgment the court emphatically stated that the SICA legal regime is not outside the scope of domestic constitutional law review, and therefore its instruments and norms are subordinated to the Salvadorian Constitution. The chamber of the court initially acknowledged that the creation of regional institutions, either of supranational or intergovernmental nature, does not violate the constitution. However, the court was emphatic that the implementation of norms enacted by these institutions by local executive actors must comply with constitutional standards.

In a later case, the Salvadorian constitutional chamber expanded this interpretation, stating that regional institutions may not create new powers or confer functions on domestic actors, including executives, when implementing regional norms that have not been originally assigned by the constitution. This is because to do so would violate the principles of conferral and the sole power of the Salvadorian Congress to create new taxes. In Central America, this principle refers to the delegation of specific and determined competencies by states to regional institutions, as a shared exercise of power for the benefit of the regional community. The delegation infringed the Salvadorian Constitution as it gave the executive a power that properly belongs solely to the Salvadorian Congress.

B. Tier II: the Tegucigalpa Protocol and SICA Complementary Instruments

The Tegucigalpa Protocol is SICA’s constitutive treaty. Similar to a constitution, it can only be reformed by the provisions established within it. As held by the Central...
American Court of Justice, the *Tegucigalpa Protocol* is the supreme instrument of SICA, and any integration treaty, previous or posterior to the ratification of the protocol, are subjected to it.\textsuperscript{114} The Protocol also recognises ‘complementary’ and ‘derived’ instruments.\textsuperscript{115} Complementary instruments are those treaties signed by member states that come to expand SICA’s governance.\textsuperscript{116} One example of a complementary instrument is the *Treaty of Social Integration*, which creates new obligations for SICA member states and the SICA’s social subsystem. Another example is the statute of the Central American Court of Justice, through which SICA states committed themselves to submit disputes to the regional court and comply with its rulings.

Under the hierarchy of laws, the *Tegucigalpa Protocol*, as well as the SICA complementary treaties are considered to have the same rank as general international law instruments and, therefore, can be subject to constitutional review in domestic legal systems.\textsuperscript{117} Central American constitutions are silent on the specific status of integration treaties and norms. For example, the Guatemalan constitution provides that any laws, regulations and provisions from any other legal ‘order’ that may infringe on rights guaranteed by the constitution shall have no legal effect.\textsuperscript{118} It also makes clear to Congress and the courts that in the performance of their duties they must observe the principle that no rule or treaty shall prevail over the Constitution.\textsuperscript{119} In the case of El Salvador, not only does the Constitution provide that the state cannot ratify treaties that ‘affect in any matter’ constitutional provisions,\textsuperscript{120} but it gives power to the courts to declare any treaty that is contrary to any constitutional provision without application.\textsuperscript{121} On its part, the Nicaraguan Constitution incorporates the principle of ‘constitutional supremacy’, which states that no ‘law, treaty, order or provisions can oppose [the Constitution] or alter its provisions.’\textsuperscript{122} In Costa Rica, the constitutional law allows for the judicial review post-ratification of treaties and obliges the president to denounce a treaty found incompatible with the

\textsuperscript{114} *File 5-05-01-08-1995 (Advisory Opinion)* (Unreported, Central-American Court of Justice, 20 October 1995) Considerando III (‘SIECA First Advisory Opinion’).
\textsuperscript{115} *Tegucigalpa Protocol* Art. 34.
\textsuperscript{116} Salazar Grande and Ulate Chacón, above n 107, 167.
\textsuperscript{117} As an example of interpretation of SICA treaties as ordinary international law treaties, see: *File 52-2012* (Unreported, Corte de Constitucionalidad de Guatemala, 03 May 2013), 8.
\textsuperscript{118} *Constitution of Guatemala* Article 44; more on the relationship between international law and domestic law in Guatemala, see: Villagrán Sandoval, above n 80.
\textsuperscript{119} *Constitution of Guatemala* for Congress, see Article 175; for courts, see Article 203.
\textsuperscript{120} *Constitution of El Salvador* Article 145.
\textsuperscript{121} Ibid 149.
\textsuperscript{122} *Constitution of Nicaragua* 182.
Constitution.\textsuperscript{123} With respect to the latter integrated members, the Dominican Republic has inserted a provision into its Constitution that ‘any person or organ that exercises public power’, without defining whether it is of an international, national or domestic nature, is subject to constitutional review.\textsuperscript{124} The courts are obliged to take into account that in a conflict of laws scenario the Dominican Constitution prevails over any other law or decree.\textsuperscript{125} Comparatively, Belize’s Constitution states that the Constitution ‘is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.’\textsuperscript{126}

In exercising constitutional review, domestic constitutional courts can review SICA treaties for consistency with the constitution. For example, in 2004, the Guatemalan Constitutional Court declared unconstitutional certain provisions of the \textit{PARLACEN Treaty}. The Guatemalan Court found that the treaty violated provisions of the Guatemalan Constitution, particularly the right to equality by giving criminal immunity to regional parliamentarians for crimes committed in Guatemala.\textsuperscript{127}

In another example, the Constitutional Tribunal of the Dominican Republic was asked to provide an advisory opinion on the constitutionality of \textit{Tegucigalpa Protocol}, before the executive would proceed to sign it. The tribunal began its opinion by stating that it has the capacity to review, either a priori or posteriori, the constitutionality of any law and exercise of powers by actors in order to prevent any conflicts between those laws and the Dominican constitution.\textsuperscript{128} In reviewing the \textit{Tegucigalpa Protocol}, the tribunal recognised the drivers and principles of the protocol, namely the pursuit of social justice and development through human rights were in conformity with its Constitution.\textsuperscript{129} The tribunal determined that the \textit{Tegucigalpa Protocol}, per se, did not impose any limitation on the tribunal’s capacity to defend the constitutional order and the protection of fundamental guarantees of Dominican citizens.\textsuperscript{130}

\textsuperscript{124} \textit{Constitution of the Dominican Republic} Article 6.
\textsuperscript{125} Ibid Article 58.
\textsuperscript{126} \textit{The Constitution of Belize} 1981 Part 1, s2.
\textsuperscript{128} \textit{Case TC/0136/13} (Judgment) (Unreported, Tribunal Constitucional de la República Dominicana, 27 July 2013) 10.
\textsuperscript{129} Ibid, 13-14.
\textsuperscript{130} Ibid, 19.
The cases discussed in Part IV A and B provide examples of how constitutional courts across Central America have reviewed the conduct of domestic actors complying with regional norms and the constitutionality of SICA treaties. Through such case law, domestic courts have asserted the supremacy of domestic constitutions over all other domestic law and regional laws.

C. Tier III: Domestic Legislation

The third tier of the hierarchy of law in Central America comprises domestic legislation. Under the traditional Kelsenian model, congresses or parliaments are conceived to be the democratic component of states and the main source of laws. Yet, domestic legislation holds a status lower to domestic constitutions and international treaties, whether they be of a human rights nature or SICA treaties. According to Kelsen, international treaties reflect higher commitment to the international regime, which laws of congress cannot derogate. This is because international treaties represent relations among states and peoples, and not only individuals. As such, the will of one state cannot derogate from the will of many nations.

This inclination towards international law having a superior status to domestic law is observed in many constitutions of Central America and in the conduct of Constitutional Courts and Chambers across the region. In the case of El Salvador, the Salvadorian Constitution explicitly states that no treaty affecting constitutional provisions shall be ratified by the executive. However, the Salvadorian Constitution mentions that after ratifying an international treaty, in case of conflict of law between a treaty and domestic law, treaties shall prevail. In the case of Honduras, its Constitution has established that in conflict treaties shall prevail over domestic legislation. On its part, the Constitution of Costa Rica establishes that the powers of Congress to enact norms shall only be limited by treaties and principles of international law.

131 Kelsen, above n 82, 224.
133 Constitution of El Salvador Art. 145 and 146.
134 Ibid Art. 144.
135 Constitution of Honduras Art. 18.
136 Constitution of Costa Rica Art. 105.
D. **Tier IV: SICA Derived Norms**

In the lowest area in the hierarchy of laws sits domestic executive acts and SICA derived norms. SICA derived norms refers to norms enacted by the SICA bodies, such as the Summit of Presidents, the various Council of Ministers and the Executive Committee. The *Tegucigalpa Protocol* states that ‘derived’ integration norms need to be adopted by member states as executive decrees or directives. As such, SICA norms do not need the approval of Congress for their ‘domestication’. However, since they are positioned at the fourth tier of the hierarchy of laws this means they are subject to domestic constitutions, international human rights instruments, the *Tegucigalpa Protocol* and its complementary instruments, and domestic legislation.

An example of a derived norm is the ALIDES declaration. The Central American Court of Justice has held that this declaration is to be applied as an executive directive. Other examples of derived norms are the *Rules of Origin of Products* (Resolution 154-2006), *Dumping Practices* (Resolution 194-2007), and the *Sanitary and Phytosanitary Measures* (Resolution 271-2001) and the 2008 *Central-American Uniform Customs Code*. These instruments were all enacted by the Council of Ministers of Economy, and establish the basic customs, principles and norms by which member states need to act regarding the pursuit of further economic integration.

SICA derived norms are understood to be ‘subsidiary to domestic legal systems. Article 22 of the *Tegucigalpa Protocol* requires that regional ‘derived’ norms must be modified to conform with domestic legislation. Article 22 of the *Tegucigalpa Protocol* provides that:

> The decisions of the Council of Ministers shall be binding on all member states and only provisions of [domestic] legal nature may serve to prevent their application. In such cases,

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137 *Tegucigalpa Protocol* Art. 15.a.
138 Ibid Art. 22.
139 Ibid 24.c.
140 Ibid 34.
142 Ibid.
144 Ibid 20.
the Council shall give further consideration to the matter by means of appropriate technical studies and, if necessary, shall adapt its decision to the needs of the legal systems in question.

However, such decisions may be applied by those member states which have not objected them.

This provision gives precedence to domestic legislation over SICA derived norms and emphasises the need for contextual design and the study of local sensibilities for the implementation of norms. The Central American Court of Justice has recognised this provision as ‘establishing the limits’ of SICA derived norms, which should be adjusted when in conflict with domestic laws. The subsidiary nature of this provision is understood to follow democratic principles, in the sense that members of congress in Central America are elected by public vote and have principal democratic legitimacy with constitutional power to enact laws. As some critical Central American scholars have argued, regional arrangements were not intended to create a new autonomous legal regime separate from domestic constitutional law, as was the case in Europe. By awarding local laws a superior status to SICA derived norms, the Tegucigalpa Protocol safeguards against unwarranted intrusion of integration norms into domestic legal systems and individuals. It requires that regional norms must be accommodated to domestic norms, giving precedence to local decision-making authorities over regional ones. It also requires regional actors to understand and give priority to the laws and policies of particular states and local sensibilities in the creation and implementation of regional norms.

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145 SIECA First Advisory Opinion: Resuelve I. It is to be mentioned that after this advisory opinion, the Central American Court has diverged from its prior interpretation by later asserting the ‘supremacy’ status of SICA norms. See discussion in Chapter 4, title IV. On an interpretation that Art. 22 of the Tegucigalpa Protocol not being applicable due that it contravenes the earlier provisions of the protocol, see: Perotti, Salazar Grande and Ulate Chacón, above n 95, 154–157.

146 Another example of the categorisation of the SICA legal regime as subsidiary is contained within the Treaty of Social Integration. This complementary SICA treaty characterises the SICA as subsidiary to state governance at the domestic level. See: Treaty of Social Integration Article 7 and 8.h.


148 This is the position of the Constitutional Chamber of the Salvadorian Supreme Court, see: Inconstitucionalidad 71-2012 (Judgment) (Unreported, Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador).

In other words, SICA is a regional regime that supports the domestic efforts of Central American states to achieve deeper integration in order to address inequality. It was not created to take over the role of domestic institutions or their governing features. Therefore, SICA is best understood as a regional governance mechanism that promotes linkages, cooperation and integration among states and a platform to establish rules and principles by which states move to implement regional policies. Consequently, SICA is not a complete autonomous legal regime. Rather, it is limited by and dependent on domestic constitutions and constitutional law. This characteristic of SICA flows from the provisions of domestic constitutions regarding the role of integration and the accountability of public actors, whether at domestic or regional level, as well as from Article 22 of the Tegucigalpa Protocol, which obliges the Council of Ministers to modify regional norms to conform with domestic ones in cases of conflict.

E. Conflict of Rules

The Central American adaptation of the Kelsenian model of hierarchy of laws was developed in order to solve conflict of rules. However, as mentioned by the Constitutional Chamber of El Salvador, there are situations where the Kelsenian hierarchy of laws is not effective to resolve conflicts. Domestic courts in the Central American region have dealt with the issue of conflict of rules in a manner that respects the Central American approach to hierarchy of laws. Analysis of the case law makes it possible to see that domestic courts have developed a two-step process involving twin principles: speciality and primacia. Initially, it suffices to note that primacia has been defined differently by the Central American Court of Justice and other Central American scholars. While the concept developed by domestic courts follows the Central American hierarchy of laws, the Central American Court of Justice has opted to equate this concept with the ‘supremacy’ doctrine of the European Union. This has led to conceptual differences between the regional court and domestic courts. The thesis explores these conceptual differences at a later point, but it is important to foreshadow them here as they have become a key problem of the SICA legal regime.

Domestic constitutional courts in the region have used the principles of speciality and primacia to resolve conflicts between domestic and regional laws and to determine when

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150 Inconstitucionalidad 54-2014 (Judgment) (Unreported, Sala de los Constitutional de la Corte Suprema de Justicia de El Salvador, 9 july 2014) 9.
151 See discussion in Chapter 4, title 4, subtitle B.
regional laws will apply. The principle of speciality is used to determine the competence of SICA actors to enact norms. As the Constitutional Chamber of the Salvadorian Supreme Court has held, speciality refers to the capacity of SICA actors to make norms that apply in matters where they are only competent or conferred to do so, namely, on matters relating to regional integration.\(^{152}\) This notion of speciality was later expanded in another case before the Salvadorian Constitutional Chamber, which stated that in a situation of conflict of laws, the principle of ‘competence’ or speciality should guide the resolution of the case.\(^{153}\)

Once speciality is met, the second step in determining the application of SICA norms over domestic norms is to determine its consistency with domestic rules, constitutions and international human rights. This second step is called the *primacía* test. As held by the Salvadorian Constitutional Chamber, *primacía* is an extension of speciality since it implies that in integration matters SICA norms should have first preference or application, although they cannot override domestic norms.\(^{154}\) The Constitutional Chamber of the Supreme Court of Costa Rica has held in relation to *primacía* that SICA norms:

\[\text{are part of derived Communitarian Law, by which they enjoy direct effect (generating rights and obligations for all Central Americans, not only for states), immediate application (they are applicable in our territory without the solution of continuity, meaning, it is not necessary for them to overcome the stage of approval and ratification of an international treaty […] and *primacía* over domestic law (pre-eminence on its application, not validity, as discussed by the German doctrine). This *primacía*, according to the robust jurisprudential line of this [Constitutional] Chamber, is relative, therefore it cedes when other structural principles of the Costa Rican juridical order and fundamental rights are at play.}\(^{155}\)

The Costa Rican and Salvadorian interpretation cases parallel certain European developments on the matter of conflict of laws between regional norms and domestic

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\(^{152}\) Ibid.

\(^{153}\) *Inconstitucionalidad 71-2012 (Judgment)* (Unreported, Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador) 10.


\(^{155}\) Ibid, 256.
The Costa Rican court even goes as far as citing the Solange jurisprudence of the German Constitutional Court. Yet in contrast to the European line of jurisprudence, the Costa Rican and Salvadorian examples contain distinctive wording on the characterisation of regional norms, that of primacy (primacía) or first choice application, instead of supremacy, or supremacía. This points to deeper parallels with Spanish characterisation of European norms. Hence, where there is a scenario where both regional and domestic laws regulate the same topic that subsequently leads to a conflict of laws between the regional laws enacted by regional institutions and domestic laws, the domestic laws prevail.

However, the Central American Court of Justice has developed its own version of primacía. The regional court’s version of this judicial concept is far different to the doctrine established by domestic constitutional courts and chambers. As detailed in Chapter 4 of this thesis, the regional court’s portrayal of primacía draws from the European doctrine of supremacy. As discussed in Chapter 4, these different approaches have caused conflict between the regional court and domestic constitutional courts. The result has been a failure to establish dialogue between the regional court and domestic constitutional courts and the development of two contradictory versions of the meaning of primacía.

VI. CONCLUSION

SICA was the product of a larger peace-building and democratisation process in Central American. In this process, Central American states developed new constitutions and ratified SICA, creating a new regional governance scheme built around the concepts of social justice and human rights. It is a scheme that has placed executives at the centre of the project of regional transformation, at both the domestic and regional levels. While regional norms take direct effect (following the monist legal tradition of Central America), the regional scheme is based on the supremacy of domestic constitutions. This means that the validity of regional norms depends on compatibility with domestic constitutions, including the international rights norms enshrined in them. Based on this
superior status of constitutions, constitutional courts have reviewed domestic and regional actors and SICA norms and identified the principles of interaction between the regional legal system and the domestic systems, namely, subsidiarity, speciality and primacia.

This chapter has shown how features of SICA resonate with the transformative constitutionalism of the 1980s. Some features, in particular the prominent role given to executives, have deeper historical connotations, which are explored in Chapter 3. These defining features of social justice and human rights, executive dominance and constitutional supremacy must be taken into account to properly understand the legal context of the SICA legal regime, its problems and potential solutions to these problems. This is intended to ground the ensuing discussion that is contained in Chapters 4 and 5.
CHAPTER THREE.

THE HISTORICAL LEGACIES OF CENTRAL AMERICAN REGIONALISM AND INTEGRATION

I. INTRODUCTION

The Central American Integration System (SICA) is the most developed regional arrangement of its kind in the Americas. However, SICA is the latest of many regional arrangements developed for the region since the fall of the Central American Federation in 1848. Since then, Central American states have sought reunification, initially through federalism in the 19th century and then integration in the 20th century. Today, SICA is the latest expression of this reunification ideal with transformative connotations. As this chapter details, Central American integration continues to aspire to an integration programme based on the rule of law and a functional political, economic and social union, but faces the realities of inequality, institutional and economic structural incapacity, and weak democratic processes, all of which stand against the ideals of integration.¹ This thesis argues that the incapacity to consolidate SICA is product of two historical legacies, executive dominance at the state and regional levels and vulnerability to external influence.

This chapter traces the colonial origins of these historical legacies and their manifestation, in different forms, throughout Central America’s regional governance over the last two hundred years. This chapter seeks to expose these historical legacies and describe their effects and impact over time and through the many regional arrangements that have taken place in the region. By describing their effect and impact, this chapter identifies how these legacies have come to be reflected within the SICA’s legal regime, impeding it from accomplishing its fundamental objective and purposes. These legacies are necessary to understand, as they have been entrenched domestically and regionally, by both constitutions and regional treaties, and are the source of the many challenges that the SICA legal regime faces, as shown in the following chapter. The historical legacies must inform comparative legal methods to make possible comparative insights from other integration process.

¹ Ludger Kühnhardt, Region-Building (Berghahn Books, 2010) vol Volume I: The Global Proliferation of Regional Integration, 73.
In identifying the regional legacies and describing their effects and impact over time, this chapter proceeds as follows. Part II defines the two historical legacies of Central American regionalism: executive dominance and vulnerability to external influence. The remainder of the part is organised in terms of three periods in the history of Central American regional integration. Each period is defined by the dominant external actor at that time through which these legacies are consolidated. Part III describes how these traits were consolidated in Central America during the Spanish colonial period and immediately following the Independence of Central America, thus defining the governance traits for the centuries that followed. Part IV examines the impact of the influence of the United States (US) in the region and its role in moulding Central America’s approach to regionalism. Ultimately, Part V shows how Europe has come to be the most recent external actor to influence Central American regionalism, pushing for deeper integration.

II. DEFINING EXECUTIVE LED DOMINANCE AND VULNERABILITY TO EXTERNAL INFLUENCE

As explained in Chapter 2, one of the core defining features of Central American governance, both at domestic and regional levels, is that it is executive-driven. SICA reflects this feature in its institutional framework as set out it in the Tegucigalpa Protocol. However, this feature is not new, but rather a historical legacy with colonial origins. Throughout the historical period under consideration, Central American state-building, at both regional and domestic levels, has been in the hands of executives in the region. The historical approach taken in this chapter explains how executive led dominance has become a persistent feature of Central American regionalism and integration, displayed even today at the SICA. It traces the origin of this trait, its evolution and its many manifestations throughout Central America’s numerous region building efforts.

As this chapter points out, executive dominance is a consequence of elite influence in the political and economic arena. Elite influence over executives has been a determinant throughout Central American history and state-building. Through elite influence, executives have been encouraged to play critical roles in the many domestic state and regional-building processes. Under elite influence, executives have become key players in preserving the status quo for these elites.
Executive dominance exhibits two facets within Central American regional governance. First, it reflects the culture of strong centralisation of power in the executive. This includes the configuration of regional arrangements by which regional domestic executives have complete oversight and overriding control in the creation, development and implementation of regional policies and norms. Second, executive dominance further reflects a preference for preservation of state sovereignty and autonomy, which is a manifestation of privileging the domestic within the integration regime.

Turning to the proposition of vulnerability to external ideas and influence, which is the second of two historical legacies that this chapter identifies, it too is characterised by longevity. Historically, the Central American region, both at a domestic and regional levels, has been influenced by external actors in the political and economic arena. One result is that Central America’s regional arrangements (including the current form with SICA) have been vulnerable to external influence. As this chapter shows, this external influence started with Spain during the colonial period from the 16th to the 19th century. Spanish influence during Central America’s colonial period shaped the societal and political dynamics of the region and its countries, even after Central America’s independence in 1821. In particular, Spanish influence created a culture of governance based on strong local actors, which translated after independence into strong executive dominance.

After Spanish domination ended, the US gained influence over the Central American region, a political-economy force that that extended throughout the 20th century. The region’s geopolitics and its proximity to the US has been a defining factor of Central American regionalism and governance. The US initial influence was a determinative factor in Central America’s turn towards international law and institutions for the purposes of integration, rather than federalism. Over the 20th century, the region saw the creation of new regional arrangements with pioneer institutions not found anywhere else at that time, all under US patronage. These regional arrangements also displayed similar characteristics to SICA’s transformative nature, with deep constitutional implications. Since this period of US intervention, regionalism in Central America has continuously displayed a deep connection between international law and domestic legal systems.

This period in history reveals another aspect of external influence. This is the dependency by Central American states on foreign actors to aid in the consolidation of regional
arrangements. Hence, the fate of many regional arrangements was tied to the capacity and willingness of external actors to provide aid to the regionalism process. This feature would persist up until the beginning of the 21st century, during which the US inhibited SICA in the fulfilment of its objectives. Yet, in the face of declining US influence in the early 21st century, the European Union would assume a fundamental role in sustaining SICA. Due to the EU’s influence, SICA gained new traction and new steps towards its institutional strengthening.

At the same time, *vulnerability to external ideas* shows another facet. This is the indiscriminate use of foreign sources on the part of Central American scholars and regional court with no consideration of context or the features of Central American governance, which the previous chapter identified. An indiscriminate use of sources has led to strong backlash against regional institutions, and consequently, development of a comparative method for transplants that is unresponsive to the needs and challenges of the Central American region. This second aspect of vulnerability of foreign influence and ideas, and the problems it causes within the SICA legal regime, is tackled in more depth in Chapters 4 and 5.

III. SPANISH INFLUENCE (1524 to 1900)

This first period of external influence reveals how Central America acquired and consolidated its feature of executive led dominance. As noted, it is a feature that would persist for almost two hundred years and which continues to inform SICA.\(^2\) This period shows how executive dominance was consolidated through the influence of elites. A legacy was established whereby elites would continue to mould and define the nature and limits of federalism in Central America. The ensuing weak version of federalism that was adopted, in which regional institutions were unable to consolidate their rule and domestic states had overriding powers, also shows also high level of parochialism in the sphere of regional relations.

A. The Colonial Times: 1524 to 1821

The historical feature of executive led dominance has its origins in colonial times. It was first observed when strong rivalries arose among the Spanish *conquistadores*, as they created new autonomous administrative centres, or ‘*ayuntamientos*’ (Town halls), with each new conquest. The establishment of the *ayuntamientos* led to political unrest and disorder, with each new centre claiming authority over the other. By 1530, *ayuntamientos* in Guatemala, Honduras, Nicaragua and Panama competed for political control of the region, an early sign of executive driven authority in the region. These early signs of executive dominance fuelled by elite interests were caused by Spanish colonial policy, which roused intra-colony disputes for political control and direct trade with the Spanish crown.

A first example of competing for dominance was exhibited by the rivalry displayed between the *ayuntamientos* of Guatemala and Panama in the early 17th century. These colonies coveted the entitlement of being the seat of the royal *audiencia*, which provided a direct link to the Crown, thus granting political control over the region. After much political struggle, the new *audiencia* was allocated to Santiago, Guatemala, and the Central American region was renamed: *Reyno de Guatemala* (Kingdom of Guatemala).

The *audiencia* was the first attempt at regionalism in Central America. It became a governing structure that would endure among the colonies, even after independence in 1821. It forged the first regional features of Central America’s governing identity. From here, Spanish colonial rule was enforced, albeit loosely, giving much autonomy to the individual colonies to administer themselves. Autonomy was further fostered by the isolation of the individual colonies and the difficulties of travel and communication.

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5 Woodward, JR, above n 3, 35.
among them. Colonial policy did not permit communication and trade between the colonies, but only directly with the crown, or Madrid, unless it transferred through the audiencia of Guatemala.

On the one hand, the effect of this policy made the colonies self-sufficient and protected the interests of their ruling groups. From this moment, elites started to become a direct part of politics, due to their wealth and the status that carried with it. This led to the entrenchment of local elites in governance, giving them a direct role in the preservation of the status-quo and control of each colony. Each of these new governing units would become in words of historian JH Elliot, ‘self-perpetuating’ oligarchies. On the other hand, this policy also heightened rivalries among the colonies. A lack of communication between them contributed to an absence of solidarity and strengthened self-sufficiency in Central-American colonies throughout the 17th century. A further impact of elites becoming key actors in regionalism is that they sought to preserve their status, wealth and conditions. Their participation in governance would become a staple feature of Central American regionalism; and it persists to this date. Their influence would determine whether executives acted to support the regional arrangements to come, resist unification, or even promote separation and dissolution.

Executive dominance heightened in the century to come. The isolation and self-sufficiency caused by Spanish colonial policy increased in the 18th century with the introduction of a new colonial administration. The change of colonial administration occurred because of the accession of the Bourbon royal lineage to the Spanish throne. The Bourbon family ostensibly wanted to modernize the colonial system. However, the result was that the new colonial administration brought in a more complex governing scheme that granted even more autonomy, and generated more competition among the

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10 Elliot, above n 8, 299.


12 Elliot, above n 8, 299.


14 Bulmer-Thomas, above n 6, 26; Woodward, JR, above n 3, 61.

colonies. This was achieved through the creation of new autonomous administrative centres, or *intendencias* (Intendancies).\(^{16}\) The intendencias were created to oversee the financial and military administration of the colonies.\(^{17}\) These new governing units would become the base that the Central American states would be founded on. As such, their governing features would be replicated and carried on after independence.

From a regionalism standpoint, the intendencias continued in a similar line to the audiencia governing system. This new colonial governing system did not constitute any strong regional or centralised power among the colonies. This meant that although Guatemala was the main political centre of the Central-American colonies, each province or intendencia was free to continue to determine its own issues, as it did before the new Bourbon policy.\(^ {18}\) Nevertheless, the intendencias also gave more power to locals to oversee the development projects of the colony. Consequently, the *creoles*, or Spanish ‘white born’ in the Americas, began to be more involved with the colonial bureaucracy and administration.\(^ {19}\) This move by the creoles gave tighter control to the colonies of their own affairs.\(^ {20}\) Modernisation also brought greater openness to trade from the colonies to Spain, raising the demand for agricultural products, pushing up prices and profits for landowners.\(^ {21}\) The creole group were quick to adapt to the new changes and policies, and became hostile towards the Spanish officials who affected their interests.\(^ {22}\) Consequently this period of time saw a rise in the power of the creole elites. They would later take charge of the politics of each colony and, as consequence, heighten the sense of autonomy, as well of self-preservation, of each colony.

Directly prior to Central American independence, another event would come to consolidate the attitude within the colonies of preserving autonomy. This was the enactment of the 1812 *Cadiz Constitution* of Spain. The Spanish Constitution of 1812, or *Cadiz Constitution*, was the first legal instrument of its type – a written constitution in

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\(^{16}\) Woodward, JR, above n 3, 67.

\(^{17}\) Ibid.


\(^{19}\) Woodward, JR, above n 3, 67.

\(^{20}\) Ibid.


\(^{22}\) Woodward, JR, above n 3, 75; Lynch, above n 15, 8.
proper terms – to be applied to the Central American region. 23 This Constitution would become the basis for later constitutions, such as the 1823 Central American Federal Constitution. The Cadiz Constitution was the product of the introduction of liberalism in Spain during the early 19th century. 24 Many Spanish Latin-Americans were involved in its drafting, transferring liberal ideals to the Latin American region, including Central America.

An example of this liberal thought was that the Cadiz Constitution recognised both European Spanish and American-born Spanish as equals. 25 However, although the Constitution represented a new union between the Spanish Crown and the Latin-American colonies, for Central America the Constitution maintained much of the previous governing arrangements. 26 That is, it maintained the complex colonial administration scheme with weak regional authorities and strong local institutions. 27 As such, local administrations had the authority to control their own public order and tax systems, develop their own education, health and agricultural policies, and even establish their own militias. 28 Meanwhile, the regional authority based in Guatemala, known as the Captain-General, maintained a role similar to the original audiencia. As the King’s representative this meant strictly overseeing and aiding developments in each colony and appointing specific local government officials. 29 Therefore, regarding impacts, the new Cadiz Constitution maintained the regionalism governance scheme and preserved the domestic autonomy of colonies and the influence of elites, without great change.

The Central American colonial era was a defining moment for Central American governance. From their origin, the Central American colonies that would later become states acted autonomously and separately from each other. This generated the trait of self-sufficiency, driven by the tight control of elites over each colony’s affairs. This mindset of autonomy and preservation of the state would carry on in Central America in the

26 Mirow, above n 23, 48–49; Soto Acosta, above n 18, 21.
27 Constitución Política de La Monarquía Española 1812 [Political Constitution of the Spanish Monarchy of 1812] Title VI.
29 Ibid Art. 335.
B. Independence and the Liberal-Conservative Dispute: 1823 to 1848

During the colonial period, Central American colonies were governed as autonomous and disaggregated entities, each with its own army, tax regime and economy. As a result, the region’s independence was experienced differently to the rest of Spanish America. By comparison to other independence movements in Spanish America, Central-American independence was achieved without battle or bloodshed. The decision to become independent was a ‘domino effect’ of the Mexican independence movement between 1810 and 1821. It was overseen by the Central American elites, who were concerned to maintain the status quo.

Independence was firstly declared by Central American states, and later recognised by Spain in the second half of the 19th century. Independence was pushed by elites in order to preserve their colonial benefits and maintain the existing governing system. There was no independence war or revolution, which meant the political and social status quo in the region persisted with independence, conserving the already established creole elite within the newly independent states. Moreover, this meant there was no common struggle or enemy to unite against for the elites, and, thus, for the colonies.

The new-born Central American states faced their first major challenge with a high degree of parochialism. This was exposed by Mexico’s attempt to annex Central-America by force in 1821. Guatemala, under threat of an invading army, relinquished sovereignty to Mexico’s demand without consultation with other newly independent colonies that it was now part of. This sparked opposition from the other states belonging to the former

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31 Soto Acosta, above n 18, 17.
Reyno de Guatemala, particularly El Salvador. After a regime change in Mexico in 1823, a new declaration was written by the Costa Rica, El Salvador, Honduras and Nicaragua states declaring independence from Spain, Mexico and Guatemala, since the latter represented the former colonial capital. This event shows a clear pattern where even after independence Central American states were keen to preserve their autonomy from each other.

After the attempted Mexican annexation, Central American states did seek to better define the relationship with each other. Yet, the traits of executive rule and preservation of autonomy were very evident in the discussions for the new post-independence regional arrangement, the Central American Federation. The constitution of this new federation, the Constitution of the Central American Federation, reflected a strong attitude of conserving autonomy. It divided powers in favour of individual states and failed to provide for a strong regional government and institutions to preserve the federal union.

The initiative for a federation was promoted by Guatemala in order to create a strong state able to defend itself from Mexico and other newly independent South American states such as Colombia, and to show the federated states as visibly independent from other extra-regional powers such as the United States and Great Britain. The other Central American states accepted Guatemala’s proposal. The new Constitution was marked by a struggle between two contending political factions: the liberals and the conservatives. This animosity surfaced in discussions about the conceptual underpinnings of the new federation. The conservatives prioritised stability and the maintenance of colonial social structures. This involved the preservation of the political status quo and a ‘moral’ authority, namely the Catholic Church. In turn, this agenda was predicated on the need to establish strong executive rulers, to preserve the status quo in the forms of social stratification and power elites. Meanwhile, for their part, the liberals advocated for an equilibrium of powers and moral neutrality of the state. This platform was heavily influenced by foreign revolutionary ideas from the US and France. The liberals wanted

36 Soto Acosta, above n 18, 18, 36.
37 Anna, above n 21, 91.
38 Mirow, above n 23, 177.
39 Castillo Carmona and Machado Loria, above n 9, 6.
40 Anna, above n 21, 94.
42 Ibid 12.
43 Ibid 14.
to introduce a US-style constitution, while the conservatives pursued development of the Cadiz Constitution of 1812, despite its liberal character.

The result of this contest was a federal constitution that took on aspects of both agendas. Compromise between these viewpoints was reflected in the 1824 Constitution of the Central American Federation. This federal Constitution not only replicated the ideals and principles of the Cádiz constitution, but it also adopted strongly autonomous individual provinces and regions, similar to the position of states in the US Constitution, which had the capacity to regulate their own affairs. The new Central American federal Constitution took its fundamental rights charter from the Cadiz Constitution, as it did the electoral composition of domestic legislatures. The new federal Constitution also carried over the complex system of administration between the regional and local authorities and powers established by the Cadiz Constitution. Like the Cadiz Constitution, the 1824 Central-American Constitution established a federal government with small overarching powers over the individual states. It continued to reflect the Central American states’ strong sense of autonomy. Moreover, the new Constitution gave power to each state to establish their own laws, local policies, tax systems and armies, as the Cadiz Constitution did with local authorities.

The impact of the compromise between these groups was the creation of federal regional bodies with weak and limited powers. This included a weak regional executive, parliament and court, with limited competencies, juxtaposed with strong local, individual executive powers that included armed forces. There were no strong mechanisms to review conflicts between states or states and the federal government. Also, in the absence of strong social ties between the newly formed states, conflicts between the federal government and domestic states were unmediated by the centre. The inability of the centre to counter domestic insurrections by governments of different political factions at the state level, ultimately led to the Federation’s rapid collapse.

44 Adolfo León Gómez, La Corte de Managua: Defensa de Su Institucionalidad [The Court of Managua: In Defence of Its Institutionality] (Central American Court of Justice, 1997) 27.
46 Mirow, above n 23, 176; Castillo Carmona and Machado Loria, above n 9, 6–7.
48 Ibid Article 10.
49 Castillo Carmona and Machado Loria, above n 9, 7.
The collapse of the federation was sparked by the struggle among factions within the elite, again the conservatives and liberals. Around 1830, tension between these groups was at its highest, which led to the rise of uncontrolled militarism in Central America. During this period, Liberals were elected to the regional office and introduced new policies, including opening markets to British and other foreign products. These new policies were aggressively opposed by conservative states and their local elites. One conservative state, Guatemala, opposed such moves, militarily confronting the Federal Government. This sparked conservative uprising elsewhere, particularly in Nicaragua. This led to the separation of Nicaragua from the Federation in 1838. Guatemala’s influence and open war against liberal governments in the region led to the total disintegration of the Federation in that same year.

C. The Central American Reunification Attempts: 1842-1921

With the fall of the Federation, the ideal of reunification was born. Although there was a lack of solidarity among the new-born states, the short-lived Federation as the first attempt of Central-American state-building created an appetite and ideal for reunification. This was first exhibited by El Salvador and Honduras. San Salvador, the capital city of El Salvador, had also been the capital of the Central American Federation, while Honduras was a strong supporter of liberal ideals.

Association of reunification with the consolidation of liberal ideals has continued throughout much of Central-American history. The aspiration for reunification has lingered in the many constitutions of individual Central-American states after the fall of

51 Anna, above n 21, 94.
52 Roniger, above n 7, 28.
53 Ibid 27.
54 Ibid 28.
55 Ibid 30.
58 Castillo Carmona and Machado Loria, above n 9, 8.
59 Wynia, above n 57, 321.
the Federation, including the latest round of constitutions in the 1980s. However, each new attempt of reunification was met with strong opposition from political leaders involved in intra-regional rivalries through the use of executive power. Executive dominance continued to make itself felt again over and over in the major reunification events, including the creation of a Central-American Confederation in 1842, the Guatemala military campaign of 1880s, the creation of a United States of Central-America in 1898, and the stillborn Central-American Federation in 1921.

Looking at these reunification events in greater detail, the first attempt of reunification was a new Central-American Confederation constituted by El Salvador, Honduras and Nicaragua in 1842. This new enterprise again displayed executive dominance and preservation of autonomy. Different this time though was how this became apparent in the incorporation of the principle of non-intervention. From this moment, future federal attempts, constitutions and integration treaties would also include the principle of non-intervention in neighbours’ affairs. Today, this principle has been recognised in Esquipulas declarations and many of Central America’s recent constitutions, such as the Honduran Constitution of 1982, the Salvadorian Constitution of 1983 and the Nicaraguan Constitution of 1987. However, the rise of a new Confederation within the region did not sit well with the conservative states of Guatemala and Costa Rica, leading to military confrontation in 1851 and the dissolution of the new Confederation in the same year.

The following major attempt at reunification was Guatemala’s 1880s military campaign. During the 1870s, in a progressive wave against conservatism that had dominated the

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63 Esquipulas I Declaration, provision 4; Esquipulas II Declaration, provision 3 (Democratisation).
67 Holden, above n 30, 51; Castillo Carmona and Machado Loria, above n 9, 8–9.
68 Zeledón, above n 61, 24.
region after the fall of the Federation, Central-America saw the rise of liberal and unification ideals. In Guatemala it eventuated in the ascent of a new ‘liberal’ dictator in 1873, who decreed the union of Central-America as one centralised republic.69 This move sparked a new war with El Salvador in 1876 which preferred unification via the federal formula, and fuelled the start of the Guatemalan military campaign to reunite Central-America. This campaign ended with the death of their dictator in battle in El Salvador in 1885.70

Another major reunification attempts in the 19th century was the creation of the United States of Central-America led, again, by Honduras, El Salvador and Nicaragua, which sought to unite under the banner of a new federation. A new Constitution was enacted for the latest unification enterprise in 1898.71 Nevertheless, the sentiment for state autonomy lingered: first, the new Federal Constitution still maintained the individual sovereignty of each member state; and second, there was a lack of solidarity exposed by struggles within the domestic states.72 After the creation of the new Federation, a coup d’état took place in El Salvador, which then declared its exit from the new integration enterprise. Due to a lack of support from other states for the regional government taking measures against the new Salvadorian regime, the regional government declared its dissolution in 1898.73

The last major unification attempt was in 1921. This was undertaken to commemorate Central-America’s independence centenary. The movement was begun by a group of Guatemalan students. It subsequently involved El Salvador, Guatemala and Honduras and led to the drafting of a new Central-American Constitution in 1921.74 Nicaragua, which at the time was under US administration, opposed the union. Moreover, the death of the Guatemalan president led that country into turmoil and unrest. Without another leader to continue with the project, the 1921 Central-American Constitution never came into effect.75

70 Ibid.
71 Zeledón, above n 61, 32–33.
74 Dabène, above n 35, 45.
75 Ibid.
By the early 20th century, Spanish influence had been consolidated in the legal and social structures of Central American states. This influence resulted in the creation of centralised states, with strong ties to their elites. The influence of elites encouraged executives at different moments during the 19th century to effectively become either promoters or destabilisers of federal regionalism attempts. The influence of elites and executives would carry on into the next century, with different effects on the regional arrangements to come. However, a constant remained, which was the overriding influence of executives in every new reunification and integration undertaking.

IV. US INFLUENCE IN CENTRAL AMERICAN REGIONALISM: 1900 TO 2004

The previous Part outlined the Spanish legacy, which imported social features that would lead to the consolidation of executive led autonomy in Central American regionalism. The discussion also showed how this period provided the initiative for Central American states to govern themselves autonomously and preserve their discrete sovereignty, which was a trait that would continue throughout the 20th and 21st century. Nevertheless, in the early 20th century, the influence of a new external actor further particularized the nature of Central American regionalism. The new actor was the US. Although the presence of the US in the region started in the mid-19th century, it was not until the end of that century that it became significantly influential. This resulted from major US investment in the region, mainly in the production of banana and coffee at the end of the century. These initial US investments would become the gateway to a stronger presence in the region over the century to come. During that time the US consolidated itself as the region’s main trading partner. Also, through the Monroe doctrine, the US installed itself as the region’s custodian, in order to acquire by any means the rights to the Panama Canal.

The Monroe doctrine was asserted by President James Monroe in 1823. It involved US efforts to limit European intervention in Spanish America. In the following century the doctrine was used as a foreign policy tool by the US to intervene in the region indiscriminately. The Central American states adopted the Monroe doctrine via public declarations of their Foreign Ministries, years after their independence. This was done to

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76 Cardoso, above n 69, 208–211.
counter Great Britain’s military presence in the region, particularly in Belize (then named British Honduras) and Nicaragua. Under this policy the US would acquire the rights of the Panama Canal in 1901. From this time, Central American regionalism and integration efforts have been tied to US foreign policy. Such processes have been permanently marked by US involvement, in varying degrees, in every Central American regional arrangement since the 20th century.

The first of these US interventions was in the early 20th century when it influenced the ways and means by which Central American states could strive for new regional arrangements. It meant that Central America would leave federalism aside and focus regionalism efforts on international law. These early arrangements exhibited ‘transformative’ features that resemble the form of the current SICA. The US also prescribed arrangements where international law was deeply connected with domestic legal systems under a set of accepted common values.

The second US intervention would come in the 1950s, after Central America created a new international law regional organisation and a separate common market. This intervention led to the first kind of fragmentation in the integration regime. This practice of intervening to foment fragmentation would repeat in SICA. In the 1950s it played out as initial US support, that transformed into opposition when it perceived integration as a scheme that would aid expansion of communism in the region. This led to the downfall of both the regional organisation and common market.

The last of these interventions by the US would come after the establishment of SICA. This involved a liberalising and privatisation agenda that would conflict with SICA’s purposes and principles. During this phase, the region also signed the US-DR-CAFTA, a new regional trade scheme that required Central American states to act outside of SICA.

A. First US Intervention and International Law in Central America (1904-1923)

At the beginning of the 20th century, the US was determined to play a leading role in the geopolitics of the region. During this period the US was mostly driven, among other

79 Flagg Bemis, above n 77, 102.
80 Ibid 143–144.
things, by the idea of securing the right to build an inter-oceanic canal in Panama. After the fall of the Central American Federation in 1848, the region entered a war-torn era among themselves. Domestic feuds between conservative and liberal parties, the rise of authoritarian leaders or caudillos, a high number of coups d’etat, ‘constitutional’ revolutions and military campaigns for the reunification of the subregion gave rise to US concerns for their own interests, and, in particular, the newly acquired US right to construct the Panama canal. With this in mind, the US Secretary of State, Elihu Root, through diplomatic efforts and direct intervention, attempted various pacifying schemes in the region. The first such intervention attempt came in 1902, when the US promoted a treaty that created the first international law dispute-settlement scheme, thus creating the first permanent regional arbitral tribunal in the Americas. However, Guatemala did not participate in this effort, because in 1904 a group of students in Guatemala attempted to overthrow the Guatemalan dictator with the aid of the Salvadorian government. The plan failed and led to a war between Guatemala and El Salvador, also involving Honduras.

By 1906, still with the perceived need to pacify the region and secure its investments and the canal, the US intervened more fiercely. This time it arranged a meeting between Central American leaders aboard a military ship, the USS Marblehead. Under US pressure, and later involvement from Mexico, Central American leaders then met in Washington D.C. where they ratified the 1907 Washington Peace Treaties. These new treaties turned out to be a defining moment in Central American state building.

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82 Salvador Martí Puig, ‘Nicaragua: The Difficult Creation of a Sovereign State’ in Miguel A Centeno and Agustín E Ferraro (eds), State and Nation Making in Latin America and Spain: Republics of the Possible (Cambridge University Press, 2013) 143; Torres Rivas, above n 81, 162.
83 Roniger, above n 7, 30.
84 Bulmer-Thomas, above n 81, 17.
85 Torres Rivas, above n 81, 162.
88 Cardoso, above n 69, 223.
89 Dabène, above n 35, 45.
90 Cardoso, above n 69, 223–224.
91 Maldonado Jordison, above n 87, 195; Katrin Nyman-Metcalf and Ioannis F Papageorgiou, Regional Integration and Courts of Justice (Intersentia, 2005) 29.
92 Tratado General de Paz y Amistad, signed 20 December 1907 (1907 Washington Treaty); see also: Maldonado Jordison, above n 87, 195; Nyman-Metcalf and Papageorgiou, above n 91, 29.
constitutionalism and its engagement with international law in pursuit of new regional arrangements.

The Peace Treaties laid down the distinctive Central American use of international law schemes and institutions to consolidate constitutional and democratic processes. Article II of the 1907 Washington Peace treaty stated that ‘every disposition or measure which may tend to alter the constitutional organization in any of them is to be deemed a menace to the peace of said republics’. This disposition was given stronger force though an additional convention, which provided that no ‘coup d’etat, or revolution against the recognized Government, so long as the freely elected representatives of the people thereof, have not constitutionally reorganized the country should be recognised by the other states.’

Also, the 1907 Peace Treaty stated that each government of Central America should bring ‘constitutional reform in the sense of prohibiting the re-election of the president of a republic, where such prohibition does not exist’ and should ‘adopt all measures necessary to effect a complete guaranty of the principle of alternation’. To this date, many of the Central American constitutions still continue to prohibit the re-election of a president.

To give effect to these provisions, the Central American states created an international supranational court, the Central American Court of Justice. The Court’s seat was in Cartago, Costa Rica, and it heard 10 cases before it closed its doors in 1918. This court was comprised by delegates from each Central American state. It was a test run for the US to promote the creation of a world court. The court not only could hear disputes

93 Article I, Convención Adicional al Tratado General de Paz y Amistad, signed 20 December 1907. (Additional Convention on Non Recognition of Constitutional Coups).
94 Article III, Additional Convention on Non Recognition of Constitutional Coups of the Tratado General de Paz y Amistad, signed 20 December 1907.
95 See as examples: Article 152 of the Constitution of El Salvador of 1983 and Article 186 of the Constitution of Guatemala of 1986 However, in certain states, like Honduras and Nicaragua, have declared such prohibitions as unconstitutional.
96 Article I, 1907 Washington Treaty.
97 Maldonado Jordison, above n 87, 197–198.
98 Convención para el Establecimiento de una Corte de Justicia Centroamericana, signed 20 December 1907.
between the Central American states, but was also able to entertain disputes brought by individuals against states, if a state had infringed its treaty obligations. The court, despite being the first of its kind, was regarded by governments as a control mechanism of the US. This sparked animosity towards the court from the states, leading governments to refuse to appear before it, and later to refuse to ratify an extension of its functions.

This moment has parallels with the Esquipulas process described in Chapter 2. Both processes were meant not only to be peace-building processes, but to herald new regional constitutional reform. As such, both exhibited similar ‘transformative’ traits. In addition, in both moments, new regional institutions were established with broad powers to aid in the peace-building and democratisation process. Both included the creation of a new regional court with supranational functions. Although federalism was set aside, both regional experiences showed the formation of a new regional arrangement created under international law that had direct and profound impact on domestic legal systems.

For instance, during this period the liberal dictator of Nicaragua boasted about the construction of a rival inter-oceanic canal in his country that could compete with the Panama Canal. This led the US to militarily invade Nicaragua in 1912 and assume the country’s administration. This resulted in the Nicaraguan Government submitting to ratification of the Bryan-Chamorro Treaty of 1916. The treaty gave the US exclusive rights in perpetuity to build a canal in Nicaragua, to lease Nicaraguan islands on the Atlantic shore, and an option to build a military base in Fonseca bay in the Pacific, near the Honduras and El Salvador frontiers.

This treaty was denounced by Costa Rica and El Salvador, separately, under the jurisdiction of the Central-American Court. In both cases, the Court resolved that the treaty violated the rights of Costa Rica and El Salvador respectively. The response of

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100 Article I, Convención para el Establecimiento de una Corte de Justicia Centroamericana, signed 20 December 1907.

101 Article II, Convención para el Establecimiento de una Corte de Justicia Centroamericana.

102 Maldonado Jordison, above n 87, 301.

103 Ibid 203.

104 Marti Puig, above n 82, 151; Bulmer-Thomas, above n 81, 20.

105 Marti Puig, above n 82, 151.


107 Maldonado Jordison, above n 87, 201–202.
the US-installed government in Nicaragua was not to abide the new court’s ruling. As a result it withdrew from its jurisdiction. This event left the US in an uncomfortable position because Nicaragua, under US control, was the first state to withdraw from the Court which had been crafted and promoted by the US. This is because the US was viewed as a foreign power that enforced the signature of a treaty upon Nicaragua under a dictatorial government that it established, which was contrary to the provisions established by the 1907 Washington Peace Treaties. Consequently, the US withdrew its financial support for the subregional court and in 1918 its mandate was not renewed.

The fall of this first international regional arrangement exposed the formidable impact of external influence – dependency on strong foreign actors for survival of Central American states. Since this first experience, Central American regional arrangements have been mostly dependent on financial funding and intervention of stronger extra-regional actors. The US position on each regional arrangement since has been either a catalyst for success or collapse. As seen in with the following major regional arrangements concerning the Central American Common Market and SICA, US support has been determinative in the survival of each arrangement.

Realising that the first peace building effort in the subregion failed because of its own actions, the US, again through diplomatic efforts, attempted to consolidate better relations with the Central American states. After regional turmoil following the death of the Guatemalan President in 1921, the US invited Central American leaders to a second round of peace conferences in Washington D.C. in 1923. This led to the ratification of a new series of treaties by Central American states: the 1923 Washington Treaties. In this new round, the US gained direct oversight over Central American armies and weapons. Additionally, a new Central American subregional tribunal was created, reflecting US belief that judicial bodies were capable of resolving disputes among the states without resorting to conflict. However, in contrast to the previous court (which consisted of

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108 Ibid 203.
109 Ibid.
110 Ibid.
111 Ibid.
112 Bulmer-Thomas, above n 81, 20; Martí Puig, above n 82, 152.
113 Bulmer-Thomas, above n 81, 20; Martí Puig, above n 82, 152.
members from each Central American state), this new tribunal, called the International Central American Tribunal, was to comprise a mixture of US citizens and Central Americans. This was to avoid any repetition of an international court impinging on US interests. The new court did not have a permanent seat and it was only to be formed for specific ad-hoc disputes. One example was the Honduras v Guatemala territorial dispute. To hear this dispute, the International Central American Tribunal consisted of Chief Justice Charles Evans and other two Central Americans. The ruling defined the formal boundaries between Honduras and Guatemala.

At the end of this period, the Central American region saw the rise of a new type of regional arrangement. It also saw the introduction of the first international and supranational court of its kind, globally. However, the region was not able to sustain these efforts, due to constant conflict between state leaders and the lack of strong support from foreign actors. After the Great Depression and a series of dictatorships in Central America during the 1920s and 1930s, the US and Central American leaders put this new international scheme aside and pursued their own agendas separately. Without backing from the US this regional arrangement was effectively abandoned.


After the 1907 and 1923 Washington Peace Treaties, Central America did not seek to create a new regional arrangement until the 1950s. During the 1940s the region experienced a series of revolutions. These revolutions brought radical constitutional reforms, especially in Guatemala (1945) and Costa Rica (1947). For Guatemala, this included the introduction of social clauses in the Constitution, such as the creation of a social security institution and protections for labour workers and syndicates. For Costa Rica, it introduced constraints on presidential powers and the abolition of the armed forces. After the success of the social revolutions in Guatemala and Costa Rica, Central

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117 Ibid 1322–1351.
118 Toussaint Ribot, above n 114, 121–122.
119 Gargarella, above n 41, 111.
120 Ibid 112.
American states recommenced talks towards a new integration enterprise.\textsuperscript{121} In 1951, the Central American states created the Organisation of Central American States (ODECA)\textsuperscript{122} to ‘find a solution to their common struggles and promote economic, social and cultural development through cooperative action and solidarity’.\textsuperscript{123}

This new regional arrangement was heavily influenced by and modelled after other newly-formed international organisations, such as the United Nations and the Organization of American States (OAS).\textsuperscript{124} The ODECA particularly resembled the structure of the OAS, since the ODECA was intended to become a platform for future cooperation among countries in spheres beyond foreign policy.\textsuperscript{125} However, like SICA, and predictably as history has been shown, ODECA had a strong executive inclination and preference for the preservation and autonomy of domestic legal systems. The ODECA institutional structure became the model for SICA. It comprised the Summit of Presidents (named the same as in SICA); the Summit of Ministers (currently called the Council of Ministers in SICA); the Central American Office (currently the General Secretariat); and the Council of Ministers of Economy.\textsuperscript{126} Again, as with SICA the institutions of ODECA reflect the executive bias of Central American governance. The Summit of Presidents, as in SICA, was the supreme body of the regional arrangement.\textsuperscript{127} Meanwhile, the Council of Ministers was in charge of the development of this new organisation and was tasked to provide solutions to potential conflicts in the region.\textsuperscript{128} Additionally, the Central American Office was a support institution for the Council, which carried out the duties delegated to it by this institution.\textsuperscript{129} In contrast to SICA, the

\textsuperscript{121} Piero Gleijeses, ‘Juan José Arévalo and the Caribbean Legion’ (1989) 21 Journal of Latin American Studies 133, 136–137.
\textsuperscript{123} Carta de La Organización de Estado Centroamericanos [Charter of the Organization of Central American States] Signed 14 October 1951, 2 ILM 235 Article 1 (‘ODECA Charter’).
\textsuperscript{124} Castillo Carmona and Machado Loría, above n 9, 23; Dabène, above n 35, 48.
\textsuperscript{125} Zeledón, above n 61, 67.
\textsuperscript{126} ODECA Charter, Article 4.
\textsuperscript{127} Ibid, Article 5.
\textsuperscript{128} Ibid, Articles 6-9.
\textsuperscript{129} Ibid, Article 11.
ODECA had a specific Council of Ministers of Economy, which was tasked to carry out those duties assigned by it by the general Summit of Ministers.130

In addition to this institutional layout, the ODECA Charter also recognised the supreme status of domestic constitutional law over regional norms,131 a provision that would also appear in the 22 of the Tegucigalpa Protocol for SICA.132 As is the case for SICA, this provision was meant to protect the democratic principles and institutions of member states.133 However, as historian Norman Padelford explores, this provision in fact was not introduced to safeguard to democracy but was a limit on integration to preserve state autonomy, creating a loophole by which states could evade any obligation, especially in times of crisis.134

This institution created more problems that it could resolve. One example was a dispute that arose between Central American states in appointing the Secretary General of the new institution. This left the position vacant and the institution lacked the capacity to achieve any concrete action for many years.135 In addition, the strong influence of the US over the region led to major disputes between the states. One example was the ODECA’s response to the US coup in Guatemala. After Guatemala’s 1945 social revolution, a agrarian reform was proposed under the presidency of nationalist Jacobo Arbenz in 1953.136 This agrarian reform would affect the major banana land plantations held by US investors. The US responded with hostility to such reforms, labelling them as communist.137

Due to US pressure, this hostility was replicated within the ODECA, as well as in the OAS, which enacted anti-communist resolutions condemning Guatemala.138 Ultimately, in 1954 the US organised a series of events, including a military intervention from

130 Ibid, Article 14.
131 Ibid, Article 18, see also: Norman J Padelford, ‘Cooperation in the Central American Region: The Organization of Central American States’ (1957) 11(1) International Organization 41, 44.
132 See discussion in Chapter 2, title IV, subtitle D.
133 Padelford, above n 131, 44.
134 Ibid.
135 Ibid 47.
136 Ronald W Cox, Power and Profits: U.S. Policy in Central America (The University Press of Kentucky, 1994) 56; Torres Rivas, above n 81, 177.
137 Cox, above n 136, 56; Bulmer-Thomas, above n 81, 141.
138 Marín C. and Sáurez U., above n 122, 48; Dabène, above n 35, 48.
Honduras, which led to the resignation of Arbenz in the same year. A year later, the ODECA was unable to deal with a boundary dispute between Costa Rica and Nicaragua because it could not gather together the Summit of Presidents, crippling the ODECA’s capacity for action. It was not until the intervention of the OAS and the US to safeguard the borders that the ODECA Summit of Presidents was able to meet once again.

Another issue concerning the ODECA was that it had no overarching legal mandate or principles on how to accomplish its purposes. The ODECA Charter contained only 22 provisions. It did not include short-, medium- or long-term objectives by which states could pursue further cooperation. In other words, it had no concrete vision on how to proceed or what to accomplish. Acknowledging its failings, Central American states began to consider reforms to ODECA. However, by the end of the 1950s, Central American countries were in economic turmoil and debt as a result of increased expenditure on social infrastructure and diversification of export agriculture that had started during the 1930s.

Consequently, every Central American state entered negotiations with the newly established International Monetary Fund (IMF) in the 1950s. This was followed by a shared balance of payments difficulty in the following years, resulting in the restructure of foreign debt incurred by Central American states during the 1940s. This made Central American governments receptive to economic reforms and external economic development proposals, in the context of the IMF agenda.

At this time, during the 1950s, the UN Commission on Latin American (ECLA) played a fundamental role in developing a new economic enterprise, away from the dysfunctional ODECA. The ECLA was established in 1948, and from the beginning was determined to bring system and coherency to the development of Latin American countries.
ECLA grew out of the decrease in international trade and US aid to Latin-America after WWII. During this period, Latin-American states felt betrayed by the US and lacked confidence in the OAS economic office. This led them to support the creation of an economic office under the UN framework. As a result, integration in Central America became fragmented in the sense that regional governance was divided into specialised and separate schemes. Political integration gave way to technocrats, mainly economists, pushing for economic rather than political integration. This was purposefully done to avoid any strong political connotations and susceptibilities among the states. The period gave birth to the Central-American Common Market in the 1960s, outside any intervention from the ODECA. This same fragmentation would again be displayed under the SICA, revealing the same underlying patterns.

The ECLA formulated a policy for the economic development of Central America through ‘structuralism’ and ‘integration through reciprocity’, or closed regionalism. Closed regionalism was an economic model based on import substitution and industrialisation using integration as the base for development. The ECLA’s proposal echoed the Central American states’ bid for industrialisation and liberalisation among themselves, thus reducing reliance on external actors. The proposal paid deference to individual states’ respect for autonomy and preservation of sovereignty. One leading

148 Castillo Carmona and Machado Loria, above n 9, 18–19.
150 Moncayo Jiménez, above n 145, 29; Moncayo, De Lombaerde and Guinea Ibáñez, above n 145, 361; Fawcett, above n 145, 39; Bielchowsky, above n 146, 19.
151 Fawcett, above n 145, 39; Castillo Carmona and Machado Loria, above n 9, 25; Guerra-Borges, above n 144, 56; Francisco Santos, ‘Cambios En El Escenario Del Regionalismo Latinoamericano. Del Regionalismo Abierto Al Regionalismo Postliberal [Changes in the Latin-American Regionalism Scenario. From the Open Regionalism towards the Post-Liberal Regionalism]’ in Francisco Santos Carrillo and Olga Pozo Teba (eds), El SICA: diálogos sobre una integración dinámica y singular en América Latina [The SICA: Dialogues of a dynamic integration and singular in Latin-America] (Talleres Gráficos UCA, 2013) 35.
result was the introduction of import substitution in Central-America.\textsuperscript{153} The ECLA proposed a regional integration model based on a Central American Common Market with a common external tariff, harmonisation of states’ policies, special treatment for less-developed nations and safeguards for products that were sensitive to global markets.\textsuperscript{154} In June 1958, the first results of the ECLA’s work appeared with the ratification of the \textit{Multilateral Treaty on Free Trade and Central American Integration} and the \textit{Integration Industries Convention}, which promoted the creation of regional industries and monopolies, designated to each country.\textsuperscript{155} With the ratification of these new treaties, the ODECA was sidelined, thereby creating a new economic enterprise outside and independent of this regional organisation.\textsuperscript{156}

From the beginning the US met the ECLA’s plan of action with hostility.\textsuperscript{157} Thus, after its initial development, the US would again take a predominant role. Its influence over the new Common Market would derail the ECLA’s backing. It would also create new animosity between the Central American states. This hardening of posture came after the Cuban revolution, followed by the 1958 Rockefeller reports. These events shaped the US position on integration of Central America in ways that reflected its fear of communism spreading in the region.\textsuperscript{158} Thus the Rockefeller reports represented a detailed approach to integration, and required that Central-American integration must not have negative effects on US interests, but rather provide stability for potential investors.\textsuperscript{159} In March 1958, the US made public its support for the regional integration process.\textsuperscript{160} However, the US integration proposal differed in several ways for the proposal developed by the ECLA economists. Whilst the ECLA proposal was based on regional industries and intra-regional trade; the US pushed for strong foreign investment and elimination of successful

\textsuperscript{153} Michael Trebilcock and Robert Howse, \textit{The Regulation of International Trade} (Routledge, 3rd ed, 2005) 486.

\textsuperscript{154} Moncayo Jiménez, above n 145, 31.

\textsuperscript{155} Bulmer-Thomas, above n 81, 173.


\textsuperscript{157} Dabène, above n 35, 53; Bulmer-Thomas, above n 81, 173.

\textsuperscript{158} Dabène, above n 35, 53; Cox, above n 136, 66.

\textsuperscript{159} Cox, above n 136, 68–69.

\textsuperscript{160} Ibid 70.
regional industries in return for aid funds. Subsequently, the US intended to recreate the General Agreement on Tariffs and Trade (GATT) in Central-America.

In February 1960, under US influence, El Salvador, Honduras and Guatemala ratified the *Tripartite Treaty* on their own and away from the ECLA’s influence. This led to a strong opposing reaction by the ECLA, Nicaragua and Costa Rica. The two states opposed the new treaty because they were left outside the negotiations and the new aid fund scheme. Although Costa Rica opposed the ratification of the *Tripartite Treaty*, it had not effectively ratified the previous integration instruments. The ratification of a treaty by just a few of the countries, leaving others outside, led towards a new practice in the region related to material fragmentation of the integration regime. This new practice developed into a pattern of ratification of treaties by only some Central-American states. In turn, this led to further fragmentation of the regional governance arrangements. This pattern recurs with SICA, as shown further below. A clear divide concerning economic integration emerged between El Salvador, Guatemala and Honduras on the one hand, and Costa Rica on the other. This divide would become more hostile with the creation of the new SICA integration enterprise in the late 1980s.

With increasing tensions between the three northern and two southern states, the five Central American states again solicited the ECLA to submit a new economic integration proposal for the region. The new proposal incorporated the provisions of the 1960s *Tripartite Treaty* into an intra-regional scheme. This scheme was implemented with the ratification of the *Central-American General Treaty on Economic Integration*, or *General Treaty*, in 1960. This instrument also integrated Nicaragua, while Costa Rica later joined in 1963. This treaty came to completely separate the new Common Market from the ODECA. As such, the treaty created its own institutional framework. The new treaty, and the economic integration legal regime, prescribed the creation of a Central American

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161 Bulmer-Thomas, above n 81, 174; Cox, above n 136, 70.
163 Ibid 203–204.
164 Bulmer-Thomas, above n 81, 174.
165 Fuentes Mohr, above n 162, 212.
166 See discussion in Chapter 4.
167 Fuentes Mohr, above n 162, 212.
Economic Council. This comprised the states’ Ministers of Economy as its main institution; the Central-American Integration Bank; and a permanent Secretariat of Central-American Economic Integration (SIECA) in charge of planning and developing the economic integration design.\(^{169}\) This regional institution had a duty to verify the correct application of regional and conventional norms, but was never meant to be supranational in nature, but instead a cooperation link between governments.\(^{170}\) On the side of the US, they bore many of the financial costs and funds of the integration scheme and its bodies through its overseas aid program (USAID).\(^{171}\) This placed the US in direct control of the development of the new integration scheme, particularly through the control of the loans system of the new regional bank.\(^{172}\)

During the 1960s, Central-American states developed economically through the strong assistance of USAID, directed to strengthen intra-regional commerce.\(^{173}\) During the late 1950s and the 1960s, intra-regional trade among and between Central American states rose from five per cent to almost 25 per cent. This increase of intra-regional trade meant that trade with the US and Europe fell significantly.\(^{174}\) The Common Market led to a major change in the nature of product trade, moving away from raw materials towards consumer goods and chemicals.\(^{175}\)

In addition, and in contrast to the 1951 ODECA Charter, the General Treaty included steps for the consolidation of the Central American Common Market. They were grounded in Bela Balassa’s theory of economic integration. The theory, which governed economic integration in the 1950s, identifies the stages towards economic integration as first, the creation of a free-trade zone in the region; second, the harmonisation of tariffs


\(^{170}\) Fuentes Mohr, above n 162, 229.

\(^{171}\) Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press, 1999) 152.

\(^{172}\) Ibid.

\(^{173}\) Phillipe C Schmitter, 'La Dinámica de Constradicciones y La Conducción de Crisis En La Integración Centroamericana [The Dynamics of Contradictions and the Management of Crisis in Central-American Integration]' (1969) 5 *Revista de la Integración* 87, 107; Miranda, above n 122, 28–29; Castillo Carmona and Machado Loría, above n 9, 27; Willy Soto Acosta and Max Sáurez Ulloa (eds), *Centroamérica: Casa Común e Integración Regional* [Central-America: A Common House and Regional Integration] (Lara Segura & Asociados, 2014) 17–30; Marín C. and Sáurez U., above n 122, 52; Maldonado Rios, above n 122, 61–62; Dabène, above n 35, 52; Moncayo Jiménez, above n 145, 34.

\(^{174}\) Mattli, above n 171, 145.

\(^{175}\) Ibid.
within the region; third, the creation of a customs union; fourth, the free movement of labour and capital within member states; and last, monetary and financial integration among the states.  

The rise and consolidation of the Common Market, through its own legal regime and institutions, consolidated separation from the political arms of integration, the ODECA, and the new economic integration Common Market. This led to a displacement of law by economics, leaving economists and ministers of the economy in Central-American states in charge of the integration process. Since that time, the economic branch of integration has heavily influenced regional integration in Central America, sidelining the role of legal instruments and privileging the accomplishment of economic goals.

Although the Central-American states signed a new charter reforming the ODECA in 1962, which included the creation of a new Central-American Court of Justice and a legislative body, (neither of which ever came into existence), the initiative was completely overshadowed by the design of the new economic enterprise.

Without a political arena or judicial procedure to address the new regional issues, the region entered a new era in which tension mounted in both domestic and foreign spheres. There was competition and animosity between states, with certain states gaining better conditions and higher revenue from the economic integration project. This fostered nationalist sentiments in Central America, particularly from business and labour organisations. Moreover, integration did not bring any substantial changes to domestic policies, particularly in the redistribution of wealth, thereby maintaining the status quo of high poverty rates in the region.

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179 Ibid 297.
183 Schmitter, above n 173, 107.
strength of employers’ organisations, particularly chambers of industry. These groups consolidated their interests in public policy in ways that disregarded the conditions of labour workers. This situation fuelled social conflict, reflected in civil unrest in El Salvador and Nicaragua. Consequently, this period saw strong military repression and dictatorship, particularly in Guatemala, Honduras, El Salvador and Nicaragua. It also led to a military confrontation between El Salvador and Honduras, the so called ‘Soccer War’ of 1969. Tensions in the region were further heightened by a series of external factors. This included a rise in gasoline prices thereby exposing, yet again, the vulnerability of Central-American countries to external markets.

In this period, the ECLA lost its regional influence due to its outdated insistence on ‘closed regionalism’ and its failure to address the oil crisis. The US also began to review its role within the region. Under the Reagan administration, the US created the Caribbean Basin Initiative, which sought to develop new trade and aid measures, as detailed in the Kissinger Report. This Report concurred with the views of the IMF and the World Bank on structural economic reforms. The Kissinger report advocated for less US intervention in Central America. It highlighted the need to promote democracy and Rule of Law in the region, and to restructure Central American economies. This meant direct investment in the region, reduction of price controls and elimination of high-tariffs and regional industries. The Kissinger report claimed that the revitalisation of the Common Market would benefit all Central American countries, including the Sandinista regime in Nicaragua, which had perceived communist connotations. The latter context shaped the US attitude on integration, influencing the other states to avoid sharing benefits with the new Nicaraguan Sandinista regime. This became the determining

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185 Bulmer-Thomas, above n 81, 200.
186 Bielchowsky, above n 146, 40; Moncayo Jiménez, above n 145, 34.
188 Bulmer-Thomas, above n 81, 260.
190 Bulmer-Thomas, above n 81, 260; Dabène, above n 35, 54–55.
191 Bulmer-Thomas, above n 81, 263.
factor in the abandonment of the Common Market regime by a part of the Central American states.

By the end of the 1970s the region was engulfed in a fight against communism. The violence was fuelled by US support for military regimes in the region. At the domestic level, military regimes targeted social movements that sought to promote social justice and poverty relief by labelling them socialist or communist. In El Salvador and Nicaragua, civil war ensued. Meanwhile in Guatemala, the regime’s national security policy led to major human rights violations, and genocide. At the regional level, the region’s executives were in collective disarray. This was due to mounting nationalist pressure created by local elites who had been affected by the integration programme. It meant near abandonment of pursuits to develop the ODECA and the Common Market. Because of the fragmentation of regional governance and strong US pressure, the region opted for the benefits given to them individually by the US. This period was the lowest point in Central American governance arrangements, at both domestic and regional levels. It also vividly showed the vulnerability of Central American states to external influence and dependency on executives to maintain regional arrangements.


After the fall of the ODECA and Common Market, the region would attempt again to pursue a regionalism agenda. Through this new process, and because of ensuing conflict and mass violations of human rights in the 1970s, the language of human rights and democracy was inserted in the SICA. Yet, the legacy of preserving autonomy through the executive persisted. This can be observed in the clash of opposing viewpoints on the aims and purpose of the SICA. It led once more, as in the ODECA times, to fragmentation. US influence also became a constant opposition to the new regional arrangement. This is seen in the promotion of liberalisation and privatisation policies. They were adopted by Central American states both domestically and regionally in a new economic integration treaty. The treaty conflicted with SICA purposes, which furthered the fragmentation of the new regional arrangement. Ultimately, US promotion of a new free trade agreement with the region would almost completely sideline the integration pursuit.

192 On a broader contextual account of turmoil in Central America, see: Villagrán Kramer, ‘The Background to the Current Political Crisis in Central America’, above n 184.
By the end of the Common Market years, in the late 1970s and early 1980s, Central American states were immersed in political and social struggles, with civil wars and military dictatorships. Regional arrangements, the ODECA and the Common Market, were ignored. However, in the 1980s, the region saw a welcome turn to democracy, leaving aside repressive military rule.193 This turn was initially driven by foreign pressure, particularly from the EU and other Latin American states.194 However they also conserved the role of the executives of the region to drive key functions. Alongside this constitutional wave, the original five Central American states launched the new subregional integration enterprise called Esquipulas, as discussed in Chapter 2.195 The Esquipulas Process represented a move away from the US sphere of influence. Esquipulas was based on values of democracy and social justice.196 It also enshrined respect for sovereignty and territorial integrity and non-intervention197 and peace in the region.198 Esquipulas was therefore also a mechanism to moderate the nationalism feelings that had arisen in the previous decades.

Although the new Esquipulas process laid down the values on how to proceed with integration, conflict arose between Central American states on how this should be done. This conflict would lay down the seeds for recurring fragmentation of integration efforts. During negotiations for the relaunch of the integration process, two competing views on Central American integration arose. On one side was the view taken by Guatemala and El Salvador, which considered integration as the ‘end goal’ and sought deeper integration among the Central-American states and the institutionalisation of regional bodies with supranational powers.199 On the other side was the view of Costa Rica, which followed the US position that saw integration as the ‘means’ towards participation in the global market, and contested the creation of supranational bodies.200 In these negotiations, states focused solely on economic integration. In June 1990, at a presidential summit in Antigua,

195 Dabène, above n 35, 55.
196 See discussion in Chapter 2, title II.
197 Declaración de Esquipulas, signed 25 May 1986.
198 Esquipulas II, 1. National Reconciliation (b) Amnesty.
Guatemala, member states emphasised the need to rebuild the new integration scheme by establishing an economic community, with no political component. The presidents stressed that integration should be viewed as an association process that would lead Central American states to integrate with external or international markets. This approach followed the conditionalities of the World Bank and IMF, which urged Central American states to restructure their economies to participate in global markets.

A year after, in June 1991, a new summit took place in San Salvador, El Salvador. This event represented a significant shift in the approach to integration. Influenced by the Salvadorian peace process, states recognised the need to include human rights, democracy and institution strengthening objectives in the new integration scheme. This shifted negotiations to consolidation of the political arms of integration: away from economic schemes onto political and social spheres. However, this shift did not change Costa Rica’s position of promoting economic integration as a mere association of states through a free trade agreement, with no supranational traits. Costa Rica, and later Panama when it was incorporated into the Central American integration process with the ratification of the Tegucigalpa Protocol, have been strongly opposed to ratifying treaties granting supranational powers to regional bodies. They have also sought to remove the regional court’s powers to deal with economic affairs. A consequence of the 1991 negotiations is that the Central American states developed a scheme for the new integration enterprise that juxtaposed two contrasting views: one of deep political and integration; and, the other a mere economic association. This planted the seeds for familiar fragmentation of the new Central American integration regime, repeating the previous experience of the ODECA years that led to the separation of the Common Market from the Central American political arm of integration, the ODECA.

202 Sánchez Sánchez, above n 199, 134.
204 Salazar Grande, above n 201, 42.
205 Cerdas Cruz, above n 57, 42.
206 Sánchez Sánchez, above n 199, 134.
During the same period when the Tegucigalpa Protocol of 1991 was ratified, the US, via the IMF and World Bank accelerated its liberalisation and privatisation efforts in the region. This agenda led to the introduction of policies by national governments in the region that pushed back against social policies implemented in the 1950s, particularly in Costa Rica and Guatemala.\textsuperscript{207} It also presented a set back to the newly adopted principles promoting social justice and welfare in the Tegucigalpa Protocol. However, and more detrimental to SICA, this liberalisation and privatisation agenda was inserted into a new economic integration treaty, Guatemala Protocol of 1993. As with the separation of economics and politics under ODECA, the new protocol laid down the design for a new regional economic integration with its own institutional design separate to the Tegucigalpa Protocol. This move to separate the economic regime from the political demonstrated two realities: first, a move away from the ‘transformative’ basis of Central American constitutions and integration values; and, second, the direct impact of economic investment rules, liberalisation and privatisation on the region’s governance.

Another pattern repeated from ODECA in SICA was the failure to include short-, medium- and long-term objectives. As a result, after the Tegucigalpa Protocol, SICA evolved in an ad-hoc fashion. This led, once more, to the further fragmentation of SICA, as new treaties dealing with specific areas of integration were signed without regard to any overarching legal design or control. By 1995, the Central American states had ratified the Framework Treaty of Democratic Security of 1994,\textsuperscript{208} and the Treaty of San Salvador of 1995.\textsuperscript{209} Each new treaty created a new legal sub-regime within SICA, creating further fragmentation. The rising disintegration led to increasing costs, over-expenditure and inefficiency. It also led to the creation of institutions without clear, or even competing competencies and functions.\textsuperscript{210}

In response to these difficulties, in 1998 the SICA member states solicited, again, the intervention of the UN’s Economic Commission on Latin America and Caribbean

\textsuperscript{207} Héctor Perla, Salvador Martí i Puig and Danny Burridge, ‘Central America’s Relations with the United States of America’ in Diego Sánchez-Ancóchea and Salvador Martí i Puig (eds), Handbook of Central American Governance (Routledge, 2014) 314–315.


\textsuperscript{210} On this issue, see discussion in Chapter IV, Title III, subtitle B.
(ECLAC), and the Inter-American Bank (IDB). This new request for intervention was made to promote reform to the SICA. The ECLAC and the Inter-American Bank focused on the institutional aspects of the SICA, which had over-expanded. They uncovered over 36 different governing institutions within SICA. Their proposal was for the unification of secretariats, changes to the regional court’s jurisdiction, and reengineered composition and attributions of the regional parliament. This model was based on the notion of ‘open regionalism’, the economic ideal by which states are encouraged to liberalise their markets and conceive of integration as a complementary process to regional participation in the global market. The ECLAC referred to free-trade agreements, particularly the North American Free Trade Agreement (NAFTA), as the prime example of this theoretical framework. On this view, free-trade agreements became tools for access to and liberalisation of both domestic and foreign markets, and to give credibility to domestic policies. In addition, the ECLAC promoted the need for flexible commitments and a higher degree of intergovernmental interaction between states. As a result, in 1997 the executives of the region adopted a new project on Central American integration reform under this concept.

The regional parliament, PARLACEN, and the newly created regional court reacted aggressively to the ECLAC and IDB’s proposal. The regional parliament opposed a proposal to completely re-structure and change its nature. The idea was to make the PARLACEN a non-permanent institution, composed of delegates of each congress of Central America, no different to a summit of domestic congresses. In reaction the PARLACEN presented its own version of a unique new treaty of integration for the states. Regarding the regional court, the ECLAC proposed to take away its permanent seat and transform it into an ad hoc tribunal for special cases, comprising the presidents.

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211 Guerra-Borges, above n 203, 114.
212 Salazar Grande, above n 201, 167.
214 Ibid 126.
216 Ibid 11.
218 Ibid 19.
219 Salazar Grande, above n 201, 167.
220 Ibid.
of the Supreme Courts of each member state. The ECLAC and IDB proposal would effectively change and constrain the courts’ powers and jurisdiction.\footnote{Economic Commission of Latin America and Caribbean and Inter-American Development Bank, above n 213, 126.} The regional court has the mandate to interpret SICA law and solve any breaches to it. In its constitutive statute, the regional court has been assigned the competence to review conflict between ‘fundamental powers of the state’\footnote{Estatuto de La Corte Centroamericana de Justicia [Statute of the Central-American Court of Justice], Opened for Signature 19 December 1992, 1821 UNTS 280 Article 22.f (‘CACJ Statute’).}.\footnote{Economic Commission of Latin America and Caribbean and Inter-American Development Bank, above n 213, 126.} This provision has been the source of non-ratification on the part of Costa Rica, Panama and Belize. Accordingly, the ECLAC and IDB report proposed to strip the regional court of that competence that had affected non-ratification of its statute.\footnote{Economic Commission of Latin America and Caribbean and Inter-American Development Bank, above n 213, 126.}

The reply from both the regional court and parliament stalled not only the reforms of these bodies, but the entire institutional review.\footnote{Pedro Caldentey del Pozo, ‘Panorama de La Integración Centroamericana: Dinámica, Intereses y Actores [Panorama of the Central-American Integration: Dynamics, Interests and Actors]’ in Pedro Caldentey del Pozo and José J Romero Rodríguez (eds), El SICA y la UE: la integración regional en una perspectiva comparada [The SICA and the EU: a comparative perspective of regional integration] (Talleres Gráficos UCA, 2010) 233.} This was accomplished by the Central American court’s capacity to rally support from national Supreme Courts in the region.\footnote{Ibid.} Due to this backlash from the regional institutions, the SICA entered an era of regression and executive inactivity. There was almost a complete halt in presidential summits.\footnote{Kevin Parthenay, ‘Presidential Summitry in Central America: A Predictable Failure?’ in Phillippe Thérien, Diana Tussie and Olivier Dabène (eds), Summits & Regional Governance: The Americas in comparative perspective (Routledge, 2016) 128; Francisco Santos Carrillo, ‘El Proceso de Cumbres de Presidentes Centroamericanos Como Artífice Del Nuevo Modelo de Integración Regional [The Process of the Summit of Presidents as an Architect of the New Regional Integration Model]’ in El SICA y la UE: la integración regional en una perspectiva comparada [The SICA and the EU: a comparative perspective of regional integration] (Talleres Gráficos UCA, 2010) 274–275.}

Because of this action, Costa Rica, which had always been a critic of the new court’s mandate, attempted to find new ways to resolve their disputes within SICA without resorting to the Central American Court of Justice. It also pushed for an amendment to the Tegucigalpa Protocol to establish a new inter-state dispute settlement mechanism for economic disputes.\footnote{Enmienda Al Protocolo de Tegucigalpa a La Carta de La Organización de Estados Centroamericanos [Amendment to the Tegucigalpa Protocol of the Central-American States Charter], Signed 27 February 2002, Intrumentos Jurídicos Del Sistema de Integración Centroamericana 27 (‘Tegucigalpa Amendment’).} The proposed amendment, took away all capacity of the newly created regional court to review disputes of economic nature.
The new regional court objected to this amendment. It issued an advisory opinion stating that it was the only institution capable of reviewing state action within the SICA, disregarding the provisions of the Guatemala Protocol that gave a supervisory role to the new Economic Secretariat.\(^{228}\) In a second opinion, the court stated that its jurisdiction was ‘exclusive and exclusionary’, and that the creation of the new dispute scheme would have an negative impact on the court’s jurisdiction.\(^{229}\) However this did not stop Costa Rica, which in 2002 pushed the other SICA states to amend the Tegucigalpa Protocol to incorporate the new inter-state dispute settlement mechanism for economic disputes.\(^{230}\)

This was not the only example of national backlash against regional bodies. In 2009, Panama presented its withdrawal from the PARLACEN due to its ‘high costs’ and ‘failed purposes’.\(^{231}\) Only El Salvador, Honduras and Nicaragua ratified the statute for the new regional court,\(^{232}\) although Honduras suspended its participation between 2004 and 2008. Guatemala, which ratified the statute of the Central American Court of Justice in 2008 has not yet appointed its own judges.\(^{233}\) These actions demonstrate the capacity of domestic executives, through the Summit of Presidents, to bend the SICA to their will, without any accountability mechanisms. The impact has been an almost complete separation of the economic system from the political sphere, replicating the 1960s bifurcation between political and economic arms of integration. These events consolidated a deep fragmentation within the SICA and revealed the deeply entrenched autonomy agenda within the integration project.

By 2002, SICA was heavily disjointed and divided, unable to deal with executive backlash. However, a further instance of US influence over the region would place even more pressure on SICA. In 2003, Central American states entered a negotiation with the US as its largest trading partner. The result of this negotiation was the *US-DR-CAFTA*, signed on 5 August 2004. Many of the negotiations were made bilaterally between the

\(^{228}\) *File 27-07-03-03-2000 (Advisory Opinion)* (Unreported, Central-American Court of Justice, 13 March 2002) 17 (*SIECA Art 44 Advisory Opinion*).

\(^{229}\) *File 44-10-21-06-2001 (Advisory Opinion)* (Unreported, Central-American Court of Justice, 12 November 2001) 8 (*Commercial Dispute Advisory Opinion*).

\(^{230}\) *Tegucigalpa Ammendment*.


\(^{233}\) Ibid.
Central American states and the US. This was because the US saw the regional integration arrangements as ineffective. The Central American states saw an opportunity to consolidate regional trade in the context of an ineffective SICA, sidelining existing regional norms and arrangements. Accordingly, the original purpose of the SICA as a regional programme to move away from US influence was set aside, demonstrating SICA’s incapacity to further develop itself. With the ratification of the US-DR-CAFTA, Central America created a new layer within the regional governance system. With the introduction of the US-DR-CAFTA, the states added a new specialised legal framework with its own institutions, which needs to be applied side by side with the integration norms in the region. With the signing of the US-DR-CAFTA, the SICA faded almost completely from the picture. By 2004, SICA had met almost the same fate as the ODECA and Common Market preceding it. It was a forum with no influence over regional policies, thus with no impact. Executive dominance and the influence of the US had made it incapable of addressing its purposes and goals. However, SICA was handed a lifeline by a new external actor. This was the EU, who had already been in the picture, but would take centre stage in its consolidating steps towards deeper integration.


It was not until 2007 that a new impulse for deeper regional integration emerged. This new stimulus came from Europe. Originally through the efforts of the European Economic Community and individual nations like Norway, Europe had pushed for Central American democratisation and peace-building processes, including serving as mediators. Since the 1980s, the EU has acted as an intermediary in the Central-American conflicts and pushed an agenda based on peace, democracy and human rights. In the mid-1980s, the EU became interested in the region as a potential importer of the European integration experience. The EU did this as a move to consolidate their external influence globally and be seen as a benevolent emerging power. The Central-American
states became open to Europe, as at the time it had been neutral on the region’s conflicts and was not seen as a hegemonic power, as was the US. After this initial engagement, Europe, now through the European Union (EU), became a new influence on Central American states to revisit integration and reform SICA. EU aid to Central America came as part of its policy to support regional integration around the world. The EU policy was supported by three principal motives. The first was a strategic aim to promote integration as a mechanism that ensures peace, stability and development. This aligns with the historical actions of the EU since the 1980s. The second motivation was to make SICA a partner of the EU on global issues, based on shared defining characteristics and position on global issues. The third motive was that an integrated Central America could provide a bigger market for the import of European products. A strong integration regime would be expected to aid the protection of EU products and enhance competition conditions and fuel investment.

The result of this policy agenda was talks towards an association agreement between the EU and Central America. As a result of these talks, and reflecting influence from the EU, the Central American states signed a framework treaty for the creation of a customs union in 2007. This led the COMIECO, or Council of Ministers of Economy to approve the latest form of the Central-American Uniform Customs Code in 2008. This instrument establishes the basic customs principles and norms by which member states need to act in the implementation of customs procedures.

In 2010, under the auspices of the Salvadorian Government, a new design began for the reform and modernisation of the SICA. This initiative has been strongly influenced by the EU via its ‘Support Program towards Regional integration in Central-America’ (PAIRCA). These efforts were the foundation for the later development of an inter-

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239 Ibid 7.
240 Joren Selleslaghs, ‘The EU’s Role and Interest in Promoting Regional Integration in Central America’ (W-2014/9, United Nations University Institute on Comparative Regional Integration Studies, 2014) 6.
241 Ibid 12.
243 Ibid.
244 Ibid 13–14.
247 Caldentey del Pozo, above n 224, 234; Selleslaghs, above n 240, 16.
regional association agreement between Central America and Europe in 2012. From this initiative, the General-Secretariat gained some leadership in the region. It funded new studies on the nature and composition of the SICA and Central American ‘communitarian’ law.248 The new study found that the SICA had expanded from 36 institutions to 140 since the 1996 ECLAC and Inter-American Development Bank study.249 As a result, in 2013 a new Summit of Presidents took place in San José, Costa Rica, to review the SICA’s institutional design.250 However, no concrete reform was approved at this summit, and none has been approved since.

The newfound impetus for reform that was mainly driven by Europe led to the ratification of the European Union-Central America Association Agreement in 2012 (EU-CAAA). This agreement established cooperation by the EU for strengthening integration in Central America, particularly for the consolidation of a common market and economic union within the region, although the agreement did not include Belize or the Dominican Republic.251 Consequently, the new EU-CAAA pushed El Salvador, Honduras and Guatemala to gain new momentum in the process towards the creation of a customs union among them.252 Between mid-2015 and early 2016, the Congresses of Honduras and Guatemala approved a protocol for the consolidation of a customs union between them, the first in Latin-America.253 Yet, once again, this serves to demonstrate a key point in this thesis that external influence has proved to be a catalyst for further integration among the Central-American states.


249 Salazar Grande, above n 201, 185.

250 Ibid 187.


VI. CONCLUSION

The aim of this chapter has been to present the context of Central American integration necessary for understanding the problems that SICA faces, and the solutions that lie in the comparative historical experiences of Central American states. This has entailed setting out intrinsic traits that have defined and continue to shape the governance of Central American regionalism and integration. These traits or behaviours are firmly entrenched, which is a crucial factor in understanding the challenges SICA faces, and the potential solutions that comparative regionalism approaches provide.

The chapter has provided an historical and contextually informed reading of Central American regionalism and its many integration programmes. It shows how through the many Central American integration schemes and initiatives, two historical legacies consolidated themselves – and continue to manifest in the SICA, which is Central America’s latest integration enterprise. These legacies are the dominance of executive action in designing, supporting/repudiating integration plans, and the influence of extra-regional actors with colonial and geopolitical motivations, together with more recent motivations driving the initiatives of international organisations and regional treaties, such as the US-DR-CAFTA and the EU-CAAA. Note that at this point in the thesis the discussion has not covered a second aspect of vulnerability to foreign ideas, which is the use of foreign legal sources by regional institutions and Central American scholars. This aspect is supported by the nature and purposes of EU involvement in the region in the 980s, canvassed in the last part of this chapter. This additional facet of vulnerability is investigated more fully in subsequent chapters.
CHAPTER FOUR.
THE PROBLEMS OF THE SICA LEGAL REGIME

I. INTRODUCTION

The history of integration regimes in Central America shows they were created to achieve various objectives including economic development and industrialisation, consolidation of political power, and promotion of cooperation among member states. SICA was created in the 1980s to help achieve an even larger ‘transformative’ democratisation and peace building process, Esquipulas. This provided a distinctive objective to transform Central America into a region of peace that promotes social justice through human rights. However, SICA, like other regional attempts at integration, has not lived up to expectations. In short, SICA has been unable to promote a regional integration scheme that aids member states to deliver social justice to their citizens. This failure is due to the repeated impact of two historical legacies: executive led dominance within the integration regime, and the region’s vulnerability to external influences in their different forms. The purpose of this chapter is to identify and investigate the problems the SICA legal regime presently faces and the impacts of these legacies. This inquiry is expected to provide the setting from which insights from comparative legal method and other integration processes globally can be drawn to provide possible solutions. This chapter is organised around three aspects of the SICA legal regime, namely its conceptualisation, institutions, and exercise of judicial power.

In Part II of the chapter, the conceptual challenges of SICA are investigated. The discussion is focused on the lack of an overarching regional design and the inconsistent ratification of regional integration treaties. These have caused SICA to fragment into many governing subsystems, leading to duplication and inconsistencies in governance. Part III examines the institutions of SICA. It argues that institutions are heavily dependent on the region’s executives, resulting in the expansion of regional institutions without coherence or coordination, and the failure of the institutions to provide effective remedies for breach of regional norms and rights of individuals. Part IV analyses SICA’s judicial problems. It shows how SICA has established a new regional court, but with a constitutive statute containing a provision that has led to its non-ratification. Part IV also examines the legal methods employed by the court in its jurisprudence and argues that the Court’s approach to transplanting European doctrines into regional law, and its failure to engage
in dialogue with domestic courts after suffering backlash, has created problems for the
development and application of regional law.

II. THE CONCEPTUALISATION OF SICA

This section details the challenges arising from the conceptualisation of SICA. It shows
how, lacking a single overarching legal design, SICA has developed in an ad hoc fashion.
This lack of overarching design is a product of the SICA’s early, heavily executive driven
and sovereignty protective negotiations. This resulted in failure to consolidate short,
medium, and long term goals within the SICA. In turn it led to two specific aspects of the
SICA’s fragmentation. The first is the creation of multiple legal subsystems, through a
variety of separate treaties within SICA. Many of these repeat characteristic failures to
set out clear objectives and goals. The second aspect concerns inconsistent ratification of
SICA treaties and instruments on the part of some member states. This has created a
Central American *a la carte*, which consequently has led towards stagnation of the SICA
enterprise and lack of concrete accountability mechanisms.

A. Fragmentation of SICA into Multiple Subsystems

*Fragmentation* is understood here as a specialisation process, in which international law
is divided into distinctive functional regimes.¹ These regimes represent a set of norms,
decision-making procedures and institutions acting within a specific mandate or topic.
Fragmentation becomes problematic when there is conflict between the mandates and
institutions in the subsystems within the regional arrangement. It also becomes
problematic in the sense that each new regime, subsystem or institution created by it could
present and promote different views on how to govern.²

In Central America, this problem was first observed during the Organisation of Central
American States (ODECA) and Common Market years, between 1960 and 1970. As
described in the previous chapter, the lack of concrete objectives within the ODECA and
conflict between executives on how to pursue deeper integration during this period led to
the separation of political and economic spheres of integration. Ultimately, both schemes

*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of*
² Kal Raustiala and David G Victor, ‘The Regime Complex for Plant Genetic Resources’ [2004] (58)
*International Organization* 277, 277.
were abandoned since separately they were unable to promote deeper integration and tackle crucial issues in the region. SICA sought to resolve this problem by providing a new platform that could encompass all facets of integration. Yet, again, disputes between the region’s executives and influence from the US during the 1990s, pushing a liberalisation and privatisation agenda, led to an acute repetition of fragmentation. Within the entity of SICA, fragmentation is seen most clearly in the proliferation of individual subsystems within it. In its attempt to address the needs of integration in the region, SICA has expanded to include a series of subsystems, in ad-hoc fashion. Today, SICA has political, economic, social and environmental subsystems, each created by a subsequent and separate treaty or protocol. Each new subsystem presents a series of new or different purposes and principles for the SICA legal regime. Yet the SICA legal regime has no overarching or guiding mechanisms or institutions to cope with this fragmentation.

As explained in chapter 2, the *Tegucigalpa Protocol* is the SICA’s main constitutive treaty. The treaty launched the new integration enterprise in 1991, establishing SICA’s fundamental objective and purposes. Yet, in ways that chapter 3 outlined, the *Tegucigalpa Protocol* represented, both a high degree of state autonomy and executive bias, which is characteristic of Central American integration. Consequently, the new protocol needed to accommodate two competing ideas. One side promoted by Guatemala and El Salvador, viewed integration as an end goal which required the creation of supranational bodies. The other side, sponsored by Costa Rica and Panama, viewed integration as an economic process to insert the region into the global market, which did not require supranational institutions. The result was that while the *Tegucigalpa Protocol* established supranational institutions, it was highly deferential to the autonomy of member states. As such, the new instrument contained only aspirational values and purposes with no short, medium, or long term objectives or clear guidelines how to achieve them. In this way, SICA came to repeat the same old patterns laid down previous by the ODECA.

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4 Raustiala and Victor, above n 2, 277.


As the old *ODECA Charter* had been, the Tegucigalpa Protocol was a short document, with only thirty-eight provisions. Similar again with the *ODECA Charter*, the new protocol did not set out any plan or steps for member states of regional institutions on how to achieve SICA’s transformative objectives. Rather, it replicated the institutional composition of ODECA without much alteration. Therefore, like the ODECA the new SICA comprises a series of intergovernmental and supranational bodies. Articles 1 to 4 detail the fundamental objective, purposes and principles of SICA. Articles 5 to 7 detail the procedure for adopting of new members. Articles 8 to 28 detail the basic institutional composition of SICA, including the Summit of Presidents (articles 13 to 15), Council of Ministers (articles 16 to 23), Executive Committee (article 24) and the General Secretariat (article 28 to 28). The Protocol includes a provision that the Central American Court of Justice, the Central American Parliament (PARLACEN), and the Central American Economic Secretariat (SIECA) shall be governed by their own governing treaties. Lastly, articles 29 to 38 include other general provisions, including the physical seat of the General Secretariat at San Salvador, El Salvador, (article 29), the capacity of SICA to acquire goods and enter into contracts and treaties (article 30), the adoption and characterisation of SICA norms as executive decrees (article 34), and the categorisation of the *Tegucigalpa Protocol* as the supreme norm within SICA and any other instrument related to Central American integration (article 35).

A first sign of the fragmentation of the SICA legal regime was the signature of a new economic integration treaty on 29 October 1993, the *Guatemala Protocol*. This instrument relaunched the economic aspect of the integration regime and established the governance structures of the economic subsystem. Yet, due to the sway of the US agenda on liberalisation and privatisation, and in an effort to keep Costa Rica and Panama involved in the regional process, this new protocol reflected a position closer to their preference for economic integration without supranational institutions. The *Tegucigalpa*

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7 Rodolfo Cerdas Cruz, *Las Instituciones de Integración En Centroamérica: De La Retórica a La Descomposición* [The Central American Integration Institutions: From Rhetoric towards Descomposure] (Editorial Universidad Estatal a Distancia, 2005) 41; Guerra-Borges, above n 6, 111.
Protocol had come to recognise supranational features, favoured by Guatemala, El Salvador and Honduras – but an option not favoured by Costa Rica or Panama. 10 Thus the economic protocol defined integration as a gradual, flexible and complementary ‘process’, with a tendency towards convergence and harmonisation of economic policies, infrastructure and services. 11 The main objective of this integration process, as the protocol defines it, is the economic, social and sustainable development of the region, which allows transformation and modernisation of the states and their integration to the international market. 12

In contrast to the Tegucigalpa Protocol, this economic integration instrument is much more detailed, with 64 provisions. It lays down the institutional composition of the economic subsystem, which includes various bodies. The Economic Council of Ministers is responsible for defining the policies of the economic subsystem 13 and comprises not only Ministers of Economy of each of member state, but also representatives of their Reserve Banks. 14 The Sectorial Council of Ministers, comprising the Ministers of Economy and Agriculture or Treasurers, is mandated to aid the economic integration process. 15 The Economic Executive Committee, whose members are named directly by each Ministry of Economy, is given the duty to provide legal form to Economic Council decisions. 16 The Economic Secretariat (SIECA), which is distinct from the General Secretariat of SICA, has the duty to ensure correct application of economic norms and execution of Council decisions by states, plus other duties assigned by the Economic Council. 17 The Central American Agriculture Council has the competence to propose and execute policies related to agriculture and sanitation 18 with its own Secretariat to provide technical and administrative support. 19 The Monetary Council, which comprises the Presidents of the National Reserve Banks, has the competence to propose and execute policies related to the coordination, harmonisation, convergence or unification of

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11 Guatemala Protocol Art. 1.
12 Ibid Art. 3.
13 Ibid Article 39.
14 Ibid Article 38.
15 Ibid Article 41.
16 Ibid Article 42.
17 Ibid Articles 43 and 44.
18 Ibid Article 45.1.
19 Ibid Article 45.2.
monetary and exacted rates. It also has its own secretariat to provide technical and administrative support.\textsuperscript{20}

In setting out the planned stages of economic integration, the \textit{Guatemala Protocol} follows the Balassian Model. This means a path for economic integration involving the following five steps: first, the creation of a free-trade zone in the region;\textsuperscript{21} second, the harmonisation of tariffs within the region;\textsuperscript{22} third, the creation of a customs union;\textsuperscript{23} fourth, the free movement of labour and capital within the member states;\textsuperscript{24} and fifth, monetary and financial integration among the states.\textsuperscript{25} Yet, the Guatemala Protocol sets out no deadlines or timeframes to accomplish these steps.

The new economic protocol came to replicate the divide between economic and political spheres of Central American integration that featured in the ODECA and Common Market integration processes of the 1960s. This divide was further entrenched by the introduction of an inter-state dispute settlement mechanism solely for disputes of economic nature.\textsuperscript{26} This was pushed by Costa Rica to avoid any supranational scrutiny by bodies like the new Central American Court of Justice. The new SICA economic dispute settlement scheme adopted a similar model to the World Trade Organisation’s (WTO) Dispute Settlement procedure. Its arbitral panels are legally required to take into account the WTO jurisprudence in their decision-making.\textsuperscript{27} However, prior to the establishment of an arbitral panel, states must exhaust a previous stage of alternative dispute resolution under the economic subsystem’s Ministerial Council.\textsuperscript{28} The settlement procedure has heard over 25 cases in its more than ten-year existence. Only two were finalised with an

\textsuperscript{20} Ibid Article 48.
\textsuperscript{21} Ibid Arts. 7-9.
\textsuperscript{22} Ibid Arts. 10-14.
\textsuperscript{23} Ibid Arts. 15-17.
\textsuperscript{24} Ibid Art. 18.
\textsuperscript{25} Ibid Art. 19.
\textsuperscript{26} \textit{Enmienda Al Protocolo de Tegucigalpa a La Carta de La Organización de Estados Centroamericanos [Amendment to the Tegucigalpa Protocol of the Central American States Charter], Signed 27 February 2002, Intrumentos Juridicos Del Sistema de Integración Centroamericana 27} (‘\textit{Tegucigalpa Ammendment’).\textsuperscript{27}
\textsuperscript{27} \textit{Solución de Controversias Comerciales, Resolución No. 106-2003 Del Consejo de Ministros de Integración Económica} [Commercial Dispute Settlement, Resolution No. 106-2003 of the Ministers of Economic Integration Council], Signed 13 February 2003, Intrumentos Jurídicos Del Sistema de Integración Centroamericana 666 Art. 3 (‘\textit{CA-DSU’}).
\textsuperscript{28} Ibid Arts. 11-14.
arbitral decision. The rest of the disputes were settled by agreement between the parties, with the intervention of the Economic Ministerial Council. The SICA was further fragmented with the introduction of two new treaties: the Framework Treaty on Democratic Security of 1995 and the Treaty of San Salvador of 1994. The Framework Treaty on Democratic Security developed further the political and democratic security subsystem. The instrument recognizes the nature of the region’s development as being towards protection and strengthening of peace, democracy, human rights and the rule of law. The Treaty is based on three pillars: the rule of law as essential for the protection of democracy, individual rights and subordination of public power and authority; the protection of individual citizens and their property, and the need to promote the individual’s economic development; and regional security, which promotes sovereign equality between states and their commitment to peaceful resolution of their controversies and respect for international law. Meanwhile, the Treaty of San Salvador created the social subsystem. This treaty affirms the SICA as a juridical and institutional instrument for the insertion of the entity of Central America into the world. This instrument came to expand SICA’s social justice identity, defining integration as means for the social development of the Central American people.

Each treaty also created new institutions and councils, all with different purposes, principles and guidelines. This has made the fragmentation problem in SICA more acute than in its predecessors. With the partial exception of the Guatemala Protocol, all other key SICA treaties display the same pathology of the Tegucigalpa Protocol: short treaties with open ended goals and no guidance on how states could fulfill their duties. The proliferation of treaties effectively broadened the SICA’s scope of governance. Although

31 Ibid art. 8.
32 Ibid art. 10.
33 Ibid art. 26.
the new treaties and international instruments gave the SICA multidimensionality and recognised key issues of subregional concern, ultimately, they promoted a governance system where each regime is treated in isolation. In other words, without any overarching guidelines or principles related to the allocation of competencies, each subsystem and their internal institutions could only act separately and without cohesion. Failure to constitute an overall coordination scheme between the many subsystems and institutions has led the SICA to become inefficient and over-burdened. It has also led to problems of non-accountability. The Tegucigalpa Protocol is silent on how the subsystems and institutions should interact and how they should be accountable to each other and to member states and their people. There is a significant need, therefore, for the SICA to consolidate an action plan and overarching guidelines that could align SICA’s many subsystems and institutions towards the fulfilment of the ambitious objectives set out in the Tegucigalpa Protocol.

B. Inconsistent Ratification of Treaties

During the ODECA and initial Common Market years, Central American states started a practice of inconsistent ratification of treaties. This is a practice by which some member states settle separate treaties on integration matters with some, but not all, SICA member states. This practice of inconsistent ratification became even more prevalent with the entry into force of SICA. Inconsistency can be traced to the concern of member states to preserve their autonomy and control over regional arrangements. This problem of inconsistency is closely associated with fragmentation as it allows the development of a legal system with different levels of obligations and accountability procedures between member states.

The Tegucigalpa Protocol is silent on whether member states should ratify the statutes establishing the PARLACEN or the statute Central American Court of Justice. It merely mentions they are governed by their own treaty. Regarding the PARLACEN, El Salvador, Dominican Republic, Honduras, Guatemala, Nicaragua and Panama are members, but Costa Rica and Belize have not yet ratified its constitutive treaty. While, for the Central

American Court of Justice, only El Salvador, Honduras, Nicaragua and Guatemala have ratified the treaty establishing it. However, Guatemala has not designated judges to it, nor has it agreed to be subject to its jurisdiction. The reason why Costa Rica and Panama have not ratified these treaties is largely their concerns about the supranational nature of these institutions. The Supreme Court of Costa Rica declared it ‘inconvenient’ to ratify the statute establishing the Central American Court of Justice. It interpreted the provision that granted the regional court power to review conflicts ‘between fundamental powers of the state’ as infringing on Costa Rica’s sovereignty. This provision would give the regional court the capacity to directly review acts of any level of power in the Costa Rican state, whether executive, legislative or judiciary. Another reason for Costa Rica’s refusal to sign the statute for the regional court was based on its belief that the Central American Court of Justice does not have the capacity to resolve economic integration or trade-dispute issues. Costa Rica would prefer that the region seek to resolve such disputes before extra-regional experts with ostensibly better expertise in these matters. To this day, Costa Rica, Panama and Belize continue to refuse to ratify the CACJ statute on sovereignty grounds. This process reveals an exercise of ‘pick-and-choose’ on the part of Central American states in deciding how to approach the Central American integration program. It gives a great degree of leverage to individual member states on how far they are willing to integrate.

Other SICA treaties, like the Guatemala Protocol, the Framework Treaty on Democratic Security and Treaty of Social Integration are similar to the treaties establishing PARLACEN and the regional court, in the sense that they leave it to the discretion of states whether to ratify them. The impact is that it creates a legal regime where member

38 Ibid.
39 Estatuto de La Corte Centroamericana de Justicia [Statute of the Central American Court of Justice], Opened for Signature 19 December 1992, 1821 UNTS 280 Article 22(f) (‘CACJ Statute’).
40 File 87-06-08-09-2008 (Judgment) (Unreported, Central American Court of Justice, 20 October 2009) 38 (‘First Costa Rica Case’).
41 Sánchez Sánchez, above n 9, 47.
states acquire different obligations under the SICA. Also, it creates a legal regime where states have different levels of accountability, weakening interpretation of laws across the regime. For example, Costa Rica and Panama did not sign the Framework Treaty on Democratic Security, which was reportedly because these states do not possess an army and prefer to stay aside from the regulation of armed forces.\footnote{Mejía Herrera, above n 37, 337.}

Another layer of inconsistent ratification is displayed even within SICA’s own subsystems. This can be seen in the different speeds with which Central American states have pursued economic integration. While Honduras, El Salvador and Guatemala have signed a treaty to create a customs union in their territories, Costa Rica and Panama opted to simply preserve a free-trade zone in the region. Moreover, Belize has not ratified the Guatemala Protocol, and is not part of the economic scheme whatsoever. This multi-speed development is permitted by the Guatemala Protocol, which enables the SICA states to take differentiated steps towards economic integration and sets no dates for the completion of each stage of integration.\footnote{Guatemala Protocol Art. 6 and 52.} Consequently states are not obligated to carry out economic integration at the same speed.

Without an overarching framework or concrete lines of action, short, mid and long term, SICA has grown to cover many areas of governance without any cohesion. The issues created by this fragmentation were recognised in the 1994 Alliance for Sustainable Development of Central America (ALIDES) agenda.\footnote{Alianza para el Desarrollo Sostenible de Centro América, signed in Managua 12 October 1994.} That agenda pushed for a reconceptualization of SICA to redress problems of fragmentation. Today, over twenty years after the ALIDES declaration, no new agenda has been implemented to reform SICA or deal with fragmentation. While SICA has launched a series of reconceptualization attempts, none has been successful.\footnote{Pedro Caldentey del Pozo, ‘Panorama de La Integración Centroamericana: Dinámica, Intereses y Actores [Panorama of the Central American Integration: Dynamics, Interests and Actors]’ in Pedro Caldentey del Pozo and José J Romero Rodríguez (eds), El SICA y la UE: la integración regional en una perspectiva comparada [The SICA and the EU: a comparative perspective of regional integration] (Talleres Gráficos UCA, 2010) 234; Joren Selleslaghs, ‘The EU’s Role and Interest in Promoting Regional Integration in Central America’ (W-2014/9, United Nations University Institute on Comparative Regional Integration Studies, 2014) 16.}
C. The US-DR-CAFTA Competing Trade Regime

In 2004, Central American states signed the US-DR-CAFTA, which created a competing economic legal regime to the SICA. This new legal regime came to create new rules on trade not only between the US and Central American states, but also between member Central American states.\(^{48}\) The US-DR-CAFTA not only brings lower tariffs than those negotiated under SICA, but also brings regulation to topics such as environmental and labour protection, and investment.\(^ {49}\) This new legal regime also incorporated new dispute settlement provisions, with stronger measures to be applied to countries who do not enforce rulings of arbitral panels.\(^ {50}\) In addition, due to US pressure, the US-DR-CAFTA incorporated a provision giving its norms superior hierarchical status over SICA treaties and norms:

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\text{Article 1.3: Relation to Other Agreements: […] For greater certainty, nothing in this Agreement shall prevent the Central American Parties from maintaining their existing legal instruments of Central American integration, adopting new legal instruments of integration, or adopting measures to strengthen and deepen these instruments, provided that such instruments and measures are not inconsistent with this Agreement.}
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This provision provoked a clash between claim about norms and the jurisdictional superiority of integration norms within Central American states.\(^ {51}\) The roots of the dispute are explicated by article 35 of the Tegucigalpa Protocol that establishes its superior status over any treaty signed among or by Central American states regarding integration issues.\(^ {52}\) In a converse claim, exemplifying potential for interpretation dispute, a US-DR-CAFTA arbitration tribunal may be entitled to entertain a matter that considers how an individual Central American state may act by reference to a particular obligation arising from the SICA legal regime, and could rule that SICA integration norm inconsistent with US-DR-CAFTA. This scenario has not yet occurred. However, a US-DR-CAFTA arbitration panel has provided an interpretation that seeks to guide and limit the

\(^{48}\) Caldentey del Pozo, above n 47, 444.


\(^{50}\) Central America-Dominican Republic-United States Free Trade Agreement, Signed 5 August 2004; Http://Www.Sice.Oas.Org/Trade/Cafta/Caftadr_e/Caftadrin_e.Asp See Chapter 20 (‘CAFTA’).


\(^{52}\) Tegucigalpa Protocol Article 35.
interaction between SICA norms and those contained within *US-DR-CAFTA*. In their reasoning, the arbitration panel interpreted the *US-DR-CAFTA* as a specialised body of norms, which cannot be subordinated by other international or Central American integration norms.\(^{53}\)

For its part, the Central American Court of Justice delivered a ‘binding’ advisory opinion stating that Central American SICA interaction norms have a ‘supremacy’ status over *US-DR-CAFTA* rules.\(^{54}\) The Court based its opinion on an interpretation of article 35 of the *Tegucigalpa Protocol*. This provision gives the protocol supreme status in all matters regarding Central American integration. Therefore, the regional court ruled that provisions of the *US-DR-CAFTA* which relate to SICA are subject to the *Tegucigalpa* protocol. As a result of this jurisprudence, Central American states may find themselves in a situation where different rules apply to the same controversy, giving rise to the risk of ‘forum shopping’ between jurisdictions. There is now a proliferation of international adjudicators in the region.\(^{55}\) Not only does the SICA have both a regional court and a WTO-like dispute settlement scheme, but the *US-DR-CAFTA* provides its own arbitration procedures all with interacting and potentially conflicting jurisdictions. This raises concerns not only about the potential for different interpretations of norms, but also about the undermining of the role and legitimacy of other judicial bodies.

These contexts make it possible to identify at the conceptual level three problems related to SICA. First, it is a fragmented legal regime, without an overarching guiding scheme or principles that has resulted in the creation of multiple legal subsystems in an ad hoc way. Second, numerous member states are not part of all the subsystems or have not signed SICA treaties recognising the competence of SICA institutions. Third, all Central American states (except for Belize) are members of SICA’s competing economic legal regime, the *US-DR-CAFTA*, which introduced new dispute settlement procedures and provisions that contradict those in the *Tegucigalpa Protocol*.


\(^{54}\) File No 2-24-1-2014 (Advisory Opinion) (Unreported, Central American Court of Justice, 17 March 2014) in relation to the third question. (*US-DR-CAFTA Opinion*).

III. INSTITUTIONAL CHALLENGES

This part of the chapter deals with the institutional problems of SICA, which covers the overriding power of executives in the governance of SICA, the over-expansion of SICA, and its failure to provide for effective remedies for breaches of law and individual rights. This part shows how, because of fragmentation, SICA is institutionally over-burdened. It shows how executives have overriding institutional command over regional arrangements, which has led to competition for governance between executives and regional bodies, thus impacting negatively on the capacities of regional bodies. It also shows how, as a consequence of lack of overarching framework and ad hoc development, SICA now encompasses more than one-hundred institutions. With the creation of each new subsystem, new institutions – each with specific mandates – were created. The impact has been competition for leadership among the subsystems and, accordingly, the institutions within them grew. In addition, ‘regulatory capture’ practices also became prevalent. Regulatory capture happens when institutions that oversee the promotion of general welfare objectives deviate to promote benefits to their own circumstances or perceived necessities.56 The impact of failure to develop an overarching legal design and guiding mechanisms has meant these institutions act without authentic accountability to other SICA institutions or member states. Rather, each institution is left to address its own mandate as it sees fit and without needing to consider the cohesiveness of the regime as a whole. The implication, as, shown in this part of the chapter, is that the SICA has no remedies for the breach of law or individual rights by SICA actors or member states.

A. Executive Dominance

The main institutional framework of the SICA is set out in the Tegucigalpa Protocol. The point previously was made that the Tegucigalpa Protocol replicated the ODECA’s 1960s design. This effectively handed to the region’s executives the primary authority to govern and shape SICA. Consequently, SICA is well characterised as a regional arrangement where states have a commanding role of the integration project through their executives. As a side effect, few powers were given to regional supranational bodies, such as the PARLACEN, the Regional Court, and Secretariats. As a result of the Central American legacy of executive led dominance, intergovernmental institutions primarily constituted

by representatives of state executives are the main architects and sole norm-makers in SICA. The *Tegucigalpa Protocol* establishes the Presidential Summit as SICA’s ‘supreme’ body.\(^{57}\) This body is comprised by the Heads of member states.\(^{58}\) It not only has norm-creation capabilities, but also the capacity to reform SICA. This power places the Summit at the apex of the Central American integration process. The only constraint on this norm-making capacity is the need for consensus of all regional executives in the creation or ratification of new norms or treaties.\(^{59}\) This constraint is also a reflection of executive dominance, since it is a requirement that ties SICA governance to the shared positions of all executives on a particular matter. Even if only one head of state does not agree, the Summit lacks capacity to enact norms. Consequently this places direct control of SICA in the hands of the executives, both as a group and individually.

An example of this dependency was observed during the period 1998 to 2004, when the SICA was neglected and almost suffered the same fate as the ODECA. In 1998 the region solicited the UN’s Economic Commission on Latin America and Caribbean (ECLAC) and the Inter-American Development Bank to review the system for a potential reboot, as a solution for its fragmentation issues. The regional court and PARLACEN reacted aggressively against review, based on their understanding that any restructure required their consent.\(^{60}\) As part of this reaction by the regional institutions, all further revision of SICA was stalled and no reform was implemented. During this same period, the executives decided not to engage anymore in the SICA summit. The percentage of mandates executed dropped from 89 per cent in 1993, to seven per cent in 2012.\(^{61}\) Also, during this period, individual states individually ratified many free trade agreements with other countries, including the *US-DR-CAFTA* with its previously discussed provision of supremacy over SICA norms.\(^{62}\) This period was also notable for the introduction by executives of a new reform to the *Tegucigalpa Protocol* that removed the power of the Central American Court of Justice to review economic conflicts.\(^{63}\)

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\(^{57}\) *Tegucigalpa Protocol* Art. 13.

\(^{58}\) Ibid.

\(^{59}\) Ibid Art. 14.

\(^{60}\) See discussion of Chapter 3.


\(^{63}\) *Tegucigalpa Ammendment*. 
Executive dominance is further reinforced at the lower levels of SICA’s institutions.\textsuperscript{64} As established in the \textit{Tegucigalpa Protocol}, the Council of Ministers is the main agent of ‘coordination’ within the SICA.\textsuperscript{65} It has the obligation to follow-up Presidential Summit decisions with implementation and execution.\textsuperscript{66} To enable this, the Council may enact resolutions that are directly binding on member states. However, there may be some exceptions to bindingness, particularly when the resolution affects or infringes on domestic laws.\textsuperscript{67} Also, as with the Presidential Summit, the Council’s decisions must be taken by consensus.\textsuperscript{68} Therefore it is subject to the same limitations as the Summit of Presidents. In addition though, since the \textit{Tegucigalpa Protocol} does not divide the competences between the Presidential Summit and the Council of Ministers, the powers of the Council have been further seriously undermined by the Summit.\textsuperscript{69} The impact of this can be seen in the very low number of decisions taken by the Ministerial Council of Foreign Relations when compared with the Presidential Summit.\textsuperscript{70} While the Presidential Summit has adopted over 550 mandates since 1986, the Council of Ministers of Foreign Affairs has focused on developing and detailing rules of procedure and other administrative matters.\textsuperscript{71} Another issue is that with the ratification of other SICA treaties, creating the economic and social subsystems, new specific Ministerial Councils were established. However, there is no overarching authority to coordinate the work done by each Council. As such, each Council works separately, implementing its own agenda in accordance with objectives established by their own governing treaty. Other SICA bodies heavily affected by the executive driven profile of member states are the Executive Committee and the many secretariats. The Executive Committee has the duty to ensure the application of SICA policies and norms.\textsuperscript{72} However, this body does not

\begin{itemize}
\item \textsuperscript{64} Salazar Grande and Ulate Chacón, above n 35, 75.
\item \textsuperscript{65} Tegucigalpa Protocol Art. 16.
\item \textsuperscript{66} Ibid Arts. 17-18.
\item \textsuperscript{68} Tegucigalpa Protocol Art. 21.
\item \textsuperscript{70} For the decisions of the Council of Ministers of Foreign Relations up to 2018, see: http://www.minex.gob.gt/Listado_Documentos.aspx?ID=50
\item \textsuperscript{71} Parthenay, above n 61, 131.
\item \textsuperscript{72} Tegucigalpa Protocol Art. 24(b).
\end{itemize}
have any norm-enacting capacity towards states and can only act through the General Secretariat. Each member of the Executive Committee is designated by the executives of each state. They are usually government officials under the competence of the Minister of Foreign Affairs. These committee members are assigned to act in the interests of SICA rather than member states. However, as functionaries of the Ministries of Foreign Relations of the respective member states, the members of the Committee are legally obliged to follow domestic law in the benefit of their own country and have no permanent seat. The first committee was not assembled until January 2008 and has gathered barely 30 times since its first meeting. It only approved its regulation of organisation and functioning in March 2012. Therefore, not only is the committee heavily influenced or aligned to state executives’ policy agenda and norm application within SICA, it also lacks a permanent and entrenched status.

B. Over-Expansion

In 1998, the UN Economic Commission on Latin America and the Caribbean together with the Inter-American Development Bank were requested by SICA executives to review the institutional composition of SICA. Their ensuing report showed that the SICA was composed of at least 36 institutions. In 2010 an internal review by the SICA General Secretariat found that SICA was subsequently composed of over 140 institutions. Without a clear distinction between the many subsystems SICA or overarching guidelines for how SICA institutions should interact with each other, regional institutions have begun to compete for control of the regional policy agenda. This competition has led to the practice of regulatory capture of the agenda, in which each institution pushes its own

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73 File 5-20-08-2010 (Advisory Opinion) (Unreported, Central American Court of Justice, 20 October 2010) 3 (‘Executive Committee Advisory Opinion’).
74 Tegucigalpa Protocol Article 24.
75 On the current representatives, see: Comité Ejecutivo del SICA https://www.sica.int/sica/r_cesica.aspx
77 Reglamento de Organización y Funcionamiento Del Comité Ejecutivo Del Sistema de Integración Centroamericana [Regulation of Organisation and Functioning of the Executive Committee of the Central American Integration System], Signed 19 March 2012.
79 Salazar Grande, above n 69, 167.
80 Ibid 185.
particular interest. It has also led to the issue of ‘managerialism’. Managerialism, as legal scholar Martti Koskenniemi has argued, arises from the lack of coordination between regimes of international law and their specialisations.\(^{81}\) For Koskenniemi, managerialism is the replacement of international law created by states with law created by technocrats specialised in public policy.\(^{82}\) Managerialism refers to the instrumentalisation of norms and law,\(^{83}\) in which law becomes a functional tool for the accomplishment of non-legal objectives or agendas.\(^{84}\) This managerial aspect is displayed by the conduct of many secretariats, which have implemented their own agendas separately from each other, and which push for diverging interests in pursuit of their own agenda. The capacity of these secretariats to implement their own agenda shows the failure of SICA to consolidate a concrete accountability mechanism in the legal regime.

One example of competition and managerialism among regional institutions is displayed by the SICA secretariats. In the contest for leadership at the regional institutional level, three actors stand out: the General-Secretariat, the Economic Secretariat (SIECA) and the Social Secretariat. The General-Secretariat represents the SICA internationally.\(^{85}\) It is required to comply with not only the decisions of the Summit of Presidents, but also of the Council of Ministers and the Executive Committee.\(^{86}\) However, the General Secretariat works to develop the agenda of each of these bodies at their meetings. In contrast to the General-Secretariat, SIECA which is the Economic Secretariat is endowed with certain supranational traits in its respective governing treaty. The SIECA, as the Guatemala Protocol establishes, has the duty to ensure the ‘proper’ application of, and compliance with economic instruments under SICA’s economic subsystem.\(^{87}\) This gives

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84 Ibid.
86 Ibid; For the Economic Secretariat see Art. 44 Guatemala Protocol; see for the Social Integration Secretariat: Art 14 of *Tratado de Integración Social Centroamericano* [Treaty on Central American Social Integration] 1927 UNTS 381, signed on the 30 March 1995 (‘Treaty on Social Integration’).
87 *Guatemala Protocol* Art. 44.
SIECA a higher scrutiny role over the domestic economic policies of states than that given to its political counterpart.

In performing this duty, the SIECA has elaborated *dictamenes* or legal opinions. These legal opinions are intended to provide an interpretation to states on how to best comply with regional economic integration norms. These opinions have been accepted as binding by member states in their practice, through adoption into domestic law. However, SIECA’s legal opinions have met opposition from the Central American Court of Justice. The regional court stated that the SIECA’s pronouncements on how states should comply with their regional economic obligations were without legal effect. Yet, after the *Tegucigalpa Protocol* reform of 2001, the economic subsystem was left completely in the hands of the SIECA. From that time on the SIECA has acted almost independently and separately from the other secretariats and subsystems. Ever since the SIECA has been able to continue giving their legal opinions without scrutiny from other regional bodies, including the court. This has allowed the SIECA to further take economic integration away from the political sphere, implementing its own agenda.

Similar conduct is observable in the SICA’s other main secretariat, the Social Secretariat. This third secretariat was created by the 1995 under the *Treaty of Social Integration*. In order to bring Panama closer to integration matters the new secretariat was based in Panama. The fact of its geographic positioning, away from the other regional institutions, has caused or enabled the Social Secretariat to work separately and independently from these other institutions; and as a consequence it has developed its own agenda.

A last example of competing agendas is displayed by the PARLACEN. The PARLACEN was a construct idealised in the *Esquipulas* process. The PARLACEN was intended to be a body for discussing the achievement of regional peace, to aid states in their transition.

88 Salazar Grande and Ulate Chacón, above n 35, 197.
89 Ibid 198.
90 Ibid.
91 *File 27-07-03-03-2000 (Advisory Opinion)* (Unreported, Central American Court of Justice, 13 March 2002) 21 (*SIECA Art 44 Advisory Opinion*).
92 For more info on the SIECA’s competition for the regional agenda, see: Cerdas Cruz, above n 7, 155–164.
94 See again discussion in Chapter 2, Title II.
from dictatorship to democracy and support domestic peace processes. It was never conceived as a supranational legislator in the region. The \textit{PARLACEN Treaty} defines the regional parliament as a body for the development, questioning, analysis and recommendation of political, economic, social and cultural common interests. Its main objectives, as established by its constitutive instrument, are to serve as a forum for the analysis of common policies, orientation of integration processes, proposing of treaty projects, and contributing to strengthening international law.\textsuperscript{95} Yet, after the signature of the last peace accords in the region, the 1996 Guatemalan Peace Accords, PARLACEN’s mandate became obsolete. It reacted aggressively against the 1998 report of the ECLAC and Inter-American Development Bank. This is because the report concluded that the PARLACEN should be reconfigured to become a summit of representatives of each member state’s congress. Since then, the PARLACEN has been pushing for further recognition and binding supranational powers.

A lack of overarching guidelines and dependency on state executives has caused many side-effects in Central America. At the institutional level, it has led to a multiplicity of institutions. With each subsystem, new ‘open-ended’ objectives were introduced each with new separate institution accountable for their accomplishments simply in the manner they find most suited. This has led to regulatory agenda capture within the subsystems and failure to coordinate common agendas. Another problem compounding this issue is that there is no overarching authority that could be endowed with the capacity to scrutinize all subsystems. The failure to constitute common agendas and accountability procedures and bodies is clear and compelling evidence of the need for SICA to adopt new pathways to achieve its goals.

\textbf{C. Failure to Provide Effective Remedies by Breaches of Laws and Individuals’ Rights}

This part of the chapter shows how the SICA legal regime offers no effective remedies for breaches of law and individual rights. As such, it reflects one the unsuccessful features of Central American regional governance: the non-incorporation of human rights charters and unavailability of remedies in courts. This is because the SICA legal regime has not recognised regional rights, or as the Central American Court of Justice has labelled them

‘communitarian rights’. Due to this failure, both the regional court and domestic courts have been unable to provide effective remedies to individuals for breaches of law by regional and domestic institutions.

1. Non-Recognition of Regional Rights

Notably, one of the successful features of the transformation of governance in the domestic legal systems of Central American states has been the incorporation of human rights charters and specific procedures for safeguarding rights these charters contain. Human rights have become the benchmarks by which all state action is reviewed in the region. The Treaty of Social Integration recognises certain human rights at the regional level, such as life, property, non-discrimination, universal healthcare, education and housing. At the same time, the Central American Court of Justice has been emphatic that it cannot review human rights violations that are covered by the American Convention on Human Rights, which many Central American constitutions have incorporated.

Regarding recognition and adoption of regional rights in spheres specific to the integration legal regime, there is none in the SICA legal regime. This has hindered the capacity of SICA to fulfil its purposes and provide individuals with remedies for breaches of law. An example of this lack of recognition is observed in SICA’s economic subsystem. The Guatemala Protocol, which establishes SICA’s economic subsystem, and sets out the steps by which economic integration should be achieved, has no provisions by which individuals can seek recourse when domestic and regional actors act contrary to its provisions. While the Tegucigalpa and Guatemala protocols establish the promotion of a legal regime which assures the development of individual’s freedoms as a purpose of SICA, they make no mention of specific liberties to which individuals are entitled. The Guatemala Protocol does not define the many liberties and rights that states should protect when consolidating a free trade area, customs union, or other forms of monetary and financial integration. As such, the Guatemala Protocol, as with other SICA treaties and instruments, does not recognise regional rights of individuals. This refers to rights such as freedom of movement, freedom of movement of goods, capital and labour, and non-discrimination and other associated rights and freedoms linked to each stage of the

96 San Salvador Treaty of Social Integration Article 6(a),(b),(e) and (h).
97 CACJ Statute Article 25.
98 Tegucigalpa Protocol Article 3(c); Guatemala Protocol Article 3.
integration process, and necessary to ensure correct application of SICA norms by both regional and domestic actors.

In the judicial arena, although the Central American Court of Justice and the Costa Rican Constitutional Chamber of its Supreme Court have recognised the justiciability of ‘communitarian’ (regional) rights at the SICA level, they have not clearly identified what those rights might be. In particular, and with special relevance to current policy requirements, the Central American Court of Justice has been asked how states should guarantee freedom of movement of people and products within the integration regime. The regional court held that states should pursue such rights in the legal framework of their own migratory laws and obligations acquired through specific migration treaties.99 The regional court also established that for the implementation of a freedom of movement ‘zone’ of individuals within Central America, it would require the deep commitment of states in terms of developing concrete policies.100

In reference to freedom of product movement, the regional court held that SICA member states have the obligation to perfect a ‘free-trade area’ in Central America.101 Yet, it did not establish any concrete obligations of states towards individuals concerning the economic subsystem, rather than opining that the obligations for creation of a free-trade area are afforded between SICA member states.102

The Central American Court of Justice 2016 Rules of Procedure addresses the topic of infringement of ‘communitarian rights’. The Central American Court of Justice has also mentioned that, based on the Tegucigalpa Protocol, it has the duty to safeguard and provide remedies for human rights violations within SICA.103 As the regional court held, this is because SICA governing bodies and institutions are not under the competence of the Inter-American Court of Human Rights.104 Yet, there has not been any occasion where the Central American Court of Justice has recognised these rights or identified them within the system.105 Therefore, there is no concrete benchmark by which regional

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100 Ibid Conclusion 3.
101 File 6-3-12-99 (Judgment) (Unreported, Central American Court of Justice, 12 January 2000) Considerando XI.
102 Ibid.
103 File No 31-11-01-08-2000 (Judgment) (Unreported, Central American Court of Justice, 24 October 2000) (‘Viquer v. Nicaragua Case’).
104 See: ibid; on a broader explanations of the cases, see: Olmos Giupponi, above n 36, 249–250.
105 Ordenanza de Procedimientos [Rules of Procedure] Arts. 79 and 82.
institutions can be held accountable to individuals for breaching SICA law. This has impeded the proper development of a remedies doctrine at the regional level by the Central American Court of Justice. With the failure to consolidate ‘communitarian rights’, not only has the Central American Court of Justice neglected to bring onboard intrinsic aspects of domestic constitutional development, it has also failed to develop a connection with individuals needing rights protection at a regional level. This aspect, together with the failure of the regional judiciary to determine individual rights applicable at both regional and domestic levels, plus the fact that the regional court is now excluded from reviewing complaints on economic matters, means that the capacity for individuals to interact with the SICA’s governing institutions are very limited.

Currently, there is a vacuum of grounds on which individuals may seek redress for violation of their rights in relation to integration. This vacuum means domestic courts are unable to promote deeper integration and engage with SICA. The Central American Court of Justice has held that because the SICA legal regime has direct application within domestic legal systems, domestic judges and courts are called upon to apply and interpret it. As such, in the view of the Central American Court of Justice, domestic courts are also regional courts that have the capacity to interpret if SICA norms have been breached and determine if any violations of individuals’ rights have occurred. As identified in Chapter 2, domestic courts have achieved some effectiveness as a result of their capacity to bring remedies to breaches by states of individual’s rights. Yet ultimately, without recognition of rights at the SICA level, the availability of domestic courts to properly provide remedies when executives apply SICA norms is inhibited.

2. The Incapacity of Individuals to Access Remedies

To emphasise the latter point where SICA does not possess a charter of rights instrument or processes to review violations of rights, the negative impact of lacking clear definition or recognition of rights is that individuals are hindered in their capacity to

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107 Mejía Herrera, above n 37, 473.

108 File 10-05-11-1996 (Judgment) (Unreported, Central American Court of Justice, 5 March 1998) 292 (‘University Title Recognition Case’).

109 Ibid.

110 Mejía Herrera, above n 37, 473.
access remedies at the regional level. Therefore, the regional court is incapable of reviewing domestic violations of human rights through the application of regional laws in domestic contexts. This point has been raised by Costa Rica’s Constitutional Chamber. The Costa Rican court recognised that Costa Ricans were at a disadvantage by not being part of the jurisdiction of the regional court. As previously noted, Costa Rica has not ratified the CACJ statute; thus by not having specific procedures or recognised rights under SICA, citizens may be denied of justice under SICA. In the final instance, although SICA reflects the values of human rights and social justice within the legal regime, it has no statement of those rights, or actual procedures to uphold them. This issue has also been raised under the jurisdiction of the Guatemalan Constitutional Court. For its part, the Guatemalan Constitutional Court has held that although a state may not use its domestic law as an excuse to not comply with international law, in this case SICA norms, conflicts of this nature cannot be resolved under a constitutional jurisdiction. As such, the Guatemalan Constitutional Court emphasized the need for breaches of law at the SICA level to be addressed to the competent authorities.

Although both the Tegucigalpa Protocol (Article 22) and the Guatemala Protocol (Article 57) recognise the supremacy of domestic law over regional, there is no concrete means to ask for revision by individuals in breach of the law. Both SICA treaties establish the hierarchy in the legal relationship between SICA norms and domestic legal systems. Nonetheless, these provisions also set out the obligation for member states to request their corresponding Council of Ministers to review the implementing SICA norms, and to adapt them in a manner that does not affect domestic laws or individual rights. Therefore, without concrete recognised regional rights, the Central American Court of Justice and domestic courts are unable to ask the executive to start a new revision procedure to consider the application of regional norms in domestic settings.

By not having recognition of rights within the SICA legal regime, executives may create and give application to SICA norms in ways that could breach individuals’ rights. This


112 Case 04640 (Judgment) (Unreported, Sala Cuarta de la Corte Suprema de Justicia de Costa Rica, 6 September 1996) Considerando III.

113 File 320-90 (Judgment) (Unreported, Corte de Constitucionalidad de Guatemala [Corte de Constitucionalidad de Guatemala], 8 January 1991) Considerando II.
failure of recognition of rights and detailed processes to give remedies to breaches of laws and rights shows a failure by part of SICA to adopt and mirror domestic features of Central American governance; and this has hindered the necessity for stronger accountability by executives in the region.

IV. JUDICIAL PROBLEMS

The last part of this chapter is focused on the series of judicial problems that the SICA’s legal regime faces. The first of these is that Central American scholars and law-makers have created a statute for the new Central American Court of Justice with broad powers that fails to reflect the intrinsic features of the region. The second is that the Central American Court of Justice has transplanted via adjudication a series of legal doctrines from Europe that conflict with treaty provisions, constitutions, domestic case law and defining features of Central American governance. This has resulted in a backlash by domestic courts. Thirdly, due to this backlash, the Central American Court of Justice has been unable to enter productive dialogue with domestic courts. Consequently the Central American Court of Justice has been reluctant to change its positions, and indeed fuelled a new line of jurisprudence that continues to transpose foreign doctrines – an approach that domestic courts have continued to reject.

A. The CACJ’s Statute

This section establishes how from the inception of the Central America Court of Justice, scholars and law makers designed the treaty in ways that conflict with defining features of Central American governance. The statute confers broad powers on the regional sphere, causing states like Costa Rica, Panama and Belize not to ratify it, claiming it infringes on their sovereignty.114

The Central American Court of Justice opened its doors in 1994. It was created by the CACJ Statute which details its jurisdiction, functions and competencies. These include: interpreting and guaranteeing the application of the Tegucigalpa Protocol; serving as a permanent counselling body to the domestic supreme courts of member states and to other integration bodies and entities; serving as an appeal body for any administrative disputes arising from the integration bodies and processes; acting as an arbitral tribunal or international court when required by member or non-member states; and providing

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114 Romano, above n 42, 132.
studies and analyses of Central American legislation towards the further integration of the region. At the heart of the dispute over non-ratification of the CACJ statute is its article 22.f. This provision grants the Central American Court of Justice the power to entertain any dispute arising from conflict of powers within a state, and the capacity to review and enforce judicial rulings of domestic courts not executed by member states. These powers were assigned to the court based on historical experience of abuse of executive power, especially in coups, with the aim to limit executive power beyond local spheres, and so support the restoration of domestic democratic rule in the region. This potential intrusion into domestic affairs, which endows with the court with a supranational aspect, has been a key reason why some state governments have not ratified its statute. It has even led some states to dismiss rulings delivered against them, as in the case of Costa Rica and Panama. Although neither state ratified the CACJ statute, the court has found Costa Rica and Panama in violation of not only regional law, but also international law. From Costa Rica, its Supreme Court had declared from its inception that it was ‘inconvenient’ for Costa Rica to ratify the CACJ statute, because it infringes on sovereignty. Expanding this line of reasoning, the Costa Rican Fourth Chamber, or Sala Cuarta has held that the transfer of competencies from domestic to regional bodies would modify significantly domestic settings. Moreover, the Sala Cuarta has stated that regional bodies are limited by ‘the purpose to fulfil regional and common objectives’ of integration and should not affect the principles and values of the Costa Rican constitution. For these reasons, the Costa Rican Supreme Court held that the state could

115 CACJ Statute Art. 22.
116 CACJ Statute Art. 22.
118 First Costa Rica Case (Unreported, Central American Court of Justice, 20 October 2009); File 123-12-06-12-2011 (Judgment) (Unreported, Central American Court of Justice, 21 June 2012) (‘Nicaraguan NGO’s v. Costa Rica’); File 103-02-26-03-2010 (Judgment) (Unreported, Central American Court of Justice, 26 March 2010) (‘PARLACEN v. Panama Case’).
119 First Costa Rica Case (Unreported, Central American Court of Justice, 20 October 2009) 38.
120 Case 04640 (Unreported, 6 September 1996) III.
121 Ibid.
not transfer those competencies that are essential to the domestic constitutional system, and that any treaty or international norm which would potentially reduce protections of fundamental rights ought to be not approved and ought to have no effect.\footnote{Ibid.}

Article 22.f of the \textit{CACJ Statute} has provided the basis for the court to declare itself a constitutional court for the region.\footnote{Cesare PR Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31 \textit{International Law and Politics} 709, 733; Jorge Antonio Giammattei Avilés, ‘El Tribunal de La Comunidad Centroamericana Su Naturaleza Su Competencia [The Tribunal of the Central American Community, Its Nature, Its Competence]’ in Rafael Chamorro Mora and Carlos Francisco Molina del Pozo (eds), \textit{Derecho Comunitario Comparado: Unión Europea - Centroamérica [Comparative Communitarian Law: European Union - Central America]} (Editorial Imprimatur Artes Gráficas, 2003) 138–145; Salazar Grande and Ulate Chacón, above n 35, 95; The Central American Court of Justice has expressed that posterior constitutional reforms have no effects on integration norms; see \textit{File 13-02-01-05-1997 (Advisory Opinion)} (Unreported, Central American Court of Justice, 5 August 1997) 37 (‘Multiple Advisory Opinions on the Application and Interpretation of the Central American Tariffs and Customs Convention’).} The powers of the regional court were expanded by the court itself when drafting its latest \textit{Rules of Procedure} in December 2014. In these rules, the Central American Court of Justice refers to itself as a supranational court with the power to interpret and apply not only regional integration norms, but also domestic and general international law norms.\footnote{\textit{Ordenanza de Procedimientos} [Rules of Procedure] Arts. 5 and 7.} As such, the regional court has effectively declared itself a ‘supranational constitutional court’ with the power to rule on the legality of certain judgments of domestic courts.\footnote{Salvadorian Congress v. Constitutional Chamber of the Supreme Court of El Salvador Case (Unreported, Central American Court of Justice, 15 August 2012) 11.} Two examples illustrate the overreach of these actions. The first arose in relation to Nicaragua, when the regional court heard a dispute arising between the President of Nicaragua and the Nicaraguan Congress. The dispute arose from the possibility of Congress giving itself new powers to scrutinize the Executive and the possibility of transforming itself into a parliamentary system. The regional court held that the constitutional reforms promoted by the Nicaragua Congress contradicted the principle of division of powers, the \textit{jus cogens} nature of democracy, and international instruments such as the UN and OAS Charters.\footnote{President of Nicaragua v. National Assembly of Nicaragua (Unreported, Central American Court of Justice, 29 March 2005) [29],[39].} The court also reiterated, referencing its previous decisions, that its status is ‘supranational’, and that its judgments should be complied with in good faith and in accordance with article 27 of the \textit{Vienna Convention on the Law of Treaties}.\footnote{Art. 27 states: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’; see \textit{Vienna Convention on the Law of Treaties}, Opened for Signature 23 May 1969, 1155 UNTS 331 (Entered into Force 27 January 1980).} Thus, any act that would contradict its finding would violate
both international and regional law. As a result, the regional court found the Nicaraguan Congress in violation not only of international and regional norms, but also domestic Nicaraguan public law.

The second case was related to a dispute between the Salvadorian Congress and the Constitutional Chamber of the Supreme Court of El Salvador. The dispute concerned a series of judgments by the Constitutional Chamber which declared void the election of new Supreme Court judges by the Salvadorian Congress. The regional court pronounced itself as a ‘supranational constitutional tribunal’ and proceeded on this basis to rule on the legality of the judgments of the Salvadorian Constitutional Chamber. The result, as in the Nicaraguan case, was that the Central American Court of Justice declared the Salvadorian Chamber in violation of the principle of division of powers, the *jus cogens* rule of democracy, and other international and regional instruments.

**B. Transplanting European doctrines of Direct Effect and Supremacy into Central America**

A second set of judicial problems involves the regional court transplanting European doctrines into Central American regional law, in ways that fail to recognise the historical legacies, context, regional treaty provisions, and jurisprudence of domestic courts. The regional court’s uncritical approach to legal transplants has caused polarisation between the regional court and some domestic courts and governments. One negative impact has been the development of a regional jurisprudence that is unresponsive to the realities of the region.

The argument in this thesis to this point has accentuated how the SICA legal regime has a monist relationship with domestic law. This relationship is established by regional treaties and later expanded by the jurisprudence of domestic courts when giving direct effect to SICA norms. The *Tegucigalpa Protocol* gives SICA norms a status equivalent to executive decrees. As such, SICA norms have been assigned an inferior hierarchical

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128 *President of Nicaragua v. National Assembly of Nicaragua* (Unreported, Central American Court of Justice, 29 March 2005) [35-36].
129 Ibid [40].
130 *Salvadorian Congress v. Constitutional Chamber of the Supreme Court of El Salvador Case* (Unreported, Central American Court of Justice, 15 August 2012) 1–2.
131 Ibid 11.
133 See discussion Chapter 2.
status compared to constitutions and legislatives decrees. Specifically, Article 22 of the 
Tegucigalpa Protocol
describes the obligation on the part of the regional authority, in this 
case the Ministerial Councils, to tailor regional norms so that they conform with the 
domestic legal system in which they operate. This provision entitles domestic courts to 
review regional laws that conflict with domestic laws, and, potentially, to declare 
inconsistent regional laws to be illegal or unconstitutional. The remedy in these 
circumstances is to require the Executive to act under its powers in Article 22 and 34 of 
the Tegucigalpa Protocol
to adapt the regional norm to comply with domestic ones and local circumstances.

Similar to the Tegucigalpa Protocol,134 the Guatemala Protocol provides the supremacy 
of domestic norms over regional ones. Article 57 of the Guatemala Protocol states:

1. When any member state considers that the execution of this protocol or its 
complementary or derived instruments, in one or more of its norms, gravely affects any 
sector of its economy, it can ask for the authorisation of the Economic Integration 
Executive Committee to temporarily suspend the application of such provisions or 
provisions.

2. The cited committee will immediately proceed to examine the situation and as result 
of this examination, deny or authorise for temporary suspension. In this case, it will assign 
a timeframe for the suspension of the relevant norm or norms, as well as the measures 
which the petitioning State must adopt to overcome the situation, committing the state, 
to the regional support necessary to achieve this objective.135

However, the Central American Court of Justice has transplanted a series of European 
doctrines via adjudication that contradict an established monist hierarchy relationship 
within the Tegucigalpa Protocol. It did so without proper consideration of potential 
consequences for the legitimacy of the court and its decisions, or the potential heightening 
of polarisation of views about the nature and limits of Central American integration law 
and norms.136 From the very beginning, the regional court has adopted foreign concepts

134 See discussion and translation of this provision in Chapter 2, Title IV, part IV.
135 Guatemala Protocol Article 57 translation by the author.
136 See discussion in Chapter 2, title IV. Prior to the adoption of the European doctrine of supremacy, the 
Central American Court of Justice interpreted SICA norms in accordance to the requirements established 
in Art. 22 of the Tegucigalpa Protocol, see: File 5-05-01-08-1995 (Advisory Opinion) (Unreported, Central- 
American Court of Justice, 20 October 1995) (‘SIECA First Advisory Opinion’).
and doctrines in its judgments. This behaviour underscores a core theme in this thesis of foreign influence, which in this instance, is the influence of European integration law.\textsuperscript{137}

Doctrines transplanted from Europe by the Central American Court of Justice have included the characterisation of regional law that gives it supremacy over and direct effect within domestic legal systems. From its early judgments and opinions, the Central American Court of Justice has referred openly and repeatedly to the findings of European case law. Examples include \textit{Van Gend de Loos}, \textit{Costa/Enel} from the European Court of Justice and \textit{Frontini} from the Italian Constitutional Court.\textsuperscript{138} As a result, the regional court, mirroring the European Court of Justice in \textit{Costa/Enel} and \textit{Van Gend de Loos}, has come to understand SICA law to be an independent system of law. This involves recognition of an ability to grant individual rights to citizens, which has direct effect and therefore effectively restricts the sovereignty of states, and further, has supremacy over domestic law, which makes member states liable for not complying with it.\textsuperscript{139}

The Central American Court of Justice has also applied the supremacy attribute of regional laws to extra-territorial instruments, such as \textit{US-DR-CAFTA}. In its interpretation, the Central American Court of Justice ruled that in matters where the \textit{US-DR-CAFTA} may regulate regional integration, SICA norms have a supreme status in relation to the \textit{US-DR-CAFTA}.\textsuperscript{140} The regional court came to this interpretation by holding that \textit{US-DR-CAFTA} is a bilateral treaty,\textsuperscript{141} which only comprises obligations arising between an individual Central American state and the US. With this judgement, the


\textsuperscript{139} PARLACEN Unconstitutionality Advisory Opinion (Unreported, Central American Court of Justice, 13 December 1996).

\textsuperscript{140} US-DR-CAFTA Opinion (Unreported, Central American Court of Justice, 17 March 2014) in relation to the third question.

\textsuperscript{141} US-DR-CAFTA Opinion (Unreported, Central American Court of Justice, 17 March 2014).
regional court neglected to engage with previous US-DR-CAFTA panels, which had analysed the relationship between SICA norms and the US-DR-CAFTA in terms of the latter’s multilateral nature. Previously, US-DR-CAFTA panels have articulated that although the US-DR-CAFTA is not explicit regarding its multilateral nature and contains many bilateral obligations between Central American states and the US, there are many abstract and generalising multilateral obligations between the Central American states with each other. 142

However, this is not the first time the regional court has ruled the supremacy of SICA norms over other international norms. In a similar vein, in a dispute between Nicaragua and Honduras, where Nicaragua defended the introduction of new tariffs on Honduran products under WTO law, the regional court held that regional norms prevailed over WTO norms. 143 The regional court failed to give any legal reasons for how it came to this conclusion. Rather it simply held that Central American values have superior status over general international norms.

These opinions and cases show how the Central American Court of Justice has been dismissive of other regional developments and hostile towards foreign sources other than those emanating from Europe. In this significant respect, the regional court has been shown to be unresponsive to the reality of the pluralism of sources in the region. It has instead tried to consolidate an EU-style court in a region that it is not the EU and does not share the defining supranational features of the EU. 144 The impact of this interpretation has been the isolation of Central American regional law from other legal developments in the region, and negative reaction from domestic courts and other actors who argue with some justification that the Central American Court of Justice has exceeded its mandate.

C. Backlash from Domestic Courts

A final aspect of the judicial problem to address has been the Central American Court of Justice’s incapacity to deal with backlash and establish an effective dialogue with domestic courts. Domestic courts have pushed back against Central American Court of

143 File 26-06-03-12-1999 (Unreported, Central American Court of Justice, 3 December 1999) 30 (‘Honduras v Nicaragua Case’) The Court made reference that articles regulating countermeasures, such as XXI of the 1994 GATT and XIV of the GATS are not applicable within the SICA forum.
144 Katrin Nyman-Metcalf and Ioannis F Papageorgiou, Regional Integration and Courts of Justice (Intersentia, 2005) 87.
Justice’s judgments that incorporate the supremacy of regional norms and the Court’s self-declaration as the region’s ‘supranational constitutional court’. The first of these instances of backlash was the Nicaraguan Supreme Court’s response to the ruling of the Central American Court of Justice concerning a dispute over the attempt by the Nicaragua Congress to transform itself into a parliamentary system. In this case, the Nicaraguan Congress applied to the Nicaraguan Supreme Court to declare the Central American Court of Justice’s judgment without effect and to declare unconstitutional the competence of the regional court to review the acts of state powers in Nicaragua. The Nicaraguan Supreme Court held that regional court’s competence conflicted with constitutional norms, because the power to review conflicts between state powers was solely in the hands of the Nicaraguan Supreme Court.\(^\text{145}\)

The second backlash case came from the Constitutional Chamber of the Supreme Court of El Salvador, in a case concerning a dispute between it and the Salvadorian Congress. The Salvadorian Constitutional Chamber retaliated against the Central American Court of Justice. It considered the Central American Court of Justice’s judgement while looking to rulings from other Central American domestic courts on the nature of the Central American Court of Justice. Based in that review, the Salvadorian Constitutional Chamber found that the regional court’s self-referencing criteria on supranationalism undermined the Chamber’s legitimacy. The Chamber noted that the term ‘supranational’ does not mean ‘supra-constitutional’, and that the state is the only entity who can determine the scope of external incursions into its legal system.\(^\text{146}\) The Salvadorian Constitutional Chamber declared unconstitutional and without effect not only the judgment of the regional court on the matter, but also the section of the CACJ statute and provisions of the CACJ Rules of Procedure that purported to give such competencies to the regional court. The Chamber also mentioned that the Central American Court of Justice should adopt a ‘systemic constitutional control’ focused on tuning both systems, regional and domestic to accept common limits to their competencies and functions.\(^\text{147}\)


\(^{146}\) *Inconstitucionalidad 71-2012 (Judgment)* (Unreported, Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador) [13].

\(^{147}\) Ibid [12].
The Central American Court of Justice response to this kind of backlash has been confrontational. It has opted not to take into account any of the arguments made by the domestic courts. In almost all these cases concerning backlash the regional court has responded by declaring that domestic courts have acted in infringement of articles 26 and 27 of the VCLT, without actual analysis of any of the substantive arguments put by domestic courts.\footnote{On the Guatemala Constitutional Court ruling as unconstitutional regional norms, see: File 75-02-11-08-2006 (Judgment) (Unreported, Central American Court of Justice, 11 August 2006) (‘Ex-President Portillo Case’); as response to the Nicaraguan Supreme Court ruling on legality of Central American court of Justices’s decision on the Nicaraguan President v Assembly case.}

V. CONCLUSION

SICA has been unable to accomplish its fundamental objective and purposes as laid down in the Tegucigalpa Protocol as a direct result of the problems that this chapter has identified. The root cause of failure can be traced to how and why the SICA legal regime reflects historical legacies of Central American regionalism at conceptual, institutional and judicial levels. A critical result is that it has led to the development of a legal regime with no overarching legal design, leaving spaces in the integration framework that the region’s executives have developed in ad hoc ways. The impact has been fragmentation of SICA governance into many subsystems, without coherence or guiding action principles. It has also led to the institutional over-expansion of SICA. This has effectively compounded the lack of coordination between regional institutions and a failure to consolidate effective accountability schemes – similar to those observed at the domestic level.

On the judicial front, law makers and scholars have created a statute for the Central American Court of Justice that ignores the penchant for autonomy of the region’s elites. Further, in the exercise of its powers, the Central American Court of Justice has imported a series of European doctrines that do not accord with the defining features of Central American governance or with the provisions of the integration treaties. As shown, this has led to backlash against the regional court by domestic courts, who have questioned its competence and legitimacy. However, the regional court has responded inadequately to the criticisms made by domestic courts, fuelling confrontation between them. Ultimately the regional court has been on the losing end of these disputes, because
domestic courts in the region have declared unconstitutional its provisions, and executives have been unwilling to ratify its statute as a result of the overreaching provisions.

This chapter, following on the work in Chapters 2 and 3, has set out to accomplish the first primary objective of the thesis, namely, to identify the problems of the SICA legal regime and investigate their causes and impacts. Within this undertaking, Chapter 2 identified the key features of Central American governance, shared at domestic and regional levels, and the relationship between them. Chapter 3 then isolated the historical legacies of Central American regionalism and inquired into how these evolved through multiple historical stages of regional development, manifesting themselves distinctly in every regional arrangement. Ultimately, Chapter 4 showed how these legacies are currently reflected in SICA’s legal regime at the conceptual, institutional and judicial levels.

The movement of thought from this point is to focus on the second key objective. This involves drawing on legal comparative method and the experiences of other regional integration regimes to find potential solutions that could help the SICA’s legal regime to better support the objectives and purposes of Central American regional integration. Specifically, Chapter 5 investigates comparative legal method, both in order to identify a suitable methodology and with the aim to supplant the paradigmatic way in which the Central American Court of Justice has undertaken foreign legal transplants. Looking further ahead, Chapter 6 analyses the European integration process. The aim there is to extract insights that could transform the failure of the SICA’s legal regime to provide remedies for breaches of law and individual rights, which could also enhance the potential for judicial dialogue between domestic courts and the Central American Court of Justice. Finally, Chapter 7 scrutinises the Southeast Asian integration project to draw on experiences that could present solutions to SICA’s fragmentation and institutional mis-coordination.
CHAPTER 5.

THE CENTRAL AMERICAN COURT OF JUSTICE AND LEGAL TRANSPLANTS: INSIGHTS FROM LEGAL COMPARATIVE METHOD

I. INTRODUCTION

One of the earlier identified judicial problems of the SICA legal regime in this thesis is the Central American Court of Justice’s approach to legal transplants. Since its early judgments, the regional court has transplanted the European doctrines of supremacy and direct effect. However, the transplantation has been done in abstract terms that neglect the defining legal features of Central American governance and overlook the hierarchy of monism relationship between the SICA legal regime and domestic legal systems. Further, it contradicts the provisions incorporated within the Tegucigalpa Protocol establishing the supremacy of constitutions over SICA norms, as well as jurisprudence establishing the principles of speciality and primacía. The adverse impact of this transplantation exercise has been backlash from domestic courts. Yet, the legal method employed by the regional court when transplanting foreign doctrines has a historical pedigree marked by how the civilian legal tradition engages with law and transplants more generally. To examine it, this chapter uses comparative legal method. The intent is that this method could help encourage the Central American Court of Justice to develop a transplant exercise that factors in the context and defining features of Central American regionalism. This thesis also relies on it in drawing from EU and ASEAN in Chapters 6 and 7.

This chapter proceeds as follows. Part II identifies the underlying causes of the regional court’s problematic engagement with transplants, namely a Eurocentric bias and reductionist, abstract comparative methodology. Since the 1950s, three consecutive generations of Central American scholars have engaged in uncritical comparison with Europe. This chapter shows how each generation has come to rely more and more on European experience in the development of Central American regional integration scholarship, and to adopt European doctrines as universal, that is, with inadequate consideration of local defining features and contexts. Part III provides insights from comparative legal method to identify processes that could strengthen efforts by the Central American Court of Justice to contextualise transplants. This part of the chapter
extracts lessons to be applied to contexts of Central American integration taken from an analysis of transplant theory. To reiterate these lessons, they involve the need to inform transplants with local context and values. The chapter illustrates the point by considering successful examples of transplants drawn from historical experiences in Central America.

II. THE PROBLEMS WITH THE USE OF LEGAL TRANSPLANTS IN CENTRAL AMERICA

Transplants of judicial doctrines or legal institutions are neither recent nor isolated practices in the Central American subregion. Early traces of transplant thinking in Central America were seen with the introduction of Spanish liberalism and US federalism in the 1823 Central American Federal Constitution. For the Central American author, Marco Tulio Zeledón, this first transplant was the region’s ‘original sin’. Central American drafters attempted to replicate a model of foreign states without taking into account the local culture and traits of the region. Since then Central America has been transplanting foreign doctrines and concepts with relatively poor success rates.

Experience with transplants is seen more recently in the Central American Court of Justice’s introduction via adjudication of the European doctrines of supremacy and direct effect. As shown in Chapter 4, this has caused direct backlash from domestic courts. The specific reason for the negative reaction was the method of importing foreign doctrines without aligning them with key features of Central American regionalism, as defined by regional treaties, domestic constitutions, and the jurisprudence of the many regional constitutional bodies. The transplant of these doctrines also sparked a new wave of scholarship that continues today. The effect has been to introduce more foreign principles and doctrines, even when there is scant evidence of successful application in the region. Those involved in this exercise further seek to influence the view of the legal integration regime without taking any into account any legal development from within the states.

1 For a general discussion of transplants, see: Michele Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’ in Mathias Reimann and Reinhard Zimmerman (eds), The Oxford Handbook of Comparative Law (Oxford University Press, 2006).
3 Zeledón, above n 2, 2.
4 Ibid 3.
This has helped produce stand-offs between the regional court and domestic courts over the nature and limits of the integration regime and its norms. The following part of the chapter investigates in greater detail the difficulties with of the Central American Court of Justice’s transplant methodology.

A. Eurocentric Bias

The Central American Court of Justice has exclusively looked to Europe and its regional court, with an eye to reinterpreting the limits and relationship between the SICA legal regime and domestic legal systems. The existing interpretation, as Chapter 2 explained, was predicated on a particular monist hierarchy between the SICA legal regime and domestic legal systems. Monism determines that SICA norms have a direct and subsidiary status in the region and with inferior status to constitutions and domestic law. SICA norms could also be subject to constitutional review and have a speciality and primacía application in the region. By looking to Europe, the Central American Court of Justice has adopted European doctrines and interpreted differently the relationship between the SICA legal regime and domestic legal systems and the concept of primacía, neglecting to take into account the interpretation already made by domestic courts in the process.

Legal interpretation in Latin America (and Central America) was heavily influenced by legal developments in Europe throughout the 19th and 20th centuries. During this period, Latin America consolidated itself within the civilian tradition of legal interpretation. For the most part following the French legal model, Latin America (and Central America) began to adopt large codes of laws prescribing how judges should engage with individual cases. This tradition is embedded in the work of codifiers (glosadores) and academics engaged in systematising norms, judgments and doctrines into abstract legal codes that could deal with any situation of life. During this period, foreign doctrine became highly regarded and widely used in the region, a practice that persists today. As the Colombian

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jurist Diego López-Medina has described: ‘there is to this day a regional dialogue of legal science with very active local influences and transplants’.7

As another Colombian legal scholar César Rodríguez-Garavito has noted, this ‘North-South’ (mainly Eurocentric) influence has meant that comparative studies in Latin America (including Central America) are dominated by a Global North perspective. Furthermore, foreign scholarship has been influential in moulding Latin American legal scholarship since its early colonial and independence days.8 This influence has led, as both Rodríguez-Garavito and López-Medina explain, to assimilation, textual translation, and enthusiastic attempts by Latin American scholars to stay current with legal developments produced in Europe or the US.9 Their preoccupation has impacted adversely on how Latin Americans view and position themselves in the global scene.10 It has led to the creation of a tradition in which Latin American (and Central American) specialists have become mere importers of foreign principles and doctrines.

Another factor that has contributed to this assimilation of foreign concepts and doctrine from Europe is the neglect of comparative law as a subject of study in Latin America. Up until the late 1980s, Latin American scholarship and legal pedagogy in law schools disregarded comparative method and comparative law, not only in general legal studies, but also in relation to the topic of integration.11 The resulting dearth of scholars trained in comparative methodological studies has created a vacuum in this field. It has been filled by foreign authors.12 Even today, many Central American universities do not have a comparative law subject in their curricula.

A further impact of this assimilation of foreign transplants in Latin America, as another Latin American scholar Jorge Esquirol notes, has been the creation of a gap between

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9 Rodríguez-Garavito, above n 8, 3; Diego López-Medina, Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America (Harvard Law School, 2001) 4.
12 Rodríguez-Garavito, above n 8, 2–3.
written and practiced law, and a misleading view of what constitutes ‘failure’ and ‘success’ of law reform. Latin American states, especially after 1960, were regarded by many to have ‘failed’ to promote legal reforms and adopt new judicial institutions and practices to support economic change in the region. Latin America’s unique historical and contextual characteristics were presented as the roots of the subsequent feature of imported phenomena. According to Esquirol, this assessment of ‘failure’ arises from the application of research methodologies that privilege ‘vertical’ comparisons and measurements modelled on foreign standards and legal practices. Like Esquirol, this thesis resists the view that Central American law is a discredited and unsatisfactory legal system or regime. Instead, the reason for failure is the non-contextualised application of transplants from foreign legal systems.

The comparatist scholar David Nelken argues that the Central American Court of Justice has utilised comparison and transplants in order to ‘speed-up’ the process of asserting its authority in the region. He points the fact that its initial judgments adopted European doctrines to establish its jurisdiction and powers. These doctrines were direct effect and supremacy. They are visible in the first judgment of the Central American Court of Justice, a case related to the recognition of academic degrees between Central American countries. Although the regional court rejected the plaintiff’s claim stating he did not exhaust local remedies, it transplanted the supremacy, direct effect and state responsibility doctrines from the European Court of Justice.

Yet, the regional court has also called the supremacy doctrine as primacía. This would create confusion concerning what primacía actually means and competing conceptions of this doctrine. On the one hand, there is the concept of primacía laid down by domestic courts, which is embedded in the doctrine of speciality and gives supremacy to

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19 See discussion in Chapter 4, Title IV, part B..
20 File 10-05-11-1996 (Judgment) (Unreported, Central-American Court of Justice, 5 March 1998) 290 (‘University Title Recognition Case’).
constitutions. On the other hand, in the practice of the Central American Court of Justice the concept of *primacía* is framed around the European doctrine of supremacy. The regional court defined these principles – supremacy and direct effect – according to how the European Court of Justice recognises them, and relied heavily on the work of European (mainly Spanish) scholars in interpreting it.\(^{21}\) Finally, from the revision of scholarship of foreign scholars and jurisprudence of the European Court of Justice, the Central American Court of Justice held that these principles were the founding principles of the SICA legal regime and, as such, it was its duty to uphold them.\(^{22}\) Therefore, the Central American Court of Justice preferred to adopt foreign doctrines rather than create a new doctrine that could take into account the definition of *primacía* used by domestic courts and in provisions of SICA treaties.

There has been a large quantity of legal integration literature produced after these judgments. By way of review, it can be said that the tendency to rely on European and Spanish authors or documents and scholarship translated into Spanish has increased.\(^{23}\) European scholarship, written or translated in Spanish had a direct impact in the founding years of SICA and on its early legal scholars. This includes high use of foreign citation of classic European integration scholarship and authors translated into Spanish. This literature embodied the very few legal sources made available to judges and scholars in this period.\(^{24}\)

On the topic of eurocentric approximations to international and regional courts, Karen Alter and Laurence Helfer have provided a critique to Helfer and Anne Marie Slaughter’s seminal theory of international adjudication. As an example to back their critique, Alter and Helfer use the study of another Latin American regional court, the Andean Tribunal of Justice. In the first place, Slaughter and Helfer provide a general theory of how international and regional courts could be effective in their context, taking as examples the European courts ECJ and European Court of Human Rights.\(^{25}\) Alter and Helfer’s

\(^{21}\) The Central American Court of Justice have cited, among others: Eduardo Vilariño Pintos, Guy Isaac, Aracely Mangas Martin, Diego Liñan, Gregorio Garzón, Pierre Pescatore, see: Ibid 288.

\(^{22}\) Ibid 292.

\(^{23}\) See: Ibid 288; as an example of these translated texts, see: Pierre Pescatore, ‘Distribución de Competencias y de Poderes Entre Los Estados Miembros y Las Comunidades Europeas [Distribution of Competencies and the Powers between Member States and the European Communities]’ (1967) 1 *Derecho de la Integración* 108.

\(^{24}\) As an example case, see: *University Title Recognition Case* (Unreported, Central-American Court of Justice, 5 March 1998).

\(^{25}\) LR Helfer and AM Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107(2) *Yale Law Journal* 273; On more recent institutional eurocentric studies of courts, see: Cormac Mac
subsequent critique is sourced in European bias despite their intent to develop an Andean context.26 Their case study involves the Andean regional court. They argue the court’s capacity to accomplish its mandate are adversely affected by regional political and social contexts and pressures (including heavy executive bias that does reflect Central American reality).27 They go on to explain that the reach of the Andean tribunal has been limited to intellectual property matters because it is a topic in which Andean governments are not invested. They also discuss the roles of domestic courts, local litigants and governments and the fundamental parts they play in consolidating the rule of a regional court.28 In such ways, Alter and Helfer seek to provide an Andean context. In the final instance, however, their analysis reflects the limits of general theories of adjudication of this kind. It also shows the need to understand local conditions and actors beyond the judicial ones.

B. Reductionism

The second underlying cause of the Central American Court of Justice’s problematic approach to transplants is a reductionist tendency in the transplantation exercise. ‘Reductionism’ in this thesis refers to the transplant of foreign doctrines in abstract terms that are devoid of or inadequately informed by local contexts. Reductionism is the product of how civilian scholars engage with comparison and transplants more generally in Central America. The tradition of engagement with civilian or civil law is highly abstract and decontextualized. The scholarship is embedded in legal ‘doctrine’ as the basis of the legal system and its foundation in the exegetic school of legal interpretation. As Javier Couso explains, the role of doctrine in civilian law systems is beyond being a mere heuristic tool. Rather, it is the product of systematic conceptualisation of legal materials, including laws, codes, statutes and judicial decisions.29 This has meant that teaching and producing Latin American scholarship has been limited to universal and context-free

27 Ibid 262–265.
approximations of law, which has resulted in high-level abstraction of legal sources into
general principles, or their recomposition to be applied in every day cases.30

This Latin American (and Central American) exercise of scholarly production, blended
with the influence of foreign scholars, has facilitated the non-contextualised
transplantation of rules between regions to an extent that it constitutes legal assimilation.
The impact has been that solutions to legal problems are drawn and solved from a ‘top-
down’ application of basic and abstract legal rational, systematic and general principles
and doctrines.31 This approach neglects the questioning of features within the legal system
that cause the problem in the first place, such as those within the integration regime in
Central America. Or as Legrand characterises civilian engagement with law in Latin
America: ‘it marginalizes an alternative world-view from within’ and is unwilling ‘to
internalise reality of an experience of law fundamentally at variance with its own horizon
of possibilities and yet located within the universe over which it purports to rule’.32

Top-down interpretation by Latin American scholars has led to foreign authors’ neglect
of local customs and traits.33 In Central American contexts this influence has had three
main consequences. The first is the development of ontological and conceptual models of
law, which in many instances do not have any reference to or potential application in local
contexts. This can be observed by the creation of Central American manuals of law
recompiling abstract principles and rules, intended to be applied in any given situation.34

The second consequence is uncritical and non-methodological readings and comparisons
with foreign models. This is the exercise of actual doctrine transplantation.35 Thirdly there
is the neglect of study of domestic legal innovations or case law and jurisprudence within
the region.36

30 John Henry Merryman and Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the
32 Ibid 222.
33 Rodríguez-Garavito, above n 8, 3.
34 See as examples: César Ernesto Salazar Grande and Enrique Napoléon Ulate Chacón, Manual de Derecho
Comunitario Centroeuropeo [Manual of Central-American Communitarian Law] (Taller de
Impresiones, 2012); Erick Mauricio Maldonado Ríos, Manual de Integración Regional [Manual of
Regional Integration] (Editorial Cara Parens, 2013); Otílio Miranda, Derecho Comunitario de América
35 As the author Luiz Bastos explains, in Latin America, the studies of transplants and comparative method
still continues to be an ‘unexplored field’, see: Luiz Magno Pinto Bastos Junior, ‘Utilización Del Derecho
Constitucional Comparado En La Interpretación Constitucional: Nuevos Retos a La Teoría Constitucional
(The Use of Comparative Constitutional Law in Constitutional Interpretation: The New Challenges to
36 Rodríguez-Garavito, above n 8, 3–4; López-Medina, above n 9, 17.
These consequences of abstract and top-down modelling and comparison can be clearly observed in the integration processes in Central America. A clear example is the first judgment of the Central American Court of Justice. The first judgment, in transplanting the principles of supremacy and direct effect from Europe, mentions that the hierarchy of Central American governance is defined in Article 35 of the Tegucigalpa Protocol. That article states that the Tegucigalpa Protocol and any norm derived from it are superior to any other instruments subscribed between the member states. Based on this provision, the regional court, interpreting it in conjunction with Article 26 of the Vienna Convention on the Law of Treaties (Pacta sunt servanda), held that the relationship between the SICA legal regime and domestic legal systems is hierarchical where SICA norms have supremacy over domestic law, including domestic constitutions. Moreover, the regional court held that domestic laws cannot ‘undermine, modify nor substitute’ provisions of SICA treaties and instruments adopted by the SICA bodies.

That interpretation by the Central American Court of Justice neglects both article 22 of the Tegucigalpa Protocol (the supremacy of domestic laws and constitutions over SICA norms and the duty of SICA bodies to modify SICA norms in a manner that does not hinder domestic law), and article 34 (the nature of SICA norms as equal to Executive decrees). This interpretation also avoids the vision of primacía that domestic courts developed. In 2012, almost fifteen years after the original transplantation exercise by domestic courts, and following a series of domestic court judgments reaffirming the non-hierarchical relationship between the SICA legal regime and domestic legal systems, the Central American Court of Justice reaffirmed, through an advisory opinion requested by the PARLACEN, the principle of supremacy and held that domestic courts are not allowed to constitutionally review SICA treaties and norms.

These examples of interpretations by the Central American Court of Justice reflect a positivist and static view of the ideals of the SICA. The basis of this view is now-

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37 University Title Recognition Case (Unreported, Central-American Court of Justice, 5 March 1998) 285.
39 Vienna Convention on the Law of Treaties, Opened for Signature 23 May 1969, 1155 UNTS 331 (Entered into Force 27 January 1980) Article 26. ‘Pacta sunt servanda’ Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
40 University Title Recognition Case (Unreported, Central-American Court of Justice, 5 March 1998) 287.
41 Ibid 288.
42 File No 9-23-09-211 (Advisory Opinion) (Unreported, Central American Court of Justice) 1 (‘PARLACEN Advisory Opinion’).
discredited European legal theory. These interpretations position the regional court as a central and hegemonic actor within the integration system – a system perceived as separate from other social constructs and developments. This has led the Court to neglect consideration of the competing social and historical pressures that characterised previous integration experiences in Central America. Moreover, the Court also failed to be socially accountable through dialogue and statement of norms. It neglected to consult other essential actors, like the SICA secretariats and domestic courts. The Central American Court of Justice actions represent an institutionalist position. This is where interpretation of other social actors (such as domestic courts and institutions) hold them as mere agents of the implementation of regional norms. This institutional position has prevented the Court from asserting its own doctrines (or even reengineering European ones) in an organic and socialised manner.

As a consequence of the institutional approach to interpretation, the Central American Court of Justice has contributed to two characteristics of new Central American integration scholarship of which this thesis is critical. This first is a universalist reflection on the regional court accepting European legal jurisprudence as its foundation, to the detriment of developing its own principles and objectives and those ratified by Central American states in the many constituting SICA treaties (such as Central American ‘subsidiarity’ and ‘solidarity’ in the Tegucigalpa Protocol). The second is the use of

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45 On a similar institutionalist position, but from an international law standpoint see: Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’ 22 European Journal of International Law 315, 328.
‘institutionalist’ and reductionist approaches to comparison. This meant that the study of foreign jurisprudence is too narrowly focused on features and contexts. For example, in drawing comparisons between itself and the European Court, the Central American Court of Justice has neglected the broader political and social context of integration both within the Central American region and in Europe.

A reductionist approach has meant that the Central American Court of Justice has effectively decontextualized the use of foreign law and principles, and failed to critically appraise the incorporation of foreign material into the integration system. Thus, since its inception the subregional court has developed a ‘foreign and top-down’ hierarchical interpretation of regional law based on European scholarship and those perceived necessities. This has led to competing claims by some domestic courts regarding the regional court’s interpretation of law. Notwithstanding these claims, the court has been adamant about its position, bypassing an opportunity for progressive dialogue with the domestic courts.

The region’s continuing dependency on foreign experiences and concepts (particularly European and North American) have made comparison exercises unsuccessful. The cause of failure can be traced to earlier-mentioned characteristics of Latin American comparison: ‘vertical’ modelling, which demonstrates a North-South or Eurocentric bias; and a universalist-reductionist approach that neglects domestic contexts and the development of constitutionalism in the region. The vast gulf that isolates the orthodoxy of legal theorising culturally transmitted by the Central American Court from social constructivism approaches of a current (third) generation of scholars in the region, isolates Central America from the mainstream of law-making from the realities and drivers of change. The orthodoxy of comparison done solely with Europe by Central American institutions and authors has helped to consolidate, as scholar William Twining expressed it, a black letter ‘surface’ law that is uninformative about how the system has evolved and

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48 On the institutionalist view of the Central-American Court see: León Gómez, above n 2, 3–5, 381.
50 López-Medina, above n 9, 11.
51 However, the regional court has referenced other domestic courts, such as the Constitutional Chamber of Costa Rica’s Supreme Court of Justice. In this occasion, the regional court took on this latter court’s interpretation of communitarian law, which was also based on European scholarship: File 9-04-08-1996 (Advisory Opinion) (Unreported, Central American Court of Justice, 13 December 1996) 2 (‘PARLACEN Unconstitutionality Advisory Opinion’).
how it currently stands. This black letter or positivist ‘surface’ law, mainly exhibited by regional court uses of its own transplanted principles that contradict the language and provisions established within the SICA conventions and treaties, demonstrates the perils of improper and inadequate comparison. A crucial impact is the failure to consolidate and further socialise a normative identity for the region.53

C. Historical Causes of Eurocentrism and Reductionism of Transplants in Central America

This part of the chapter explains the historical sources of the orthodox methodology of the Central American Court of Justice. As earlier mentioned, it has had a profound impact on civilian legal traditions concerning the responsibility of scholars to develop and codify best practices and principles in abstract terms, to be later used to provide solutions in concrete cases.54 This part of the chapter demonstrates how, after the 1950s, three generations of Central American scholars have come to provide the basis for the regional court’s European bias and reductionist approach to legal transplants.

1. First Generation 1960-1980

From the late 1960s, with the rise of early integration studies, Latin American legal integration scholarship began to be strongly influenced by European doctrine and theory.55 At this time, both the UN Economic Commission in Latin America and the Inter-American Development Bank, through its Institute of Latin American Integration (INTAL), started to publish European scholarship on integration and translate it into Spanish.56 From that time integration theory showed a narrow academic focus on the

54 Merryman and Pérez-Perdomo, above n 30, 80–81.
56 Under the INTAL, a series of journals were created, such as: Derecho de Integración [Law of Integration] and Revista de la Integración [Journal of Integration] which translated the work of European authors such as: Nicola Catalan, Manual de Derecho de Las Comunidades Europeas [Manual of the Law of the European Communities] (Instituto para la Integración de América Latina, Banco Interamericano de Desarrollo, 1966); Pescaire, above n 23; Maurice Lagrange, ‘La Interpretación Unitaria Del Derecho de Las Comunidades Europeas. Aspecto de La Acción Prejudicial [the Unitary Interpretation of the Law of the European Communities. An Aspect of the Preliminary Reference]’ (1968) 3 Derecho de la Integración 59; Phillipe C Schmitter, ‘La Dinámica de Contradicciones y La Conducción de Crisis En La Integración Centroamericana [Thys Dynamics of Contradictions and the Conduction of Crisis in the Central-American
European integration experience in the late 1960s and 70s, particularly on the idea of supranationalism. As a consequence, the first generation of Central American scholarship shifted its attention away from the political and social realities of the region. There was a movement towards recommending creation of supranational courts in Latin America, based on the European Court of Justice’s foundational doctrines of supremacy and direct effect of integration norms. The movement was marked by highly descriptive and conceptual scholarly work. In addition, most regional scholarship of the integration systems failed to engage in robust comparative methodology.

From that time, Central American authors were attempting to formalise large conceptual and context-free ‘general theories’ of integration or communitarian law ostensibly applicable in both Europe and Central America. The key feature of the research was legal developments within European scholarship. From this early period onwards Central American authors non-contextually used European experiences as a source for discussing the construction of a new Central American regional law. Although some authors granted a degree of importance to historical factors, the early scholarly work became the starting point for a split between written Central American conceptual black letter law and the variables that marked the regional political and economic contexts.

Integration’ (1969) Revista de la Integración 87; Ernst B Haas, ‘El Estudio de La Integración Regional: Reflexiones Acerca de La Alegría y La Angustia de Pre-Teorizar [The Study of Regional Integration: Reflections on the Joy and Anguish of Pre-Theorising]’ (1972) 10 Revista de la Integración 85.


Ibid 645.


Example of a systematic account to develop a ‘general theory’ of integration law using as basis European scholarship, see: Maza, above n 59, 32–33, 98–101, 131–132 particularly, page 132 makes reference to the INTAL translated material.

See as a regional example of this trend: Instituto para la Integración de América Latina, above n 60.
this, some foreign authors began to compare the Central American Common Market to the European integration scheme in terms that neglected the ODECA aspect of the Central American integration regime.63


By the late 1980s, Central American scholarship shifted from developing grand ‘general theories’ of integration and regional law to reviewing and describing European theory. Legal scholarship in the region moved towards acceptance of core European concepts and notions such as supranationalism and direct effect, eyeing them as intrinsic elements of Latin American integration theory and law.64 During this period in the mid to late 1980s, Central American integration entered a new stage of reconstruction. This period saw the birth of the SICA. Nonetheless, Central American scholarship became even more grounded in European scholarship, thus broadening and deepening the European bias.

The distinction between the second generation of authors and their predecessors is that the second scholarly wave accepted the European integration enterprise as part of a ‘universal’ story and model of accomplishment. In other words, Central American (and Latin American) authors ceased their consideration of theoretical and ontological discussions and debates of legal concepts of integration across regional contexts. Instead they accepted and drew on European scholarship as their foundation. The Chilean scholar Arnulf Becker-Lorca’s view on traditional Latin American international law scholarship is suggestive in this respect, showing that the second wave of Central American scholars assumed integration was fundamentally European with Latin America merely a sideline contributor that was attempting to replicate the experience.65 By the early 1990s Central American (and Latin American) integration scholars had accepted European studies as the starting point and pillar for any new integration enterprise and no longer considered the notion of comparative systems.66


64 On a critical account on this first generation of scholarship see: Orrego Vicuña, above n 59, 16.

65 Becker Lorca, above n 6, 285.

This new turn of interpretation, enforced by the regional court, paid small account to regional developments and social constructs. This is clearly demonstrated by the predominance of ontological and theoretical studies of Central American law that attempts to frame local concepts and theories into a European framework. On its part, the earliest decisions of the Central American Court of Justice, from its beginnings, reflected the second wave of legal scholarship. The Court comprised many of the second generation scholars who directly shaped its referencing of European doctrine and jurisprudence. The Court cited European integration scholars and made references to European jurisprudence such as Van Gend de Loos and Costa/Enel as similar to precedent. This further led to the regional court adopting European Community law principles and doctrines that disregarded the provisions set out in the Tegucigalpa and Guatemala Protocols.

3. Third Generation 2000-2018

The judgments and opinions of the Central American Court of Justice have continued to influence the third generation of scholars and scholarship in the region. Using the regional court’s European-reductionist jurisprudence as their foundation, the current round of authors and scholarship has continued to interpret and transpose more European doctrines into the SICA legal regime with inadequate critical reading. An example is the...
introduction of European principles undefined or previously used by the Central American Court of Justice. They are not even mentioned in any of the SICA’s constitutive treaties or later instruments. Another example is the practice that involves narrowly functionalist methods of comparison with the European experience and institutions.71 The resulting transplants reveal assumptions that European integration has the same objectives and goals as SICA. This tendency persists, conserving a non-critical and vertical comparison between Europe and a ‘lesser developed’ or ‘in crisis’ Central American region.72

Functionalist methods of comparison are based on identification and reduction of ostensibly similar problems, in order to pin-point solutions across legal regimes.73 Such methods are aimed at making direct comparison between regimes deemed to have common denominators or assumptions.74 At the same time, the mainstream practices of functionalism rely on reduction and decontextualization of legal concepts and laws.75 For instance, the functionalism that gave rise to a European-reductionist approach by the regional court and scholarship neglects other competing developments in the region. An example is the introduction of ‘open regionalism’ by Executives proposed by the ECLAC modernization proposal of 1997, against which the Court reacted aggressively.76
Court explained that this concept of open regionalism was too complicated to understand, thus it should be not taken into account in an already established integration system.\textsuperscript{77}

Currently, and long after the dispute between the regional institutions with the executives in the late 90s and early 2000s, there is no consensus in Central America on how to continue with integration. The region continues to be presented as a ‘failed’ integration system by foreign \textit{and} local authors because it does not reflect the same conditions as the European experience.\textsuperscript{78} They measure the success of Central American integration in terms of the capacity of the regional court’s work to replicate the European ‘model’\textsuperscript{79}. That bias shows no interest in a comparative standard based on the reviews of both exporting and importing realities. Although there is occasional recent work that recognises contextual and social differences between the European court and the Central American court, the prevalence of Eurocentrism inhibits the production of detailed methodologies on how to engage with local contexts.\textsuperscript{80}

Currently, the Central American Court of Justice continues to transplant foreign doctrines.\textsuperscript{81} Similarly, current scholarship of integration in Central America maintains its focus on abstract and general principles and doctrines. Even though the dominant paradigm endures backlash from domestic courts in calls to review its interpretation of SICA norms, advocates continue to promote their prevailing opinion without inviting dialogue. Moreover, Central American scholars, even after examining backlash from domestic courts, continue to refute the effects of article 22 of the \textit{Tegucigalpa Protocol}. This is on the basis that article 22 conflicts with European doctrines and an interpretation

\textsuperscript{77} Ibid.


\textsuperscript{79} For examples see: Katrin Nyman-Metcalf and Ioannis F Papageorgiou, \textit{Regional Integration and Courts of Justice} (Intersentia, 2005); Cesare PR Romano, ‘Trial and Error in International Judicialization’ in Cesare PR Romano, Karen J Alter and Chrisanthi Avergou (eds), \textit{Trial and Error in International Judicialization} (Oxford University Press, 2013).

\textsuperscript{80} See as example: Salvatore Caserta, ‘Regional Integration through Law and International Courts - The Central American and Caribbean Cases’ (iCourt Working Paper Series, No. 87, Faculty of Law, University of Copenhagen, 2017).

\textsuperscript{81} See as most recent example use of supremacy: \textit{File No 2-24-1-2014 (Advisory Opinion)} (Unreported, Central American Court of Justice, 17 March 2014) (‘US-DR-CAFTA Opinion’).
that this provision is contrary to the purposes and principles set out by the Tegucigalpa Protocol, particularly the principle of applying integration norms in good faith.  

III. INSIGHTS FROM LEGAL COMPARATIVE METHOD

This part turns to practices that could improve the Central American Court of Justice’s legal method when transplanting foreign doctrines. The inquiry proceeds as follows: first, it engages with comparative legal method and transplant theory to address the underlying causes of the Central American Court of Justice’s approach to transplants (detailed in Chapter 4); second, it generates understandings about how to move beyond the Eurocentric bias and reductionist method of transplants; and third, it presents two actual examples of transplants that have already taken place in Central America, which were informed by context and Central American values when being imported to the region.

A. Transplant Theory

In general terms, ‘transplants’ are the diffusion of legal concepts or doctrines from one legal system to another or the appropriation of foreign ideas by courts and their subsequent modification through this process.  

As comparative scholar Jaakko Husa explains, the study of legal transplants is the area where legal history and comparative law are most connected. Husa notes the reason is that it entails recognition of the significance of the respective contents of the transplant in both legal systems, exporting and importing. Transplants or the migration of concepts could be motivated by a number of reasons. One is prestige, associated with social stratification and people’s imitation of foreign concepts they see as successful. The use of foreign transplants could also be motivated by ‘legitimacy generating’ effects, which ostensibly could help a newly established court build its own reputation. Serious problems result from uses of transplants to ‘generate legitimacy’ like adopting transplants uninformed by contexts of the society to which they are being transplanted. An example has been previously noted in the example of the Central American Court of Justice that led to dispute when the transplant of foreign doctrines conflicted with treaty provisions and the established

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82 Perotti, Salazar Grande and Ulate Chacón, above n 71, 156–157.
83 Graziadei, above n 1, 443–444.
85 Ibid.
86 Graziadei, above n 1, 458.
87 Vlad Perju, ‘Constitutional Transplants, Borrowing, and Migrations’ in Michel Rosenfeld and Adrás Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) 1318.
jurisprudence of domestic courts. The impact, undercutting rather than generating legitimacy, was backlash and confrontational postures between the regional court and domestic courts.

The critique of transplant theory to this point demonstrates that to move beyond Eurocentric ‘universal-reductionist’ comparison requires engagement with comparative legal methods that are critical of both importing and exporting systems and are informed by their own historical and social pressures and normative claims.\(^{88}\) This involves analysis and engagement with how ideas are epistemologically constructed, socialised and implemented in specific historical, social and legal contexts.\(^{89}\) Comparative regionalism of that kind also engages in more than just trans-regional constructs and transplants within a framework of regional values and drivers. It additionally engages in critical review and comparison among the individual states that apply these regional constructs.\(^{90}\) Consequently, comparative engagement with regional transplants in individual contexts views all levels of actors and stake-holders (regional and domestic) as active and necessary participants in the organic development of the regional legal system. This facilitates further socialisation and bottom-up construction and acceptance of trans-regional norms.

In the context of integration, the adequacy of methodologies depends on contextual consideration at both regional and intra-regional levels of the historical legacies of regionalism that underpin the respective legal systems. This means the study of why and how actors and subjects accept, develop and implement norms, principles and doctrines.\(^{91}\) Such methods contrast and compare norms, principles, and institutions within the contexts of philosophical, social and historical features and drivers.\(^{92}\) Methods that critically review both importing and exporting legal systems under the epistemological and historical ideals of their construction are likely to liberate comparative methodology from the presumption that privileges vertical comparison with other foreign legal

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\(^{88}\) López-Medina, above n 9, 36.


\(^{92}\) Ibid 705; López-Medina, above n 9, 51.
systems. Contextualisation seeks to facilitate comparison through critical reflection on a legal system’s own normative objectives and social drivers. The idea is not to compare each legal system under similar (usually Eurocentric) conditions or objectives since this vitiates comparison from the start. Instead, contextualisation alleviates reductionist and static comparisons by identifying how norms, principles and institutions are created, developed and moulded though time and acquire specific meaning associated with particular social needs of the time.

Cheryl Saunders has argued that to relieve the shortcomings of previous comparative scholarship and jurisprudence in Central America, comparative methods at a regional scale must be an exercise aimed to bridge the gap ‘between universalist assumptions of international law and the realities of constitutional difference’, or in the case of integration, regional differences. Comparative law, as well as comparative regionalism, is not only an exercise that balances universalism against parochialism, but also one that involves the practice of self-reflection. This is of particular relevance to Central America. It would mean not only reassessing how the region sees herself, but taking a step further to consider how others see her in a global scenario. This could allow practitioners and decision-makers to normatively constrain foreign influence, and to reintroduce legitimate (contextualised) forms, if, or as required.

An example of the methods proposed in this thesis was the basis of a recent Salvadorian case regarding the validity of its amnesty law. In 2012, the Constitutional Chamber of the Salvadorian Supreme Court reviewed the Salvadorian amnesty law regarding crimes against humanity under international and Inter-American law and the jurisprudence of the Inter-American Court of Justice. In that decision, before engaging with and challenging the interpretation of the Inter American Court of Human Rights, the Constitutional Chamber analysed its positions and those of other Central American domestic courts. The latter positions involved interpretation of the reaches of regional law and its interaction with domestic law. In their review, while the Salvadorian Chamber accepted the existence of regional values and objectives, it claimed that the Inter American Court of Human

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94 Van Hoecke and Warrington, above n 89, 532.
Rights’ approach was unresponsive to legal developments within domestic contexts. With this interpretation, the Salvadorian Chamber, using intra-regional critical comparison, did not completely dismiss the interpretation of the regional human rights court. The latter interpretation was characterised by supranationalism and supposed superiority of the Inter American legal system over domestic legal systems. With that mindset, the Chamber observed that such a position would go against the values of democracy, imprinted in both the Salvadorian Constitution and regional treaties. Subsequently, the Chamber called for more engagement between the regional court and domestic courts, on a horizontal level rather than invoking a vertical, top-down interpretation. Ultimately, the Salvadorian Constitutional Chamber tendered an interpretation of foreign and transnational human rights instruments and jurisprudence that shed further light on the constitutional deficiencies of the Salvadorian legal system. That would later help in the further construction of the Salvadorian constitutional legal regime.

To reiterate a core argument in this thesis, comparative legal engagement when adequately done encompasses a reflective review of context and culture and epistemological assessment of both importing and exporting legal systems. The failure to connect the historical and political environment of the SICA with the regional legal regime has obscured critical reflection by Central American authors and legal institutions concerning the conceptual, institutional and judicial issues of integration. As a result, Central American scholarship has been unsuccessful in developing an apposite comparative method, both extra- and intra-regionally.

Generally speaking, comparative legal method helps identify potential lessons to be learned across legal systems. Specifically, comparative law and comparative legal methods have been used to determine similarities and compatible features, as well as

97 *Inconstitucionalidad 71-2012 (Judgment)* (Unreported, Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador) 11.
98 The Salvadorian Constitutional Chamber reviewed the judgments of other regional domestic constitutional courts, such as that of Costa Rica and Guatemala, ibid 13–14.
99 Ibid 18.
100 Ibid 18.
101 Samuel, above n 49, 64.
differences and potential lessons observed between the many legal systems. Notably, the legal regimes being compared need to have a clearly-defined identity to be able to provide useful lessons between them. While self-reflection in non-Central American regions could generate strategies, tactics or even solutions, it does not mean they apply elsewhere. Historical, social, cultural and institutional contexts vary exponentially across regions. Moreover, critical reflection needs to focus not just on current regional challenges but also on a range of domestic contexts. There is clear evidence of this benefit in previous comparative studies.

Comparison of this kind needs to be further understood within the contexts of the normative guidance and culture that underpin a legal system. For instance, there should be a clear idea of the normative identity that the SICA must assume in order to understand how it could learn from other comparable systems. Identification of a clear normative identity could help move beyond mere black letter law towards comparison that could make authentic impact.

B. Moving Away from Eurocentrism

In Central American contexts it is clearly visible that comparative legal scholarship has not yet made a complete transition from Eurocentrism to recognition of the pluralism of law. This reflects the global situation as well. In the broader setting, contemporary comparative scholars such as Werner Menski, William Twining and William Ewald argue that current approaches in general comparative scholarship still fail to supplant traditional functional methods of comparison. Werner Menski suggests these failures stem from the focus of scholars on positive law and marginalising its social dimensions. All three

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103 Ibid.
104 Cappelletti, Seccombe and Weiler, above n 90, 9.
109 Menski, above n 108, 7.
scholars agree that comparative method must go beyond superficial and abstract comparison to construct methodologies that understand law as encompassing culturally sensitive contexts.\textsuperscript{110} Specifically, William Ewald argues that to understand a foreign ruling entails recognition of it as a component of an entire legal system.\textsuperscript{111} Ewald explains that comparison methods need to be able to implicitly understand the nature, philosophical underpinnings and function of the law in a society.\textsuperscript{112} In the words of David Nelken, the implementation of legal transplants could only be meaningful and successful if they prioritise the study of differences between the exporting and importing realities.\textsuperscript{113}

With regard to the SICA the same view is supported by Ronnie Yearwood’s work. As pointed out in the World Trade Organisation (WTO) development processes, the SICA must become a ‘self-producing and evolving’ system that could learn, appropriately, from other regimes.\textsuperscript{114} Yearwood elaborates that the reconstruction of foreign transplants needs to be done with a clear vision of the importing regime in order for its reconstruction to make sense.\textsuperscript{115} Therefore, reconstruction (or reengineering) contains an essential step to make sense of not only the values and drivers of the importing system, but also the horizontal interactions with other legal regimes. In other words, this requires a shift in Central American scholarship away from ‘vertical’ comparisons with Europe towards a more ‘horizontal’ approach. This could be facilitated by reviewing comparisons under the constructs and normative objectives of the importing legal system. Doing so could untether scholarship from reductionist comparison with Europe, while avoiding ethnocentric traps concerning incompatibility. Such movement could enable meaningful comparison and transplants across regions.

C. Using context to avoid reductionism

As discussed, a chief reason for the failure of Central American law to evolve organically is the tendency for Eurocentric reductionist comparison to use functionalist methods that are informed by European experiences and an assumption of similar local conditions and

\textsuperscript{110} Ibid 6; Ewald, above n 108, 1891; Twining, above n 52, 302.
\textsuperscript{111} Ewald, above n 108, 2106.
\textsuperscript{112} Ibid 2107.
\textsuperscript{115} Ibid 77–78.
objectives. The result has been static and black letter comparison, replete with unwitting assumptions and biases.\textsuperscript{116} Such methods introduce bias in the comparison that gives a peripheral status to Central American law. As Latin American author López-Medina has understood, that bias has led to ‘imprisonment’ of theoretical thought.\textsuperscript{117} This refers to how the regimes being compared are attributed with arbitrary assumptions of commonalities between them. Thus the functional methods ‘imprison’ or separate the legal concepts from context.\textsuperscript{118}

The use of functionalism for studies of foreign models or positive approximations needs to overcome neglect of how concepts are determined by social structures and interpreted through preconceived assumptions.\textsuperscript{119} As López Medina and Ewald have seen, law should be understood beyond social facts, in ways that encompass the contexts of ideas and visions.\textsuperscript{120} This refers to the significance of cultural context. Judgments and norms ought to be read within the historical and philosophical visions and ideas that underpin a legal system.\textsuperscript{121} By understanding how regional law works in cultural contexts this enables more adequate comparison of subjects.\textsuperscript{122} Specifically, such understanding could reveal the philosophical underpinnings and functions of law within comparative regimes, thus helping to understand the nature and potential effects of norms based on the institutional design of their applications.

Contextual analysis marked by the whole range of historical, political, economic, social and cultural variables involving both the importing and exporting legal systems could allow scholarship to move beyond the practice of a positive tertium and theoretical imprisonment in two respects. First, it could enable a shift from universalist claims of integration towards recognition of the divergence of elements and ideas that underpin the respective regional integration efforts. Second, by understanding the historical and social underpinning of each regional integration enterprise, it could facilitate an apt narrowing down of the focal points of comparison, to see clearer pathways for transplants of norms and institutions.

\textsuperscript{116} Watt, above n 107, 590–591; Menski, above n 108, 66; Frankenberg, above n 93, 413.
\textsuperscript{117} López-Medina, above n 8, 44.
\textsuperscript{118} Frankenberg, above n 73, 75.
\textsuperscript{119} Saunders, above n 95, 6.
\textsuperscript{120} Husa, above n 84, 153; Ewald, above n 108, 2111; Menski, above n 108, 68–69.
\textsuperscript{121} Menski, above n 108, 68.
\textsuperscript{122} Ewald, above n 108, 2114.
In the legal literature, the reworking of foreign ideas or transplants in the appropriation of an imported concept is called ‘reengineering’. Characteristically this is a process where the original idea is substantively modified to meet the goals and purposes of the importing actor and her or his situation. The idea is that reengineering enables a higher appreciation of both the exporting and importing legal fields. A key implication of reengineering for states and regional institutions like the regional court is the necessity to treat rigorously and critically the foreign or international sources they seek to incorporate in their legal systems. The reason is clear that such transplants contain vast implications concerning the quality of their judgements, as well as the success of other actors’ prospective uses.

D. Examples of Successful Reengineering of Transplants in Central America

It is useful to note that not all transplants implemented in the Central American region have failed. There have been successful examples of reengineered transplants. At the same time, that success has been due to the capacity of judges importing the transplants to consider the contextual factors. Two examples are significant, the amparo (constitutional injunction) and the bloq de constitutionalité (constitutional block). Both examples demonstrate the success of not just reengineering but overarching response to the constitutional move in Central America after 1980. They exemplify the potential capacity of courts to critically review and reengineer a transplant based on the social structures and needs of both exporting and importing countries. They further exemplify the wider potential for courts’ critical reflection, given that these cases occurred more than 150 years apart. Furthermore, successful transplants have been attained during the same time as Central American state building.

Each of the above examples reflects occasions where judiciaries, within their own legal systems, have organically developed bottom-up socialised conceptions of law. This needs to be emphasised. Both transplants were successful because they were implemented in a bottom-up way and accepted at a local domestic level, rather being imposed. This has

124 Ibid 814.
125 López-Medina, above n 9, 20–21.
126 Perju, above n 87, 1322.
allowed the countries to introduce comparative transplants in their own legal environments based on a clear appreciation of the legal system where they would be applied. Thus these successes boil down to capacity of the courts to epistemologically analyse the transplants in multiple contexts, thus gaining knowledge how to reengineer them to a different legal realm and normative vision. These experiences show capacity to transplant foreign ideas, with crucial lessons for the Central American Court of Justice and scholars undertaking similar exercises. There was no reliance on the use of a tertium, but instead, the applications of the transplants were used to enhance the values and ideals of the importing systems. These examples will be examined further in the next section.

1. *The Amparo*

The *amparo* was the result of Latin American reengineering the US system of judicial review of laws.\(^{128}\) US judicial review consists of the power of the courts to review laws for conformity with the constitution and declare invalid those that do not comply.\(^{129}\) The US system of judicial review migrated originally to Mexico, and later would find its way to Central American countries, where each country created a unique twist on the institution.\(^{130}\) Historically, in Mexico, this procedure was named ‘amparo’ and was originally introduced in the Constitution of *Yucatán* of 1841. The term amparo, as studied by Mexican scholar and constitutional specialist Héctor Fix-Zamudio, was used as a synonym for ‘remedy’ in colonial times.\(^{131}\) This institution was used either to challenge court judgments like an injunction to protect property rights, or as a Spanish version of the English *habeas corpus*.\(^{132}\)

The reengineering of this judicial function was the result of Mexican judges examining Alexis de Tocqueville’s study on the US judicial review system.\(^{133}\) MC Mirow notes in an historical study of the amparo that Mexican judges took on the US model of judicial


\(^{129}\) Ibid.


review after scientifically and philosophically studying both US and Mexican constitutions, jurisprudence, academic commentaries, and treatises as part of their own judicial review. Accordingly, as former Mexican Supreme Court Judge Vallarta evocatively noted, this exercise was anything but an ‘immodest itch to imitate the foreign’. Judge Vallarta added his further opinion that although the Mexican constitution represents a an improved version of the US constitution, the imperfect US constitution made possible the judicial review. Mirow argued that Judge Vallarta well understood there were no legal remedies in Mexican legislation to provide scrutiny of the acts of judges and protect the rights of individuals. In reviewing the US system therefore, the amparo provided an opportunity to secure and provide remedies for unconstitutional laws and their application by judges beyond legislation.

The work and opinions of Mexican judges on both US and Mexican constitutional systems led towards successful reengineering of the amparo, which still defines current practice. The reengineering transformed the institution of US judicial review into a remedial procedure against actions of public organs, and even judgments of lower courts, where they conflicted with constitutional provisions. Nevertheless, the success of the amparo, as Mirow concludes, reflects the capacity of the Mexican judges to reengineer a foreign institution through clear and reflective comparative analysis of both the importing and exporting legal systems, and subsequent explication of its necessity and its implementation or adaptation.

Beyond its reengineering, the success of the amparo includes its adaptation to the intellectual constructs and drivers in the region and in each state. During the period of dictatorship and civil struggle in Latin America (including Central America) human rights

135 Ibid.
136 Ibid 53.
137 Fix-Zamudio, ‘A Brief Introduction to the Mexican Writ of Amparo’, above n 131, 312.
139 Mirow, ‘Marbury in Mexico: Judicial Review’s Precocious Southern Migration’, above n 134, 81.
became an intrinsic part of Latin American constitutionalism.\footnote{Gonzalo Aguilar Cavallo, ‘La Internacionalización Del Derecho Constitucional [The Internationalisation of Constitutional Law]’ (2007) 5(1) Estudios Constitucionales 223, 230–231.} With that move by various Latin American states, the amparo found a \textit{niche}, becoming a recognised regional right fundamentally linked with a right to judicial remedy.\footnote{\textit{American Convention on Human Rights} Opened for Signature in 10 July 1969, Organisation of American States Treaty Series No. 36 (Entered into Force 18 July 1978) Article 25. Right to Judicial Protection 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted. see also: Fix-Zamudio, ‘La Creciente Internacionalización de La Constituciones Iberoamericana, Especialmente En La Regulación y Protección de Los Derechos Humanos [The Rising Internationalisation of Ibero-American Constitutions, Specifically in the Regulation and Protection of Human Rights]’, above n 138, 607.} This made the amparo in the broader region and Central America in particular an effective tool to promote the rule of law at all levels of the state: executive, legislative and judicial. Moreover, the amparo is currently used to review the implementation of international norms and international judgments under constitutional law. In a specific case in 2010, the Guatemalan constitutional court limited the reach and effect of a judgment of the Inter American Court of Human Rights.\footnote{\textit{File 548-2010, Amparo en Única Instancia} (Unreported, Corte de Constitucionalidad de Guatemala [Guatemalan Constitutional Court], 25 August 2010).} Although the Inter American court had ordered Guatemala to re-open cases against officials of alleged human rights violations, in its reasoning the Constitutional Court held that such implementation should be done while upholding constitutional rights.\footnote{Ibid 12.} It furthermore called on the Inter American Court to assist in developing a proportionality test in order to not vulnerate constitutional rights, such as non-retroactivity of criminal charges and double jeopardy, when implementing its judgments.\footnote{Ibid.} In addition, Costa Rica’s ‘\textit{Ley de la Jurisdicción Constitucional}’ enabled its Constitutional Chamber to review international instruments and make declarations on their compatibility with the Law of the Constitution.\footnote{\textit{Ley de La Jurisdicción Constitucional de Costa Rica, 7135 de 11 de Octubre de 1989}[Law of Constitutional Jurisdiction, 7135 of 11 October 1989 of Costa Rica] Art. 73[e].}

Thus, the amparo can be interpreted as a tool that brings centrality and greater power of review to domestic courts in the implementation of not only domestic law but also regional and international laws. This recognises the necessity of linking regional law with domestic law under socialised constructs. If such links are not made, regional laws may
run a course of non-implementation and, as described in the previous chapter, be declared unconstitutional and without effect by domestic courts.

The amparo is an example of the reengineering of transplants where success can be distilled down to responsiveness to the constitutional and human rights necessities of the region, specifically the introduction of remedies for breaches of laws and individual’s rights. Deservedly, the amparo has become a feature of Central American constitutionalism in maintaining a check on public power.

2. The Constitutional Block

Turning to the second example of reengineered transplants that illustrate the capacity of judges to consider contextual factors, the ‘constitutional block’ has current significance for extending the reaches of the amparo. The constitutional block has broadened the value of the amparo beyond its role as a safeguard and remedy of constitutional law, to encompass international law, specifically international human rights law.

The defining quality of the constitutional block is that a constitution not only includes the constitutional text, but also other laws and international treaties or instruments as constitutive parts (of the block). Although the idea of the constitutional block originated in Europe (specifically France) with characteristics and functions specific to that region, it migrated to Latin America in ways that produce a different conception to its European counterpart. This reengineered concept in Latin America represents an interpretative method for determining the interaction between international and constitutional law that is embedded in human rights.

The originating constitutional block in France had a very different connotation and characteristics to its Central American counterpart. The French version was

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conspicuous for a landmark ruling on 16 July 1971 by the French Constitutional Council, which held that interpretations of the French constitution needed to give effect to the instruments referred to in the preamble.\(^{148}\) This range of constitutional texts became known as the ‘constitutional block’.\(^{149}\) However, in its migration to Central America, the constitutional block acquired transformation, resulting in a very different conception from its original version.

Panama was the first country to apply the Constitution block in the region, via a ruling of its Supreme Court in 1990.\(^{150}\) The Panamanian Court made reference to the French origins of the constitutional block.\(^{151}\) The court reviewed the European use of the block, specifically in the judgments of the French Constitutional Council and studies by eminent scholars, and subsequently the court reengineered the application of the constitutional block for Panamanian contexts. In its ruling the Supreme Court stated that its decisions, specifically regarding human rights and constitutional matters, were part of the block, thus expanding the Constitution.\(^{152}\) In this comparative exercise, the Panamanian court made an analysis of the reasons why and how the foreign court applied this principle. This allowed the court to detail a unique pathway through which it could be applied in that country. In summary, the Panamanian court applied this principle based on close consideration of all relevant contexts, including Latin American constitutional movements and the establishment of rule of law following transition from military to civilian rule.\(^{153}\)

Costa Rica’s *Sala Cuarta* of its Supreme Court followed Panama’s lead in 1993.\(^{154}\) Costa Rica named its reengineering of the constitutional block *Derecho de la Constitución* (Law

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\(^{150}\) Arturo Hoyos, “El Control Judicial y El Bloque de Constitucionalidad En Panamá [Judicial Control and the Constitutional Block in Panama]” (1992) XXV(75) *Boletín Mexicano de Derecho Comparado* 785, 798.

\(^{151}\) Case No. 21,726, *(Judgment)* (Gaceta Oficial 1, Plenum of the Supreme Court of Panama, 30 July 1990), 2-3.

\(^{152}\) Ibid, Hoyos, above n 150, 799.

\(^{153}\) Ibid.

\(^{154}\) Góngora Mera, above n 146, 306.
of the Constitution). Since that time, the Costa Rican court has referred to the Law of the Constitution as a group of norms, principles and values emanating from the Costa Rican Constitution, as well as from international and regional treaties, particularly regarding human rights. The guiding principle is that these various laws need to be interpreted in harmony and coherence, and thus become parameters for constitutional review. In this sense, the constitutional block has helped to consolidate in Costa Rica an ideal of constitutionalism native to the country, embedded in their own construction of constitutionalism.

Based on Panamanian and Costa Rican success in applying the block, the notion has migrated to other Central American countries, including Nicaragua (2002), Dominican Republic (2003), Guatemala (2012), and Honduras (2013). In each case the block shows distinctive contextualised traits.

Beyond the value of these transplants as examples of successful reengineering, it is expected that both transplanted constructs present opportunities to expand and enrich regional law in Central America. Both the amparo and the constitutional block represent concepts and institutions that expand the role and implementation of regional norms in domestic contexts. Central American constitutionalism depicts a distinctive regional

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156 Case 07818 (Judgment) (Unreported, Sala Cuarta de la Corte Suprema de Justicia de Costa Rica, 5 September 2000) [author’s trans].


drive toward social justice, social and economic rights contained within the region’s domestic constitutions or international human rights treaties, either of universal or regional nature. This shared context provides a scenario whereby reengineered concepts could produce a harmonious multi-level interaction platform between SICA and the Central American states.\(^{159}\) In this sense, the constitutional block could help provide guidelines to domestic institutions to implement their respective multi-level obligations.\(^{160}\) At the same time, the amparo has proven to be an apt mechanism for reviewing the implementation and enforcement of regional objectives to further develop states within a social justice and human rights framework. It is further well-suited as a mechanism to review the interpretation and implementation of regional norms in situations where potential conflicts between human rights treaties and other international treaties may arise, such as trade-related disputes.\(^{161}\) In such ways the constitutional block could provide support for interactions between SICA and domestic states, whilst the amparo distinctively serves as a procedural safeguard for implementation. Both constructs thus provide substantive and procedural mechanisms to support a multi-level rule of law in the region.\(^{162}\)

IV. CONCLUSION

This chapter engaged with a core judicial challenge identified in the thesis, namely, the indiscriminate transplantation of foreign doctrines through legal comparative methods not informed by history or other context. The investigation was focused on historical impacts of foreign influence on Central America’s intellectual development and legal scholarship production. The chapter was further concerned with the Central American Court of Justice’s Eurocentric and reductionist approach to comparative method. The analysis showed how foreign influence, coupled with the highly abstract nature of comparative studies in the subregion produced by scholars and judges, has generated an approach to legal integration scholarship and judgments that both fail to reflect historical

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\(^{162}\) Waldron, above n 45, 334–338.
regional experiences. The unwanted impact has been backlash by some domestic actors and courts who have called for new forms of interaction between regional and domestic spheres of law. Yet, even in the face of negative reaction by domestic actors, Central American scholars and subregional judges persist in their use of a discredited ahistorical approach to comparison.

The amparo and constitutional block transplant exercises have provided strong examples of effective comparative legal methodology. The analysis presents supporting evidence for ways to help transform the prevailing comparative methodology. The value of the amparo and the block as historical examples of successful transplants in the region strongly reinforce the core argument in the thesis that contexts matter when importing foreign legal concepts.
CHAPTER 6.

JUDICIAL DIALOGUE AND REMEDIES FOR BREACHES OF LAW AND RIGHTS: INSIGHTS FROM THE EEC/EU

I. INTRODUCTION

The previous chapter provided insights from comparative legal method to address judicial problems arising from the Central American Court of Justice’s approach to transplants. The SICA legal regime faces specific judicial and institutional issues related to that approach. These include the failure of Central American Court of Justices to establish proper dialogue with domestic courts and other judicial bodies outside of the SICA legal regime, and the failure to provide remedies for breaches of law and individuals’ rights within the integration regime. This chapter addresses ways to better tackle these judicial and institutional issues. It undertakes a contextualised investigation of the European integration experience where the intent is to draw insights about adaptation that apply to the country contexts of Central America.

SICA is an intergovernmental regime with supranational features such as a regional court, and at the same time its norms have direct effect within domestic legal systems. Yet, the regional court in Central America has had very little interest in promoting dialogue with domestic courts, and SICA has developed a legal regime with no remedies for breaches of law or individuals’ rights at the regional level. In these respects, Europe is an important case study as it shows a very different supranational regime that consolidated itself through dialogue between its regional court (the European Court of Justice) and domestic courts and other judicial bodies via the procedures of remedies and preliminary references. It also shows how the European Court of Justice, as well as the EU, have actively responded to the demands of domestic courts and catalysed the ratification of the European Charter of Fundamental Rights and Freedoms. This chapter is interested in how the European Charter of Fundamental Rights and Freedoms came to provide a platform by which the European Court of Justice consolidated its jurisdiction through adopting the language of rights within the integration regime. Lastly, this chapter shows the perils of supranationalism that SICA needs to avoid in consolidating its legitimacy and rule.
In this chapter, Part II details the historical and other contextual aspects of how Europe consolidated its model of supranational governance. The objective of the analysis is to produce a contextualised comparative account of European and Central American integration experiences. As such, Part II is focused on how Europe has developed a scheme where governance is ‘functionally’ moulded and constitutionalised through a ‘single market’ lens and through ‘subjectivation’ of integration treaties to afford rights to individuals. Part III produces some understandings regarding the SICA legal regime’s issues of judicial dialogue, and the issue of competing jurisdictions between the Central American Court of Justice with SICA’s economic dispute settlement procedures and US-DR-CAFTA panels. This part analyses how the European Court of Justice consolidated its defining features and doctrines of supremacy and direct effect through the procedures of preliminary reference and remedies. There is additional focus on its openness to establishing dialogue to address backlash from domestic courts and other judicial bodies. Distinctively, this did not entail sacrificing the functioning of the EU’s single market. Part IV provides understandings for the SICA’s institutional problem of lack of remedies for breaches of law and individual’s rights. Substantively, it proposes the development of a regional charter of rights for Central America. A sound basis for this is an adaptation of the European Charter of Fundamental Rights and Freedoms. This would necessarily be informed by features of Central American governance to increase the potential that a rights charter for SICA could provide a platform for remedies for breaches of law and rights in the SICA legal regime. Lastly, Part IV shows how supranationalism also has perils at the institutional level that SICA needs to consider cautiously, as shown in the example of how the EU attempted to tackle its 2008 monetary crisis.

II. CONSOLIDATING SUPRANATIONALISM

The European integration experience has been adopted as the global ‘model’ for regional integration.¹ In Central America, the model has been heavily reproduced and replicated within the region’s scholarship, and its doctrines adopted via adjudication by the Central American Court of Justice – typically in ways that neglect the historical and contextual

conditions of the respective integration experiences. This part of the chapter investigates the difference between European and Central American integration experiences in terms of supranationalism and how supremacy of EU norms was consolidated in Europe. The analysis accentuates the highly intentional nature of the move to create a supranational legal regime in Europe. This contrasts strongly with Central America, where states and domestic actors have had a deeper regard for autonomy and state sovereignty. Against that backdrop, the analysis aims to explain the conditions that supranationalism achieved which have not been replicated in Central America. Such analysis, it is contended, fills a gap left by the neglect of these conditions or *formants* as jurist Rodolfo Sacco termed them by the Central American regional court and scholars when transplanting European doctrines to Central America.²

Supranationalism, institutional design and mechanisms that include the *subjectivation* of treaties and the role of domestic courts in accepting the supremacy and direct effect doctrines, have been paramount in the transformation of Europe and consolidating the European legal integration regime. On the topic of institutional design, the European Union shows a stark difference with the SICA. The key institutions of the European Union comprise of the European Council, the European Commission, the regional parliament and the European Court. The European Council consists of the heads of state or government. It defines the EU’s political agenda through consensus.³ Although it has a co-legislating power with the EU parliament, it takes the primary decisions which set out the EU’s regional agenda.⁴ For its part, the EU Commission is in charge of initiating the EU-law making process, verifying the correct implementation of EU rules, negotiating international treaties on behalf of the EU with other countries and regions and implementing the EU budget.⁵ Meanwhile, the EU Parliament comprises of members elected by the public every five years.⁶ The Parliament functions to advise and supervise the implementation of EU laws.⁷ Although it has no direct capacity to initiate EU

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⁵ Arnell, above n4, 39-40.
⁶ Ibid, 33.
legislation, it provides a forum for its debate.\(^8\) Lastly, the European Court of Justice rules on the legality of EU acts and provides an interpretation on the limits of EU law.\(^9\)

It is important to note that the capacity of the EU to legislate over matters is not unlimited. This capacity is determined by the principle of conferral. As the treaty founding the European Union establishes, conferral requires that the EU to act within the limits of competencies granted by the EU treaties.\(^10\) Additionally, the EU founding treaty establishes that each EU institution shall only act within the competencies granted by the EU treaties and not overstepping the powers granted to other supranational institutions.\(^11\)

As discussed later, through the jurisprudence of the European Court of Justice, the competencies of the EU expanded to cover areas of governance outside of its competences, causing backlash from domestic courts in Europe. Yet, the European design shows that European Council, which is the only regional body in which executives have direct influence, has a specific role in regional governance. Unlike Central America, Europe has designed an integration arrangement where regional institutions have complete oversight on the production, application and verification of legal norms.

With regard to subjectivation treaties, as EU scholar Miguel Maduro points out, refers to the recognition of rights and freedoms embedded in the integration treaties, giving individuals capacity to seek remedies when states breach integration or regional norms.\(^12\) Subjectivation cleared a path by which European integration norms had direct effect and supremacy status in Europe. It was through the recognition of regional rights within the European legal integration regime that the regional court, the European Court of Justice, and domestic courts consolidated themselves as the main engines and transformed the integration process in Europe. This was done using the doctrine of proportionality. Through this doctrine, the European Court Justice was able to expand its jurisdiction and review both the forms in which European states implemented European norms and their impact on regional rights.

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\(^{8}\) Arnul, above n4, 33.

\(^{9}\) EU Treaty’Art 19(3)

\(^{10}\) EU Treaty, Article 5[1].

\(^{11}\) Eu Treaty, Art 13(2); see also Council of the European Union v European Commission (C-409/13) [2015] ECLI:EU:C:2014:2470 [64]

As noted in the institutional composition of the EU, Europe created a scheme that instead of consolidating executive rule at the regional level, promoted supranational governance and limited the influence from executives. As a result, regional institutions became the main drivers of integration transforming European governance through judicial rule and the doctrines of supremacy and direct effect. The European Court of Justice was able accordingly to consolidate the transformation of regional governance through the use of the proportionality principle and the subjectivation of treaties centred on recognition of individual rights within the European integration scheme.

These European experiences contain very different contextual understandings when compared with Central America. It means that insights concerning integration in Central America need to be informed by the defining features of Central American governance in order to be accepted by domestic courts and law-makers and create impact in the SICA legal regime.  

A. Different Origin Stories and Paths: Consolidating Supremacy and Direct Effect in Europe

The European integration experience was born at a similar time to its Central American counterpart. Yet, the conceptual and institutional bases of the two were radically different. Notably, the Central American integration experience was designed within a split or divided scheme. On one part, the political structure was developed under the umbrella of the 1950s Organisation of Central American States (ODECA). The ODECA was an institutional replicate of the Organisation of American States (OAS), instituted a few years earlier. As such, it was a mere intergovernmental body, dependent on executive will and diplomacy. On the other part, economic components of the Central American integration programme were embedded in the notion of ‘limited reciprocity’ and veneration of sovereignty. Both arms of Central American integration, the ODECA and the Common Market, consciously avoided any supranational elements within the new integration regime. The intention was to maintain the autonomy and sovereignty of Central American states within the regional arrangement.

For its part, the economic integration programme was intended to bring industrialisation to an ‘underdeveloped’ region. The integration plan for constituting the Common Market

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13 See discussion on reengineering of transplants in Chapter 5, Title III, part D.
14 See discussion of Chapter 3, Title IV, part B.
in Central America was intended to create regional industrial monopolies able to secure equal development rates across the region.\textsuperscript{15} That focus precluded any social or labour variables and merely prioritised industrialisation as the sole tool for development. The lack of social focus in the integration regime during the 1960s and 1970s, plus the disconnection between the ODECA and Common Market, led to a situation where this period brought very little improvement in the quality of people’s lives in Central America.\textsuperscript{16} Further, the policy agenda contained no platform to resolve disputes among the states in the face of unequal gains from the integration process. This meant failure to constitute procedures by which individuals could ask for remedies for breach of their rights within the legal integration scheme.

In regards to Europe in the 1950s, the continent was engaged in post-war rebuilding. Most of its states were already measured as ‘highly developed’, with strong levels of respect for the rule of law and strong employment and social security records. However, there was a considerable problem of nationalism. The new European integration programme had intended to tame this problem that had brought war in the previous decades.\textsuperscript{17} As such, integration through regional and international structures provided an alternative that could prevent a single European state from ever asserting its hegemony over the rest.\textsuperscript{18} As a footnote, this option was also favoured by the US through its Marshall Plan, which favoured integration as a mechanism to prevent new nationalist tendencies.\textsuperscript{19}

The resulting early manifestation of European supranational conceptual thinking came in 1951 in the form of the European Coal and Steel Community. The purpose of that community was to secure coal and steel production for manufacturing military armaments. To that end a new integration legal regime was created with the capacity to oversee the regulation of these resources – control prices, subsidies, trade and employment practices.\textsuperscript{20} In other words, European economic integration was conceived

\textsuperscript{15} Ibid.
\textsuperscript{16} See Chapter 3, Title IV, subtitle B.
\textsuperscript{19} Ibid.
as a mechanism that could ‘remove’ or manage the risks arising from domestic shortcomings of European states seeking to rebuild themselves after the war.21

Under this new European approach of ‘removing the shortcomings’ of member states for economic rebuilding and development, new regional institutions were born. The functions of the new institutions had strong impacts in domestic settings and far-reaching effects within legal domestic systems.22 They transformed the landscape of European governance, towards a supranational model.23 From this moment, European integration became a ‘function’ driven system, whose ends were regional peace and the construction of an ever-closer Europe through an economy-first scheme and specifically the creation of a ‘single-market’.24

‘Functionalism’ has a distinctly different meaning in this context of European integration compared to its meaning in the previous chapter regarding comparative law methodologies. Following Turkuler Isiksel in regard to functionalism in the European integration context, the concept characterises the European normative pattern for integration.25 In that function driven system, supranationalism became the main feature of governance.26 Function-based theories of regional integration, such as neofunctionalism, focus on the study of the integration process in institutional terms, namely studying the role of regional bodies and courts.27 Function driven integration relies on the creation of these new central institutions over state ones to solve common problems in the economic field.28

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23 Jeffrey T Checkel, ‘Regional Identities and Communities’ in Tanja A Börzel and Thomas Risse (eds), The Oxford Handbook of Comparative Regionalism (Oxford University Press, 2009) 47.


25 Isiksel, above n 11, 73.


27 Arne Niemann and Phillipe C Schmitter, ‘Neofunctionalism’ in Thomas Diez and Antje Wiener (eds), European Integration Theory (Oxford University Press, 2009) 47.

28 Fredrik Söderbaum, ‘Old, New, And Comparative Regionalism: The History and Scholarly Development of the Field’ in Tanja A Börzel and Thomas Risse (eds), The Oxford Handbook of Comparative Regionalism (Oxford University Press, 2016) 21; Paul Craig, ‘Neofunctionalism, The Legitimacy of Outcomes and the
Supranationalism became a new pathway for governing and transforming Europe. More than this, the insertion of supranationalism was a deliberate decision by part of European states from its inception. As Bruno de Witte points out, supranationalism was referenced in early instruments of European integration like the European Coal and Steel Treaty of 1951.\(^{29}\) That treaty was an extensive instrument – very different to Central American preference for short treaties. The *European Coal and Steel Treaty* was a detailed and legalistic document with broad regulatory provisions and institutional design.\(^{30}\) This preference for *extensive* treaties has continued in Europe as seen in the treaties constituting the European Economic Communities and European Union.\(^{31}\) The first treaty also contained the prototype version of the institutional composition of the European integration enterprise. This prototype version was very different to the ODECA’s or Central American Common Market intergovernmental design, which instilled the role of executives in all aspects of integration, from decision-making and creation of norms to later implementation.

Europe created a regional governance system with strong counter-balances to executive rule which could act independently from the will of executives. Accordingly, the first treaty created the following legal entities: the High Authority, mandating appointees from member states to act independently as the new regime’s executive with decision-making powers; the Assembly composed by members of state parliaments endowed with supervisory and advisory powers; the Council comprising a representative of each government, with consultative duties as representatives including some decision-making capacities; and additionally, a Court of Justice.\(^{32}\) As a result, supranationalism was embedded early and robustly in the European system, particularly with the creation of the High Authority and regional Court. This provides stark contrast with Central American institutions, in which weak secretariats were created to coordinate and support state action and decision-making processes, and given no supranational bodies to reinforce a deficit of executives that marked times of conflict between states.


\(^{30}\) Folsom, above n 9, 4–5.

\(^{31}\) Ibid 5.

The transformation of European governance ultimately was achieved through the work of supranational institutions, namely the work of its regional court and a novel form of interpretation of regional norms. This new interpretation was set out firstly with the 1962 Van Gend de Loos preliminary referencing case, by which the European Court of Justice gave an interpretation that European integration constituted a ‘new legal order in international law’ with the objective to establish and consolidate a single market. This new prototype of interpretation included giving regional norms the traits of direct effect, supremacy, and individual rights. Direct effect relates to the capacity of regional laws to be applied by domestic courts. Supremacy is the attribute of regional norms overruling domestic laws in domestic proceedings.

These notions were introduced by another European integration paradigmatic case: Costa/ENEL. In Costa/ENEL, a preliminary referencing case, the European Court of Justice mentioned again the special nature of EU law as a new regime of law. Moreover, the European Court of Justice continued with this interpretation stating that due to the specific nature of this new regime, the obligation derived from rules of the European legal integration regime cannot vary from state to state and cannot be overridden by domestic legislatures. This was done to ensure the function of integration across the borders of member states. This contrasts starkly with Central American governance, where the Tegucigalpa Protocol prescribes that decisions of the Council of Ministers need to adapt themselves to domestic law and circumstances. This exemplifies how there can be several forms of interpretation and application of these decisions in Central America depending on the context of the respective Central American country.

From these early interpretations, the European Court of Justice began to present a vision of an integration regime similar to a constitutional one. As European scholars Joseph Weiler and Miguel Poiares Maduro explain, this evolved in a time of stress within the

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34 Weatherill, above n 10, 153; however, other authors also consider implied powers as part of this new interpretation, see: JHH Weiler, The Constitution of Europe: "Do the New Clothes Have an Emperor? And Other Essays on European Integration (Cambridge University Press, 1999) 19–25.
36 Ibid.
37 Flaminio Costa v ENEL (C-6/64) [1964] ECR 587, [593] (‘Costa/ENEL Case’).
38 Ibid 594.
Union and a lack of legislative work by other community organs like the European Council. The 1960s saw a period of institutional stress including shocks in De Gaulle’s presidency and weakening support by member states. In the face of this the European court manifested itself as a beacon for integration. Through these early preliminary referencing cases, the European Court of Justice created a culture of judicial compliance embedded in legal doctrines such as direct effect and supremacy, thus tainting the integration system with constitutional undertones. As Maduro reveals, this constitutional undertone was further expanded during the 1970s through the jurisprudence of Article 30 of the Treaty Establishing the European Community of 1958.

A key political-economic implication of the Treaty Establishing the European Community of 1958 was how it came to transform and expand the nature of the coal and steel community. It broadened its scope to cover other goods and services, transforming the legal regime to that of a single market. Yet, the new treaty maintained the founding gene of European integration, the European Coal and Steel Treaty. The new treaty transformed the original High Authority to that of the Commission. Although the new treaty did not award powers as far reaching to the new commission, it had the main power to promote new regional law and to review the correct application of regional norms.

During this period, the European Court of Justice began to interpret treaty provisions in broad ways, which served the Commission to strengthen its role within the regime and give more effect to regional norms, thus granting more prerogatives to the Commission. This shows stark differences to the SICA’s early years. Although the SICA Economic Secretariat was handed similar power to the European Commission to oversee the correct application of regional economic norms, the Central American Court of Justice opposed and thwarted its ability to fulfil that mandate. This showed an incapacity of regional institutions to work cohesively and coherently in the new SICA, which led towards the creation of a new economic dispute settlement procedure away from the Central

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40 Weiler, above n 23, 30–31; Maduro, above n 3, 18.
42 Alec Stone Sweet, ‘The European Court of Justice’ in Paul Craig and Gráinne de Búrca (eds), The Evolution of EU Law (Oxford University Press, 2011) 133.
44 Craig and de Búrca, above n 21, 6.
46 See Chapter 4, Title III, part B.
American Court of Justice, thereby undermining its role and legitimate standing in the region.\textsuperscript{47}

B. \textit{Proportionality and Subjectivation}

The proportionality principle is a general principle of European governance by which European courts, especially the European Court of Justice, expanded competence to review activity in the region and within member states in every aspect related to integration.\textsuperscript{48} It has its origins in German administrative law and is heavily linked to the preservation of rights against negative effects of legislation.\textsuperscript{49} This principle was first recognised by the European Court of Justice in 1956 in the \textit{Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community} case.\textsuperscript{50} It was later consolidated in the \textit{Internationale Handelsgesellschaft} case, by which proportionality became linked to the preservation of the regional rights of individuals.\textsuperscript{51} Through this principle, the European Court of Justice has been able to review the limits of domestic policies and preserve European rule through a rights based approach to integration treaties, or what Maduro calls ‘subjectivation’.

As Maduro points out, Article 30 of the \textit{EC Treaty} not only presented a general principle of European law in the consolidation of the single-market, but also helped to enhance the effectiveness and legitimacy of European governance through ‘subjectivation’ of regional treaties.\textsuperscript{52} Subjectivation of treaties is transferred through recognition of rules and individual rights within the European integration regime. The process attained the rights of freedom of movement for individuals and their goods, direct review by the European courts as well of by the European Court of Justice, and individuals’ access to domestic remedies of member states.\textsuperscript{53} This innovation in article 30, as Maduro goes on to argue, not only gave the capacity to the ECJ to directly scrutinize domestic legislation, but also

\textsuperscript{47} Salvatore Caserta, ‘Regional Integration through Law and International Courts - The Central American and Caribbean Cases’ (iCourt Working Paper Series, No. 87, Faculty of Law, University of Copenhagen, 2017) 25.
\textsuperscript{48} Chalmers, above n 7, 233.
\textsuperscript{49} Craig and de Búrca, above n 21, 110; Chalmers, above n 7, 233.
\textsuperscript{50} \textit{Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community} [C8-55] [1956] ECR 11, 299.
\textsuperscript{51} \textit{Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel} (C-11/70) [1970] ECR 1125, 1134 (‘\textit{Internationale Handelsgesellschaft Case}’).
\textsuperscript{52} Maduro, above n 3, 9.
\textsuperscript{53} Ibid 25–26.
a heightened role to individuals for the protection of their own rights within the single market.54

The above innovations give the European integration its constitutional undertone. It was first held with the Simmenthal case, which established the duties of domestic courts to apply regional law in its ‘entirety’ and protect the rights of individuals conferred by these regional norms.55 Subsequently, as Armin von Bogdandy explains, through the language of Article 30 and cases such as the Dassonville,56 Cassis de Dijon,57 Casagrande58 and Cinéthèque59 the European court of Justice consolidated a ‘doctrinal constructivism’ of the vision of Europe and its legal infrastructure.60 This doctrinal constructivism is later compiled within the subsequent treaties after the EC Treaty, including the 1993 Maastricht Treaty,61 the 1997 Amsterdam Treaty62 and the 2007 Lisbon Treaty.63

The case law has established the nature of European law, as Maduro further notes. He explains that the European legal integration regime was conceived as an autonomous legal system, separate from the national and international systems, but with broad and deep effects on it.64 This autonomy can be traced to how European law is enacted with a capacity to regulate the conduct of individuals. Yet, it is separate from domestic law since it is not dependent on states for its creation, application and interpretation.65 Therefore, it is also different to the international legal order, given that it does not regulate relationships between states. Although it has its main sources in treaties, European law has created

54 Ibid 27.
56 Procureur du Roi v Benoît and Gustave Dassonville (C-8/74) [1974] ECR 837, 664 (‘Dassonville Case’).
57 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (C-120/78) [1979] ECR 649 (‘Cassis de Dijon Case’).
58 Donato Casagrande v Landeshauptstadt München (C-9/74) [1974] ECR 773 (‘Casagrande Case’).
59 Cinéthèque SA and others v Fédération nationale des cinémas français and Distribution of films in the form of video recordings (Joined cases C-60 and 61/84) [1985] ECR 2605 (‘Cinéthèque Case’).
65 Ibid.
other independent sources and authorities with direct impact on individuals.\textsuperscript{66} Therefore, like the Central American system, Europe has consolidated a monist system of public law, by which regional norms interact and have direct application within domestic legal systems.

Yet, different to Central America, European monism has developed alongside a series of principles governing interaction between European laws and domestic ones. The previously noted case law also shows the extension of the limits of European law over domestic legislation. With the use of the principle of proportionality, not only had the European Court of Justice assured itself the capacity to review almost any domestic regulation impacting EU rules, but additionally granted itself the power to oversee and determine the limits of implementation of these same rules. This gave the regional court, as well as other regional institutions, the capacity and penchant to rule in a ‘top-down’ fashion.

This top-down feature of rulings by the European Court of Justice was ultimately consolidated with the \textit{Simmenthal} Case. The case established the duties of domestic courts to apply regional law in its ‘entirety’ and to protect the rights of individuals conferred by these regional norms.\textsuperscript{67} This ruling contrasts starkly with the failure of the Central American Court of Justice to define the limits of Central American laws and the nature of the SICA legal regime. On one hand, the Central American Court of Justice is eager to adopt the view of the ‘autonomous nature’ of the European legal regime established by the European Court of Justice, even at the expense of provisions contained in the founding treaties of SICA. But on the other hand, the case law of the Central American Court of Justice has shown both the Court’s reliance on general international law, namely articles 26 and 27 of the \textit{Vienna Convention on the Law of Treaties} of 1969, as well as neglecting to expand it own standing in relation to the nature of the SICA legal regime.

By the 1990s, the EEC transformed itself to the European Union. However, during the 1970s and 1980s European integration already had taken steps to transform itself and constrain individual state influence. After the accession of Great Britain, Ireland and Denmark during that period, and with the ratification of the \textit{Single European Act}, a new

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\textsuperscript{66} Ibid.

\textsuperscript{67} \textit{Amministrazione delle Finanze dello Stato v Simmenthal SpA} (C-106/77) [1978] ECR 629.
institutional framework for the creation of European law was created. The new institutional framework was intended to remove the overriding influence of states over the integration project. The reform prioritised the procedure for the creation of new regional norms. This new procedure did not require any longer consensus among all state members of the Council. Rather, a new qualified majority procedure was introduced. This move finalised the shape of new regional dynamics and made the enactment of new norms quicker. It responded to the need to expand the single market with new member states, and to abusive practice of veto on the part of stronger states – as occurs currently within the SICA. This move in Europe to introduce qualified majority voting in enacting new regional legislation, plus the incremental role of the European Court of Justice and Commission shaped the dynamics in the decades to come, being instituted in new European Union treaties, like the Maastricht Treaty.

The Maastricht Treaty mentions as an objective the creation of an ‘area without frontiers’, able to promote economic and social progress that could lead to an economic and monetary union. The Amsterdam Treaty expands the substantive limits of the single market by introducing social provisions and the language of rights. It additionally incorporates the terminology of ‘European citizenship’. The Lisbon Treaty continues with this inclusion of social and economic rights language and mentions the role of the single market to promote these goals. The conventional, or constitutional evolution of the EU thus demonstrates that European governance has expanded to encompass revised goals, purposes and values. Characteristically, the revised aims are functionally grounded in the single market.

The Maastricht Treaty came also to codify the use of proportionality, as developed by the European Court of Justice through its case law. Proportionality, as well as other governing principles such as conferral, and subsidiarity (another heavily cited principle by Central American authors), have been recognised as competence-limiting principles between the EU and member states. ‘Conferral’, as mentioned previously, refers to the capacity of the EU being circumscribed by powers conferred to attain its objective of achieving the single

68 Chalmers, above n 7, 38.
69 Ibid 39.
70 Maastricht Treaty Article B.
71 Amsterdam Treaty Article 1[5].
72 Lisbon Treaty Article 1[4].
‘Subsidiarity’ entitles the capacity of the EU to act in non-exclusive state member competences insofar as ‘action cannot be sufficiently achieved by the Member States’ and can be better achieved at a union level.74 ‘Proportionality’ was conventionally defined as the capacity of the EU to act on ‘what is necessary to achieve the objectives of the Treaties’.75 As a consequence, the developing jurisprudence from the European Court of Justice, from its early to its current decisions, reflects a functional approach to integration intended for the establishment and preservation of the single market. This functional approach has resulted in the ECJ having a ‘top-down’ scheme echoed in the conventional and constitutional evolution of the EU. This refers to the creation of a scheme where subsidiarity is limited by proportionality and supranationalism is judicially enforced. Moreover, the European jurisprudence and conventional development have placed social matters, such as labour standards, under this single-market construct.76

The history and multiple other contexts comprising this review of European integration have made it possible to distinguish key conceptual differences between Europe and Central America. As discussed, the current Central American integration programme was the response to a need for peace-building and democratisation in the region. Thus, Central American integration has its origins in domestic constitutionalism and was constructed to address it within each member state. Distinctively, European constitutionalism was the aftermath of the judicialisation of the European integration regime after the war. As Weiler points out, the European integration project was born without any ‘constitutional demos’, and instead was functionally designed to create conditions to assure peace and prosperity in the region.77 Weiler goes on to note that the constitutionalising of Europe was achievable through the increasing activity of actors beyond the regional court accepting its rulings and the constitutional undertones provided by it.78 Therefore, Europe can be seen as a ‘constitutionalised’ autonomous legal regime and a function based integration system. Differently, Central America presents an integration system that

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73 EU Treaty, Article 5[1].
74 Ibid Article 5[3].
75 Ibid Article 5[4].
78 Weiler, above n 23, 226.
supports domestic constitutional frameworks and their transformation in securing regional social justice through human rights.

The SICA legal regime exposes weak accountability procedures. It also presents a legal regime where individuals have no effective access to remedies to safeguard their rights at the regional level. Consequently, the European supranational example could be helpful in Central America in the sense of consolidating more effective accountability and remedies procedures within the SICA legal regime. The dialogue created with domestic courts by the European Court of Justice has facilitated a legal regime where individuals have greater protection of their rights at the regional level. It has also allowed domestic courts to become involved in the development of the legal regime through judicial dialogue. Additionally, it shows how supranational governance has been relatively receptive to domestic demands in consolidating a legal regime that is responsive to individual rights. The European rights orientation is strongly suggestive that the development of shared valuation of rights between the centre and the states in Central America could provide a pathway whereby domestic courts could establish a more successful and open dialogue with the regional court.

III. INSIGHTS FOR JUDICIAL DIALOGUE

The analysis has shown how the European project has been ‘functionally’ driven towards the consolidation of its single market. It emphasised how it was the European Court of Justice’s ‘subjectivised’ treaty interpretation jurisprudence that set down the framework for the consolidation of the European integration scheme. Nevertheless, a narrow focus on the use and recognition of rights within the jurisprudence of the European Court of Justice could obscure other key aspects and triggers for multi-level judicial dialogue between the European Court of Justice and domestic courts. These other aspects include preliminary procedure, remedies, and backlash.

As Weiler mentions, the success of the European construction was not due only to the European Court of Justice’s functional interpretations. Weiler, and also Komárek contend that the development of the European judicial integration has been heavily reliant on work behind the scenes by domestic courts, using the preliminary referencing
mechanism resulting from individuals petitioning for remedies. Mattli and Slaughter expand on this observation by explaining that national courts, by using this preliminary referencing process, gained legitimacy when partnering with the European Court of Justice. The authors enhance this argument by stating that domestic courts use preliminary referencing in order to perceive themselves as part of the ‘community of law’.

Another ‘behind the scenes’ interaction between EU rule and domestic judiciaries concerns the development of effective remedies. In the European integration laboratory, the issue of remedies and enforcement of union law has been a strength of their legal regime. This can be traced to the European Court of Justice being mindful of its own limitations and not wanting to isolate itself from domestic courts when introducing the notions of supremacy and direct effect. Conversely, the Central American Court of Justice has been and currently still is unable to gain the trust of Central American states and individuals. This is seen in the development of traits where regional norms are repelled by the domestic courts, as well as in the failure to present effective remedies and procedures for the accountability of regional actors and states in the implementation of regional goals and purposes. Differently to the European Court of Justice, the Central American Court of Justice has forced the adoption of European doctrines via adjudication. In so doing it neglected to analyse the limits posed by SICA founding treaties, such as the Tegucigalpa and Guatemala Protocols.

Moreover, in forcing transplantation of European doctrines into Central America, the Central American Court of Justice has overlooked the manner and techniques by which these doctrines would be developed. They neglected to establish the use of preliminary procedures, remedies and the will of domestic courts to use them. As the fieldwork of Salvatore Caserta shows, the Central American context exhibits very few uses of

81 Ibid 196.
84 Caserta, above n 36, 26.
preliminary procedures. Caserta’s analysis shows there has been an overall lack of knowledge in Central America about how to file such procedures, on the part of both domestic courts and litigants.\(^85\) This has led to a view sometimes heard that the Central American Court of Justice is more an inter-state court rather an economic supranational court.

A last aspect of investigating the success of the European Court of Justice in consolidating successful dialogue with domestic courts as well as other type of judicial bodies, involves propensity to enter into judicial dialogue and actively respond to backlash from domestic courts. In contrast this, one of the serious challenges of the Central American Court of Justice involves its failure to respond to backlash. The Central American regional court has been unresponsive and maintained its interpretation, subsequently disregarding SICA treaties and domestic jurisprudence. In addition, the Central American Court of Justice needs is challenged to deal with issues arising from SICA’s economic dispute settlement system that can establish panels that may interpret SICA norms differently. Associated with this is a further issue of a competing legal regime, the \textit{US-DR-CAFTA}, in which arbitral panels may also, and have effectively proceeded to, interpret the nature and limits of SICA norms. Showing a strategic acumen from which the Central American Court of Justice could well learn, the European Court of Justice has been respectful of demands of domestic courts and other judicial bodies and moulded its interpretation to accommodate the views of domestic courts in a manner where it has not sacrificed the single-market function of the EU.

\textbf{A. Preliminary References and Remedies}

Both the preliminary procedure and remedies themes are techniques to ensure cohesion within a legal system. Moreover, and as seen in the European realm through the subjectivation of treaties, both themes have been exercised strategically by the court to create a ‘culture of compliance’ and advance both the dialogue of \textit{supremacy} and the \textit{direct effect} nature of regional norms within Europe.\(^86\) The Central American Court of Justice could gain significant levels of legitimacy from insights concerning the European Court of Justice’s strategic use of such procedures. This is because the preliminary referencing procedure represents an opportunity to construct dialogue between the

\(^{85}\) Ibid 28.  
\(^{86}\) Maduro, above n 3, 9–10.
Central American court of Justice and domestic courts. Meanwhile, remedies are important in the sense that they aid the consolidation of accountability in the region. They represent a bridge by which accountability could permeate the regional integration scheme, through measures that create links between the regional court and domestic ones and other regional bodies.

Further on the topic of preliminary procedures, and drawing on Karen Alter’s earlier-noted analysis of the European Court of Justice’s jurisprudence, the legitimacy of the European Court of Justice’s powers is given definition by the questioning of national courts of the application of European law.87 Early dialogue between domestic courts and the European Court of Justice helped to solidify a culture of compliance.88 Consequently, the use of the preliminary referencing procedure within the EU has been a precondition for the shaping of the European function of integration by way of small building blocks.89 This is a direct opposite conception to how the Central American Court of Justice has approached integration.

The Central American regional court has attempted, with a small number of controversial rulings dealing with disputes between main organs of the member states, and small usage of its own preliminary reference procedure, to assert a European view of integration in Central America.90 Conversely, it was dialogue between the European Court of Justice and domestic courts that helped to create compliance needs able to overcome stagnation in the European integration scheme. For the most part, it was through the preliminary referencing scheme that the European Court of Justice became a beacon for integration and a connection between individuals and the European supranational system. Therefore, the preliminary referencing procedure emerges as a significant judicial insight for Central American integration given its value for addressing the Central American Court of Justice’s failure to connect with individuals and domestic courts.

On the topic of enforcement of regional norms (remedies), this is a specific weakness of the Central American Court of Justice and the SICA legal regime. The failing can be

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88 Ibid 228.
89 Ibid 250.
90 Katrin Nyman-Metcalf and Ioannis F Papageorgiou, Regional Integration and Courts of Justice (Intersentia, 2005) 87.
generally attributed to how remedies are awarded in civil law courts in ways that are usually restricted to statutory law.91 The statute of the Central American court of Justice is silent on the topic of remedies. This raises a weighty question concerning whether individuals can bring suits against states that infringe their rights on regional matters, and if so declared, how the regional and domestic courts should provide remedies.92 Moreover, although the 2016 Rules of Procedure of the Central American Court of Justice addresses the notion of infringement of plaintiff ‘communitarian rights’, the newer bylaw does not mention whether individuals can bring suit to the court, or point to how there has not been one occasion where ‘communitarian rights’ are ruled in favour of individuals.93 Ultimately, the Central American court of Justice has been unimaginative and failed to detail standards for the application of remedies by domestic courts or regional bodies and states.

Conversely, it is possible to identify a behind-the-scenes mechanism that enhances the success of the European Court of Justice: the development of a doctrine of remedies based on individual rights. The use of rights language for remedies was settled through the 1976 Rewe and Comet cases.94 As Dougan explains, both cases have served as the basic framework for addressing issues related to ‘decentralised’ enforcement of regional laws in Europe.95 Dougan proceeds to identify two requirements to which the enforcement of treaty-based rights and obligations are subject:

‘the rules applicable to Treaty-based actions (first) cannot be less favourable than those relating to similar domestic actions and (secondly) cannot in any case make it impossible in practices to exercise rights derived from Community law. Those requirements have since become known as the principles of equivalence and effectiveness (respectively).’96

The success of the European Court of Justice from the beginning can be attributed to the implementation of equivalence and effectiveness principles to provide domestic courts with discretion needed to implement regional laws. Also, the European Court of Justice has coupled itself with other regional institutions, such as the European Commission, in

92 See: Estatuto de La Corte Centroamericana de Justicia [Statute of the Central-American Court of Justice], Opened for Signature 19 December 1992, 1821 UNTS 280 Arts. 22 and 39 (‘CACJ Statute’).
93 Ordenanza de Procedimientos [Rules of Procedure] Arts. 79 and 82.
94 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (C-33/76) [1976] ECR 1989; Comet BV v Produktchap voor Siergewassen (C-45/76) [1976] ECR 2043.
95 Dougan, above n 72, 411.
96 Ibid.

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selective enforcement of regional laws and creating a ‘habit of obedience’.\textsuperscript{97} By having judgments that create or enforce rights for individuals, domestic courts find it easier to assure the enforcement of regional norms when breached. This scenario is entirely different to the Central American one, where the Central American Court of Justice has customarily declared which norms have been violated without providing precision on how this affects the individual. This has created a domain of ineffectiveness and failure to apply and remedy breaches to regional norms.

**B. Judicial Dialogue with Domestic Courts and Other Judicial Bodies**

Its lack of response to backlash has produced issues for the Central American Court of Justice that impede the implementation of foreign economic doctrines in Central America. Since its statute grants the Central American Court of Justice (non-negotiable) overreaching powers, not only have member states opted to not ratify its constitutive treaty but have also created a new economic dispute settlement procedure, taking over its economic competence. Moreover, Central American states have signed the \textit{US-DR-CAFTA}, which grants arbitral panels the power to revise the implementation and compatibility of SICA norms with \textit{US-DR-CAFTA} provisions.

Conversely, the European Court of Justice has shown openness to dialogue with other judicial bodies in areas of preserving the nature of the EU legal regime. The European Court has dealt with domestic backlash and developed innovative ways to be responsive to domestic sensibilities, based on respect for rights and the intrinsic features of the states.\textsuperscript{98} The analysis continues with an explanation of the dialogue that marks interactions between the European Court of Justice and other judicial bodies, such as domestic courts, arbitral tribunals and panels.

**1. Domestic Courts**

Preliminary referencing and remedies procedures have served to establish a platform for the recognition of the \textit{supremacy} and \textit{direct effect} notions of community law in the European case. However, judicial dialogue has also asserted certain conceptual limits in the EU on both \textit{supremacy} and \textit{direct effect}. This limitation comes in the form of the

\textsuperscript{97} Maduro, above n 3, 9–10.
\textsuperscript{98} See discussion in Chapter 2.
doctrine of equivalent protection or Solange.99 These terms refer to the notion of transfer of sovereign duties to international bodies in order to uphold communal values insofar as they maintain or afford the same or ‘equitable’ levels of protection for fundamental rights.100 In this sense, states can delegate certain legality review functions to international adjudicators, however with the caveat of maintaining a sovereign link to guarantee fundamental rights in a case of possible violation of the international body.101 This principle was later adopted by the ECJ in its landmark decisions Kadi I and II.102 The case reviewed the application of UN’s Security Council resolution by part of the EU. However, the ECJ found that, in both cases, UN standards do not uphold similar or ‘equitable’ standards for the protection of fundamental rights to those in force in Europe, and so do not merit compliance.103

Solange was the result of the collision of the ECJ functional construction of Europe vis-à-vis fundamental rights guaranteed by constitutions of member states, as seen primarily in the Internationale Handelsgesellschaft case.104 In a first instance, Solange I, the German Constitutional Court made express reference to the ECJ findings regarding the supremacy of European regional law.105 The reaction of the German Constitutional Court was that although the ratification of the Rome Treaty opened the legal system to make room for direct effect of regional norms in Germany, it did not however allow changing the basic structure of the constitution.106 Under this presumption, the German Constitutional Court stated that the guarantee of fundamental rights is a main component of the German Constitution.107 Consequently, the Court reasoned that in the case of a

106 Ibid.
107 Ibid.
conflict between regional law and guarantees of human rights, since the European integration regime and institutions lacked accountability measures to safeguard fundamental rights comparable to those of Germany, it could not give direct effect to the regional norm.\textsuperscript{108}

In a second judgment, the German Constitutional Court provided a pathway for regional governance to overcome the original Solange I argument. In the Solange II judgment, the German Constitutional Court recognised that the European Court of Justice jurisprudence, as well as the respective developments of the European Parliament, Council and Commission in adopting a declaration recognising the ‘exercise of their powers and in pursuance of the aims’ of European integration, had thereby introduced the language of rights as one of the values of integration.\textsuperscript{109} By doing so, the German Court recognised that it would not intervene if equivalent levels of protection for fundamental rights were afforded in the regional governance system.\textsuperscript{110}

In its application of boundaries to regional law, it is to be noted that the response of the German Constitutional Court has not been an isolated action in Europe. The Italian Constitutional Court delivered a similar opinion in its Frontini Case that aligns with the Solange II argument.\textsuperscript{111} The Italian case has been used by the Central American Court as a reference point to assert the supremacy of regional law over domestic.\textsuperscript{112} However, the Central American Court failed to review how that case was specifically about settling equivalent protection boundaries to support EU supremacy.\textsuperscript{113} In this sense, the Italian Court recognised that the European integration scheme was its own source of law, with direct effect and binding on European citizens.\textsuperscript{114} In addition, the Italian Court’s review

\textsuperscript{108} Ibid.
\textsuperscript{112} File 10-05-11-1996 (Judgment) (Unreported, Central-American Court of Justice, 5 March 1998) 290 (‘University Title Recognition Case’).
\textsuperscript{113} Ibid.
focused on the development of the jurisprudence of the European Court when reviewing the legality of regional law that could potentially harm the rights or interests of individuals. From their analysis, the Italian Court recognised both the character of regional laws and the capacity of the European Court of Justice as the guardian of regional rights, relinquishing its own responsibility to review European law. However, the Italian Court made a caveat to that recognition stating that in the final instance only the Italian Court could review the compatibility of European law with the Italian Constitution and guarantee that the prior cannot violate fundamental rights recognised by the latter.

After the original Solange I and II judgments, the German Constitutional Court reviewed again their interpretation of the limits to European law. In Solange III, the German Court reviewed the Maastricht Treaty and defined more expansively the requirements for the transfers of sovereignty to the EU. As Juliane Kokott explains, the Court did not change its position from Solange II, rather it defined how under the new Maastricht Treaty the German Constitutional Court would have the capacity to revise the possible ultra vires character of European law. In Solange IV, the German Court would review European law only insofar as determining if the minimum level of human rights protection was not being guaranteed by EU institutions.

In a more recent development, the Spanish Constitutional Tribunal declared a distinction concerning the character of European regional law. For the Spanish Court, regional law does not possess a supremacy character, rather a *primacía* (primacy or first choice) application. In other words, European law does not possess a superior hierarchical position of domestic laws, in the same way that ‘conflicts of law’ character can be reviewed under the ‘supremacy’ of the Spanish Constitution. Therefore, European law can be constricted and reviewed under Spanish law if it conflicts directly – as in the Italian

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115 Ibid 639.
116 Ibid 640.
117 *Bundesverfassungsgericht* [German Constitutional Court] (1994) 33 I.L.M. 388 (‘Solange III’).
121 Ibid 11.
and German cases – with fundamental rights recognised in the Constitution and basic components of the Spanish state.122

The previous examples demonstrate that even in the European realm domestic high courts have struggled with how to reconcile the notion of supremacy of European integration law vis-à-vis domestic constitutional law. Even when delimiting the competencies and powers of the European Court of Justice, domestic high courts seem reticent to surrender their kompetenz-kompetenz jurisdiction over the European Court.123 These same arguments have been posed by domestic courts with regard to the Central American integration regime.124 Central American domestic high courts, particularly the Costa Rican and Salvadorian Constitutional Chambers of their respective Supreme Courts, have placed limits similar to their European counterparts on the competencies of the regional court.125 Moreover, they have called for new ways to reimagine the interaction between regional law and domestic law.126

However, in the case of Central America, there has been no response by the regional court to promote a dialogue that could generate solutions for this conundrum. Meanwhile, as detailed by Svetiev, the rulings in Solange and in the Italian and Spanish high courts in recognition of ‘equitable protection’ related to the boundaries of EU law have meant that domestic high courts have settled when to ‘defer’ to the European Court of Justice.127 More specifically, domestic high courts have displayed deference to the European Court protection of the single market, and other regional institutions, as long as they do not intrude on fundamental rights.128 The result of this view, as Svetiev notes, has been identification and creation of platforms on which regional bodies could build and reflect.129

122 Ibid 12.
124 See again discussion in Chapter 2, particularly in relation to the interpretation of primacia given by the Costa Rican Constitutional Chamber of its Supreme Court and comparison with the solange doctrine.
125 See discussion in Chapter 2.
126 See response of the Constitutional Chamber of the Salvadorian Supreme Court to the Central American Court of Justice, Chapter 4.
128 Ibid.
129 Ibid.
A deeper investigation of the Spanish interpretation of interaction between EU law with domestic that gives primacía to EU rule (rather than supremacía), helps to further clarify this deferential approximation and more cohesive interaction between EU law and constitutional law. It makes it possible to see how this promotes the safeguarding of sovereignty and hierarchy of the Constitution, which Central American states are likely to find appealing given its accordance with provisions that award superior status to domestic laws found by the Tegucigalpa Protocol. Appeal of this could also facilitate recognition of the autonomy and speciality of regional law, which may be applied in a choice of law (or conflict of laws) scenario by domestic judges to secure the boundaries of regional laws in Central America. In such ways, within Central American regional monism, judges and the Central American Court of Justice would come to respect domestic constitutions and an awareness of hierarchy within domestic contexts. By awarding mere first choice application, domestic sensibilities that have been included within the SICA founding treaties are more likely to be taken into account.

2. Other Judicial Bodies

Unlike the Central American Court of Justice, the European Court of Justice has not been severely limited in the exercise of the performance of its functions. Additionally, European states have not signed an extraterritorial free trade agreement that would present a competing economic legal regime in the European region. On the first point, the European Court of Justice was successful in blocking the creation of other regional courts in Europe. The European Court of Justice delivered an opinion regarding the creation of a European Patent Court and a European Economic Court.130 In consideration of the European Patent Court, the opinion of the European Court of Justice was that this new court would be illegitimate insofar as it would remove prerogatives of domestic courts in applying EU law.131 In considering a new European Economic Court, the European Court of Justice emphasized that the existence of a new court would undermine the homogeneity of application of Community law.132

131 Opinion delivered pursuant to Article 218(11) TFEU - Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties (O-1/09) [2011] ECR 1137, 1172 [80] (‘ECPA Opinion’).  
132 Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade
A significant implication for the SICA in Central America however, is that the European Court of Justice has engaged in dialogue between itself and judicial bodies from other legal regimes. Regarding that dialogue between the European Court of Justice and other judicial bodies of other legal regimes, it is fair to point out that the case law of the European regional court has shown some openness towards these other types of tribunals. Initially, in the *Broekmeulen* case the ECJ interpreted that any authority which may ‘affect the exercise of rights granted by Community law’ may use the preliminary reference procedure to obtain an interpretation of the compatibility of EU law with other legal regimes applicable in Europe, but outside of the European legal integration regime.133

The European Court of Justice interpretation aimed to assure the ‘proper functioning’ of Community law.134 In this line of argument, although the European Court of Justice has shown openness towards certain types of special tribunals – even domestic tribunals acting as arbitration tribunals – it has made clear that international tribunals are under no ‘obligation’ to use the preliminary reference mechanism of the European Court of Justice.135 Nevertheless, under this premise the European Court of Justice has accepted the preliminary reference of the industrial arbitration tribunal in *Danfoss*.136 Furthermore, the European Court of Justice reasserted its capacity to receive a preliminary reference from a taxation arbitration tribunal in the *Ascendi* case.137 In that sense, the implication for Central America of the existence of a separate inter-state economic dispute settlement scheme does not necessarily mean a divergence of interpretation of law within the SICA legal regime. Using the Central American Court of Justice’s preliminary reference system, economic inter-state arbitral tribunals under the SICA’s economic subsystem may engage in dialogue with the Central American Court of Justice on the interpretation of certain regional provisions.138

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134 Ibid.
136 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* (C-109/88) [1989] EUR 3199, [7],[8],[9] (‘*Danfoss Case*’).
137 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* (C-377/13) [2014] EUR 1754, [28],[29] (‘*Ascendi Case*’).
138 *CACJ Statute* Art. 22 (k).
Conversely in the European realm, the statute of the Central American Court of Justice does not prescribe that the preliminary reference should be done by a member state’s domestic court. Rather, the statute only mentions that any ‘judge’ or ‘judicial tribunal’ may ask the Central American Court of Justice for its opinion concerning implementation of the regional norms of the SICA’s legal regime. This open provision could additionally include any arbitral tribunal under the SICA’s Economic scheme or the **US-DR-CAFTA**. However, the Central American Court of Justice would need to reform its preliminary referencing procedure’s provisions within its *Rules of Procedure* of 2014. The necessity comes about because that rule closes down potential preliminary referencing from arbitral tribunals, such as those from the SICA’s economic subsystem and those created under the **US-DR-CAFTA**, by only allowing references from member state’s judges or tribunals.

IV. INSIGHTS FOR BREACHES OF LAW AND RIGHTS: THE EUROPEAN CHARTER

The analysis is now focused on producing new understandings concerning the SICA’s institutional problem of failing to provide redress for breaches of law and individuals’ rights at the regional level. In this regard it investigates the value of developing a Central American Charter of Rights for SICA. The discussion is based on an assessment of the impact of the *European Charter of Fundamental Rights and Freedoms* and its potential compatibility with the features of Central American governance.

In SICA, human rights have played a key role in the region’s return to democracy. Central American constitutionalism is marked by its recognition of the necessity to uphold human rights through constitutions or treaties. Central American constitutions and SICA constitutive instruments reflect this feature by explicitly recognising human rights in charters and treaties, as well as in the detail of procedures providing remedies to them. This had made recognition of rights a trigger for the integration movement under a broader social justice scheme in Central America. Rights are intrinsically embedded and have become not only legitimating instruments but also the language for governance. Therefore, although rights are recognised in other conventional instruments (both

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139 Ibid Art. 22(k).
universal and inter-American), in Central America rights have further significant status as proxies for defining policies and governance processes.

There is however an institutional challenge for integration in Central America concerning the failure to recognise regional rights and to develop procedures that assert accountability of executive action for breaches of regional norms and rights at the regional level.\textsuperscript{141} Although some regional rights have been recognised, these are not specific or justiciable at either regional or domestic level of the legal system. Although Central American constitutive treaties have expressed aspirational respect for human rights and the development of individuals’ capabilities, there has never been an occasion where Central American regional institutions, including the regional court, have recognised regional justiciable rights.\textsuperscript{142} In Central America, where many member states are civil law countries, there is a need for express or formal recognition of rights in order to obtain redress for violation.\textsuperscript{143} Recognition of rights encompasses the use of particular constitutional procedures to obtain remedies for violations.

In the European experience, the enactment of the \textit{Charter of Fundamental Rights} has been used to grant more legitimacy to the integration project and was a response to the regional rights-based jurisprudential development of the European Court of Justice. Meanwhile in Central America space seems to be opening for parallel developments. It is possible to see a heightening of recognition and direct effect of international human rights instruments within Central American constitutionalism. This is highly suggestive that a \textit{Central American Charter} could be a timely innovation. It could aid the process of subjectivation of integration treaties in the region. A Charter could further serve to anchor the multiple SICA treaties and lay down their capacity for enforcement onto individuals and other actors, whether regional or domestic. This could create a direct link between the SICA and individuals. The recognition of human rights via treaty in relation to


\textsuperscript{143} Merryman and Pérez-Perdomo, above n 80, 26.
integration aspects could subjectify other regional treaties and thus enable scrutiny by individuals and other actors. The potential achievement of subjectivation of treaties would provide another key element of Central American constitutionalism and a path for the consolidation of the integration project.

The European jurisprudential evolution codified in treaties shows that recognition of regional rights has been paramount in the consolidation of the European regional arrangements. The recognition of these rights did not undermine the function driven system, rather they promoted a governance scheme by which new limits were imposed on both regional and local institutions and actors. As Mathias Kumm explains, the introduction of regional integration rights in Europe reflected the cultural and aspirational sensibilities of member states to promote and protect fundamental rights after the war. However, human rights were not acknowledged as part of EU law until the Maastricht Treaty. Due to the expansion of European governance, the recognition of human rights became paramount as a means to secure its role in integration. Recognition of human rights would come to provide an additional layer to the constitutionalisation of European law and an opportunity to assert a single market function conjointly with domestic institutions, namely domestic courts. This recognition would take shape as the European Charter of Fundamental Rights.

The EU Charter contains a series of civil and political rights, replicating those of the European Convention on Human Rights. Nevertheless, the EU Charter introduces a series of economic, social and regional citizens’ rights. The European Court of Justice has made clear that when applying the EU Charter in domestic contexts, a provision of the charter must be applied directly in relation to an EU norm. This would avoid any

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145 Isiksel, above n 11, 109.
146 Kumm, above n 98, 114.
147 de Búrca, above n 133, 480.
151 Rosas, above n 137, 17.
misconception or direct competition between applications of the *European Convention on Human Rights* and the EU *Charter*. This keeps human rights contained within the single function and helps provide legitimacy for it.

To reiterate discussion in previous chapters on the limits of international human rights instruments in Central America,\(^{152}\) the courts’ recognition of conventional rights has been a catalyst to enforce social and economic policies benefitting individuals and has created new progressive obligations for states.\(^{153}\) With the introduction of the constitutional bloc in the region, fundamental rights have gained new meaning and force, thus becoming innovative parameters for governance. This same situation could be replicated at the regional level with the introduction of a charter on fundamental rights in Central America. Then, similar to the European *Francovich* decision, fundamental rights could be tied to the positive application of regional norms by member states of regional institutions.\(^{154}\) As seen in the European example, this charter would not need to compete with the developments and instruments developed under the Inter American Human Rights system, which the Central American Court of Justice has no competence over. Specifically, the Central American regional court cannot review any right recognised under the *American Convention on Human Rights*,\(^ {155}\) as shown in the review of competencies of the Central American Court of Justice. As such, Inter American rights are not reviewable by the Central American regional court and instead are covered by domestic courts, which is similar to the recognition of civil and political rights in multiple domestic Central American Constitutions.

The inception of a Central American Charter could fill the vacuum left by the Inter American system and currently by domestic courts and construct a new conceptual inquiry into the limits of the SICA and how it could transform to become a legitimate system with Central American constitutional undertones. These inquiries would need to take into consideration the new dimensions of application of Central American law. This involves the need to review existing procedures and remedy systems within the integration framework that show systemic deficiencies, or do not even exist. An inquiry would need to take into further consideration how a charter could affect

\(^{152}\) See Chapter 2, Title IV, part A.


\(^{154}\) Andrea Francovich and Danila Bonifaci and others v Italian Republic (Joined Cases C-6/90 and C-9/90) [1991] ECR 5337, 1-5414 [34],[35],[36] (‘*Francovich Case*’).

\(^{155}\) See discussion in Chapter 2.
regional laws and the interplay with domestic laws. It is expected that a charter could provide greater legitimacy to the Central American regional court, since it would provide the Central American Court of Justice with a platform to become the main interpreter of the legality of the SICA legal regime. In turn this contains strong potential to advance dialogue between it and domestic courts – pro-active through initiating preliminary references or remedies, as opposed to reactive by ignoring backlash.

V. PERILS OF SUPRANATIONALISM: THE 2008 EURO CRISIS

The analysis to this point has been focused on how European integration gradually expanded both conventionally and judicially to cover different areas of governance intended to constitute and constitutionalise the single market across Europe. This expansion has grown in several areas of governance, including human rights. Moreover, the growth of a market driven functional regional governance scheme has stimulated the creation of strong regional institutions, such as the European Commission and Central Bank. At the same time, the development of strong institutions under a market driven function of integration has led to a managerial approach to integration. As an unwanted consequence this has sidelined the role of regional and domestic parliaments. Additionally, it has led to the creation of a top-down model economic model with no capacity to respond to systemic failures, as demonstrated by the 2008 Euro Crisis. The 2008 crisis is a crucial lesson for Central American integration, because it shows the need for democratic scrutiny within the integration regime and within domestic responses to regional crisis. The Eurozone crisis produced further lessons for the Central American region on the perils of deep integration without adequate democratic input.

The challenge of economic integration in Central America has been delegated to the Guatemala Protocol and its route for economic integration that was based on the EU Balasian model. That involved the creation of a monetary and financial integration regime similar to the EU, which arose from European influence to adopt a similar model to their one. As Weiler mentions, although the European Court of Justice gave impetus to integration in Europe, this was not one-directional in its self-interest.157

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157 Weiler, above n 23, 33.
Intergovernmentalism was needed for European states to accept regional laws as binding and enhance the activity of regional institutions.\(^{158}\) In other words, the European regional court could conduct itself independently without undermining state power in its work to enact laws to which the European court was bound.\(^{159}\) Nevertheless, Maduro has pointed out that the key turning point of European governance was the relationship established between the European Court of Justice and individuals.\(^{160}\) Maduro argued that link ultimately achieved the effect of not only aiding creation of an accountability process and legitimizing EU rule, but also helping to extend the competencies of EU institutions.\(^{161}\)

The success of conventional development in the EU can be attributed to the codification of jurisprudential activity. Through the exercise of their implied powers or the interpretation of the European Court of Justice, EU institutions have steadily extended their competencies.\(^{162}\) This is seen in the conventional development of European treaties. The European Commission has been most favoured in this power expansion effort. As Maduro explains, the type of norms used for economic integration to advance freedom of movement could be used to challenge almost any area of national legislation.\(^{163}\) This trait of EU rules that makes them able to reach almost any area of governance within states has meant the European Commission could expand its powers to assure the ‘correct’ construction of the single market.\(^{164}\)

As previously mentioned, the genesis of the European Commission was the High Authority in the European Coal and Steel Community.\(^{165}\) Since that time, the Commission has been empowered with the duty to serve as a monitor or ‘watch-dog’ of European treaties.\(^{166}\) Due to the development of the European Court of Justice’s functional jurisprudence, the powers of the Commission grew to regulate and monitor compliance with EU rules in a new vast landscape of single market rules that were opposable to any domestic laws.\(^{167}\) As Moxon-Browne has understood, the European Commission is

\(^{158}\) Ibid 36.
\(^{159}\) Ibid.
\(^{161}\) Ibid 10–11.
\(^{162}\) Ibid 12.
\(^{163}\) Ibid.
\(^{164}\) Ibid.
\(^{165}\) Moxon-Browne, above n 10, 72.
\(^{166}\) Ibid.
currently more than a mere secretariat; rather it is a body similar to an executive that blends both supranational and intergovernmental features.¹⁶⁸

With the ratification of the *Maastricht Treaty*, member states not only codified function driven jurisprudential developments in Europe, but also expanded European governance through regional institutions like the Commission – all within the function market driven paradigm.¹⁶⁹ The Treaty also settled the baselines of a new strong monetary and institutional framework of the EU.¹⁷⁰ In these structures the *Maastricht Treaty* included two new facets for deeper economic integration. The first reflects how monetary union competence was given exclusively to the European Central Bank (ECB). The second shows how other modes of economic integration like fiscal were given to member states under soft law frameworks.¹⁷¹ In sum, states received power to design their own budgets and to tax how they felt necessary, albeit losing control over the management of their actual currency.¹⁷² More accurately, and significantly, not all EU members have adopted the European currency.¹⁷³ It turned out to be the case that non-adoptions of the Euro currency enabled these countries to provide more adequate and timely domestic responses to the Euro crisis, rather than be forced to wait for collective decision-making at the regional level.¹⁷⁴

The design of the European currency system was linked to the establishment of a technocratic body, the ECB, in order to promote price-stability and further economic integration – although without democratic accountability.¹⁷⁵ As Joerges comments, the financial crisis was the result of varying socio-economic conditions, including credit rates within the EU.¹⁷⁶ These conditions, coupled with weak accountability measures on

¹⁶⁸ Moxon-Browne, above n 10, 72.
¹⁷² Ruiz Almendral, above n 160, 9.
¹⁷³ These include: Bulgaria, Croatia, Czech Republic, Denmark, Hungary, Poland, Romania, Sweden, and the United Kingdom
¹⁷⁵ Joerges, above n 158, 29.
taxation, the Eurozone, and the Euro, were more than a single currency could sustain. When the financial crisis first struck the US, and later moved to European institutions, the response was inadequate in terms of currency devaluation or currency control innovations. The ECB predicated its response on a broad interpretation of its mandate, which it claimed was necessary to resolve the issue. This has led to technocratic interpretation of EU rules, or managerialism as discussed in Chapter 4 regarding Central America. Koskenniemi points out that managerialism typically seeks to replace state-created law with policy-making by rational actors or specialists. This has led to the failure to institutionalise political accountability within EU structures. It has further triggered the removal of domestic state capacities to stabilise solvency crises. In other words, as Joerges has pointed out, the EU created ‘state[s] without markets’ and a ‘market without states’ without any strong political and democratic avenues to redress systemic issues.

The crisis of 2008 has meant that a managerialist trait persists in Europe. By way of pushback, member states ratified the Treaty on Coordination, Stability and Governance, or Fiscal Compact. This treaty displaces the capacity of any corrective mechanism that may be attained by member states under the control of the European Commission. Ultimately this recent conventional move ensures the capacity of EU regional institutions to determine the route of European integration. The Eurozone crisis sheds light on the implications of deep economic integration that lacks an equivalent degree of political engagement. The crisis raises an added need to address democratic deficits inherent in managerialism. This manifests in the managerialist vision of European integration.

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177 Ibid.
179 Tuori, above n 159, 9.
181 Koskenniemi, above n 169, 15.
182 Joerges, above n 165, 11.
183 Ruiz Almendral, above n 160, 9.
184 Joerges, above n 158, 31.
undermining the legitimacy of EU governance. Weiler remarks on how democracy, including within a supranational system, depends on accountability and representation.\textsuperscript{187}

The Eurozone crisis uncovered a critical lack of democratic accountability at both the EU level and at the level of EU interaction with domestic institutions. To explain, at the EU level integration has a democratic body – the European Parliament. However, this organisation has no capacity to scrutinise other regional institutions or enact laws, such as its domestic counterparts have. From its beginnings under the \textit{Rome Treaty}, the European Parliament has had the same capacities that the Central American PARLACEN holds today. In other words, the parliament could merely hand out advisory opinions without any real norm-enacting capacity.\textsuperscript{188} Over time the European Parliament has gained new powers, mainly supervisory over the Commission. However, it is currently still sidelined in its capacity to enact laws – which remains in the domains of the European Commission and Council.\textsuperscript{189} In other words, although the European Parliament should be a body that can challenge EU policies in safeguard of individuals’ rights, it has no power to do so.\textsuperscript{190}

At the domestic parliament and EU interface level, democratic failure is demonstrated by how the ECB and European Commission dictate fiscal and monetary policies in a managerial mode with no clear limits on who would be responsible in case of crisis. This severely weakens European monetary governance, leaving it incapable of response to systemic challenges. The implication, as earlier mentioned, is that subsidiarity is relinquished from domestic parliaments or domestic Central Banks, thereby affecting the capacity to determine pathways to solve their own crisis or deal pre-emptively with regional systemic issues. Furthermore, the lack of central political tiers of governance within the EU has made the regional governance inefficient in its responses to crisis. A crucial impact is that this makes it hard for individuals to hold accountable regional or national policies and actors in moments of crisis.\textsuperscript{191}

\footnotesize{\textsuperscript{187} Weiler, ‘Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy’, above n 68, 100.  
\textsuperscript{188} Ward, above n 6, 24.  
\textsuperscript{189} Ibid 44–45.  

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To explain the implication of subsidiarity, this is a judicially recognised principle of the EU codified under the Maastricht Treaty, together with other principles including conferral and proportionality. Subsidiarity entitles the EU to act in non-exclusive state member competences insofar as ‘action cannot be sufficiently achieved by the Member States’ and can be better achieved at a union level.\(^{192}\) Conferral refers to the delimited capacity of the EU concerning its sole conferred powers to attain the objective of a single market.\(^{193}\) Whereas, proportionality was conventionally defined as the capacity of the EU to act on ‘what is necessary to achieve the objectives of the Treaties’.\(^{194}\)

Subsidiarity is very different in the case of Central America. Its integration regime is seen as subsidiary to the main role of executives in governing. The Central American integration regime is not completely autonomous regarding the role of executives. More accurately integration extends local settings to support the actions of states when integrating and so defines the part that will implement this. ‘The part’ (of executives) is defined by constitutional provisions; that is, executives have explicit mandates within the integration regime. They are bound to reviews. However these are primarily at a domestic level rather than regional level. The same applies with norms, where explicit provision in treaties gives supremacy to domestic legislation, as a democratic safeguard and to ensure the adequacy of regional norms.

In the case of Europe, the Subsidiarity Protocol is attached to the Amsterdam Treaty, emphasising that subsidiarity is a judicially enforceable principle.\(^{195}\) However, to date the ECJ has not applied subsidiarity with a purpose to strike down an EU act or norm.\(^{196}\) In Estonia v Parliament and Council case of 2013, the Court only mentioned that when reviewing the subsidiarity of EU acts or directives in this case, these should not be

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\(^{192}\) Ibid Article 5[3].
\(^{193}\) EU Treaty Article 5[1].
\(^{194}\) Ibid Article 5[4].
reviewed as a whole but rather each provision considered individually. Furthermore, in 2015 the General Court mentioned that subsidiarity cannot be applied in areas where the internal market has application. This makes it possible to argue that subsidiarity has lesser force than the European integration functional approach. This is seen in the *Vodafone* case, where the Grand Chamber interpreted that the legislative powers given to the EU should be reviewed under broad discretion. Under this vision, the Grand Chamber mentions that a community legislature that introduces a ‘common approach’ to the ‘smooth functioning of the internal market’ that does not infringe on the principle of subsidiarity. As a consequence, the developing jurisprudence from the ECJ, from its early decisions to current ones, reflects a functional approach to integration purpose-built to establish and preserve a single market under managerial rule.

Turning to implications for Central America, as intimated the 2008 Eurozone crisis and its response show not only the perils of deep integration but also the challenges faced by developing a system under a market driven function and democratic deficit. The contemporary form of the Central American system exhibits the same deficiencies that dogged early stages of European integration. This can be traced to embedded centralism within Central American intergovernmentalism. The existence of many secretariats within the SICA has further led to managerialism. Thus, the lack of democratic accountability via control by the regional parliament (PARLACEN) and by domestic parliaments has fuelled democratic deficits in the Central American case. In addition, the failure to include justiciable rights in regional forums has impeded the construction of a regional legitimate authority, whether judicial or intergovernmental in nature.

The SICA Parliament has no direct accountability control over either SICA institutions or states when implementing regional norms and policies. And currently, some member states including Honduras and Guatemala are moving in a fragmented way towards deeper integration. This makes it necessary to create clear norms and rules when addressing deeper integration and accountability of regional governance. They are needed to ensure maximum benefits for individuals. This was recognised by the main instrument

198 Kingdom of Spain v European Commission (T-461/13) [2015] ECR-SC 891, [182].
199 Ward, above n 6, 45–47.
200 The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform (C-58/08) [2010] ECR I, 5044 [52] (‘*Vodafone Case*’).
201 Ibid 5050 [76–77].
of the SICA, the *Tegucigalpa Protocol*, in its mention of the need for the integration process to promote democratic participation by all social sectors.²⁰²

Further undermining the integration process is the weak and ineffectual role of the Central American Executive Committee, which adopted the role of its counterpart in the European Commission. Meanwhile, the PARLACEN finds itself under heavy scrutiny because it represents a heavy economic burden for states without holding any real powers.

Nonetheless, these shortcomings of heavy institutional fragmentation and weak regional bodies do not incapacitate the integration vision. Central America still has the capacity to reform and transform itself institutionally into a more democratic regional system. Notable differences with Europe need to be kept in mind concerning the stage reached in integration. Europe has gone through a ‘constitutionalisation’ process. Whilst Central America has developed an integration process that transfers the potential to further constitutionalism in the region. Feasibly, the SICA may not need the same strong centralised institutions that European integration has. Instead, these could be entities strategically tasked to promote Central American integration and consolidation of constitutionalism within the states. At the end of the day, the European case shows the hazards of deep integration and strong managerial institutions. Central America needs deep understanding of this in order to make changes to enhance the democratic features of the SICA at both the regional level and in the interaction between domestic congresses and regional bodies.

VI. CONCLUSION

The European integration experience has generated understandings with the potential to help the SICA legal regime accomplish its objectives. These objectives relate to dual failures of the Central American Court of Justice: one, to establish dialogue with domestic courts and other regional judicial bodies; and two, to provide remedies for breach of law and individuals’ rights at the regional level. To shed further light on how to proceed, the analysis in this chapter focused on conceptual differences between Europe and Central America in developing their own integration programmes. Europe developed a supranational governance structure to create strong counter pressures to domestic states.

²⁰² *Tegucigalpa Protocol* Art. 4(f).
Differently, Central America developed a model by which executives of member states have centre stage in defining the regional policies.

Working through these differences, the chapter concentrated further on the relevancy for Central America of the consolidation features of the European legal regime. This refers to judicial dialogue and the creation of remedies for breach of law and individual’s rights. The chapter was especially interested in how dialogue of domestic courts with the European Court of Justice that engages both the proportionality principle and the procedure of preliminary reference, and additionally responds to domestic judicial backlash, has enabled a constitutional regional system in Europe. This constitutional regional system has increased the possibility for individuals to obtain remedies at the regional level. It has done so while consolidating strong regional bodies including a regional court and commission, and in due course led to the development of a regional charter. Clearly, the Eurozone crisis provides a warning of the risks of deep economic integration and the lack of individual democratic responses to regional crisis. The crucial lesson for Central America is the necessity for democratic accountability at the regional level, which would put regional issues at the forefront of impending considerations.
CHAPTER 7.
LACK OF OVERARCHING FRAMEWORK, AD HOC DEVELOPMENT, FRAGMENTATION AND OVER-EXPANSION: INSIGHTS FROM ASEAN

I. INTRODUCTION

Beyond the judicial realm, the SICA legal regime faces other problems. These are conceptual and institutional in nature. Three broad concerns are of special interest: first, the lack of overarching legal framework and principles and ad hoc development which has led to the fragmentation of the SICA legal regime into many subsystems; second, institutional over-expansion; and third, the overriding influence of executives. The thesis turns to the Southeast Asian integration experience (ASEAN) to elicit understandings about these problems.

ASEAN provides an alternate, distinctive approach to regionalism and integration. The distinctiveness derives from its decision to not follow the European ‘supranational’ model. Instead, the ASEAN model was based on an ‘intergovernmental’ approach to regional governance and integration. The ASEAN intergovernmental approach is the result of historical developments, external intervention, and vast social and cultural diversity within the region. At the epicentre of this intergovernmental approach, the term the ‘ASEAN way’ plays a crucial role in Southeast Asian regionalism.

The guiding purpose of this chapter is to consider how the ‘ASEAN way’ not only represents an historical reaction to the region’s past and current choice of comity arrangement between its members, but also a method of engagement with international ideas and norms. This engagement approach has led to the effective localisation of international norms via heavy socialisation and local procedures.

The analysis is further focused on how ASEAN has transformed itself though its ‘blueprint’ exercise. This exercise has led to the introduction and development of short, medium and long term objectives in the ASEAN integration regime, helping to fulfil its fundamental aim to transform the region into global ‘production hub’. Through the blueprint exercise, executives have pushed for deeper integration among themselves without sacrificing the ‘ASEAN way’ and have been able to promote an integration regime that responds to its contextualising challenges.
The purpose here is gain understandings about ASEAN that could inform future actions for SICA to tackle its problems. The chapter is developed in four parts. The next one, Part II, delves into the history of ASEAN and its icon ‘the ASEAN way’. The analysis identifies similarities between Central American and Southeast Asian intergovernmental approaches towards regional governance. Part III analyses the ASEAN reconceptualization process by which the blueprint exercise and the localisation of foreign concepts made it possible for ASEAN to transform itself after the Asian financial crisis of 1997-1998. It further considers how the reconceptualization process facilitates new forms of scrutiny of executives, which at the regional level meant the incorporation of soft-law instruments and the development of short, medium and long term objectives. A crucial finding in this part is that the reconceptualization process provides insights on how to deal with the strong intergovernmentalism feature of regional governance in Central American integration, and the underlying conceptual limits exemplified by lack of overarching legal principles and ad hoc development. Part IV identifies ASEAN problems of intergovernmentalism and explains strategically how these could be avoided by SICA in pursuit of deeper integration.

II. ASEAN IN CONTEXT: SIMILARITIES AND DIFFERENCES

While the norms of intergovernmentalism provide an excellent comparative feature of the integration processes in Central America and ASEAN, there are significant intrinsic similarities and differences which this section focuses on. Both ASEAN and SICA share the trait of executive predominance and rely upon member states to implement regional integration policies. However, in social and cultural terms the regions are vastly different with distinctly different historical challenges and conceptual differences. In considering these differences and similarities, the analysis reflects on the extent to which ASEAN’s evolution could be attributed to its main policy agenda known as the ‘ASEAN way’. Its value and significance in the regional arrangement is assessed in terms of its ‘trademark’ value for Southeast Asian integration. The analysis considers the historical nature of the values of the ASEAN way to highlight the significance and consequences of ASEAN’s creation through the decolonization period in the second half of the 20th century.
A. Intergovernmentalism and Sovereignty: History of ASEAN

It is helpful for comparative purposes to reiterate that Central America has been influenced by foreign ideas and legal doctrines whilst being subjected to overbearing interventions by foreign actors, particularly the US, and most intensively during the Cold War era. During that period under US influence, Central American states acted repressively against their citizens through military dictatorships. In the 1980s, to move away from repression the region placed its confidence in a different kind of intervention. This intervention involved sympathetic South American countries – the Contadora Group – and the EU who shared support for peace-building and democritisation processes in the region. The policy agenda resulting from this new wave of foreign intervention was the Esquipulas process. The Esquipulas process launched a new integration program, the Central American Integration System (SICA), alongside a new constitutional drive encompassing social justice, human rights and democracy. It also gave rise to many peace processes that took place in the region during the 1990s.

The key implications of these developments have featured as key tenets of the argument in this thesis that the failure to construct an over-arching legal framework with short, medium and long term accountable objectives and ad hoc development have plagued the SICA legal regime. This has been demonstrated by its adverse impacts: fragmentation, managerialism, failure to provide accountability for public actors involved in SICA, and an integration system containing very few remedies and an accountability deficit.

The analysis now turns to the comparative case of ASEAN. Founded on 8 August, 1967, ASEAN currently comprises 10 member states: the founding states, Indonesia, Malaysia, the Philippines, Thailand and Singapore, and the more recently incorporated states of Brunei Darussalam (1984), Vietnam (1995), Myanmar (1997), Laos (1997) and Cambodia (1999). Like the SICA, ASEAN was also created as a result of regional struggles during the Cold War era. Unlike the SICA, ASEAN was founded as a political,
collective reaction in Southeast Asian states to counter extra- and intra-regional threats and interventions particularly attributed to communist expansion.³

ASEAN was born during the 1960s decolonisation movement.⁴ However the emergence was sometimes progressive and sometimes not. The latter gave rise to a significant feature of ASEAN creation: the Konfrontasi. This refers to Indonesia’s opposition to Malaysia’s new birth and the former’s efforts to assert its hegemony in the region by fomenting instability in the region and especially in Malaysia and Singapore.⁵ Thus, differently to Central America, ASEAN’s collective response was a consequence not only of the interference of major powers escalating during the Cold War, but also of rising domestic intra-regional disputes and rivalries.⁶ The result has been consolidation of a regional response in ASEAN that viewed – and still views – intervention, both intra- and extra-regional, as intolerable.⁷

Another difference with Central America is that regional peace in Central America was consolidated through legal procedures and ratification of a series of treaties with aspirational goals, entrusting a regional court with determining compliance. In contrast, ASEAN preferred methods of diplomacy to solve regional disputes, particularly in its early stage. Diplomacy meant the use of detailed soft law instruments, and informal dispute resolution.⁸

Throughout the 1970s, ASEAN became a platform for the recognition of self-determination and independence of additional Southeast Asian states.⁹ A big part of the interest and commitment to ASEAN was that interconnections between ASEAN states were forged in large part by mutual respect for sovereignty, territorial integrity and non-interference in other states’ affairs.¹⁰ This policy agenda became known as the ‘ASEAN

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⁴ Piris and Woon, above n 1, 11.
⁶ Miles Kahler, ‘Regional Institutions in an Era of Globalization and Crisis’ in Miles Kahler and Andrew MacIntyre (eds), Integrating Regions: Asia in Comparative Context (Stanford University Press, 2013) 21.
⁷ Ibid.
⁸ Deinla, above n 2, 5.
⁹ Louise Fawcett, ‘Driver of Regional Integration: Historical and Comparative Perspectives’ in Louis Brennan and Philomena Murray (eds), Drivers of Integration and Regionalism in Europe and Asia: Comparative Perspectives (Routledge, 2015) 41.
¹⁰ Piris and Woon, above n 1, 11.
way’. The key message it transmits is non-interference in and mutual respect for the self-determination of ASEAN members.\textsuperscript{11} The ‘ASEAN way’ responds to a prevailing regional aspiration of respect of sovereignty and limitation of competition between its member states.\textsuperscript{12} As Imelda Deinla writes, ASEAN’s pursuit of regionalism is inextricably connected with nation-state-building of this kind.\textsuperscript{13}

This ASEAN approach to integration had to be renegotiated by member states in the late 1980s and 1990s at the end of the Cold War. As Miles Kahler points out, by that time ASEAN comprised ‘minimum welfare states, and relatively open global economy, sustained by a strengthened global trade regime’.\textsuperscript{14} Such openness to the global economy meant that ASEAN members had come to see each other as rivals. This led to member states directly competing with each other to try and attract foreign investment.\textsuperscript{15} This can be seen in the movement by ASEAN states to drop import-substitution policies and enter a stage of extra-ASEAN investment liberalisation.\textsuperscript{16} During this period, intra-ASEAN investment was marked by more protectionist standards than extra-ASEAN investment.\textsuperscript{17}

Economic rivalry was not the only negative aspect of ASEAN regionalism. Another drawback of the ASEAN way emerged as a lack of political solidarity among the region’s governments. This can be seen in member states’ unwillingness to publicly discuss the domestic affairs of other members. Subsequently, member states began to distance themselves from discussions of human rights and democracy, and developed toleration for authoritarian and repressive regimes rather than intervention tendencies.\textsuperscript{18}

Southeast Asia continues to differ from Central America in many important ways. For instance, in linguistic and broader cultural ways Central America is a relatively


\textsuperscript{12} Cesare Onestini, ‘How Do We Assess Cooperation between Regional Organisations? EU and ASEAN as an Example of Region-to-Region Cooperation’ in Louis Brennan and Philomena Murray (eds), Drivers of Integration and Regionalism in Europe and Asia. Comparative Perspectives (Routledge, 2015) 258.

\textsuperscript{13} Deinla, above n 2, 3–4.

\textsuperscript{14} Kahler, above n 6, 21.

\textsuperscript{15} Cho and Kurtz, above n 11, 16.

\textsuperscript{16} Ibid 17.

\textsuperscript{17} Ibid.

\textsuperscript{18} Li-ann Thio, ‘Implementing Human Rights in ASEAN Countries: “Promises to Keep and Miles to Go before I Sleep”’ (2014) 2 Yale Human Rights & Development Law Journal 1, 1.
homogenous region. Politically, Central American states are mostly representative democracies, and have experienced almost 200 years of state-building. They have also experienced similar slow rates of economic development, resulting mainly in low-income households (with the exceptions of Costa Rica and Panama). They also face shared challenges of state-building, including high levels of corruption and weak rule of law. Last but not least, Central America’s main trading partner has been and continues to be the US.

Southeast Asia has distinctly different characteristics. ASEAN states emerged in the 1960s decolonisation era in ways that reflect contrasting realities, contexts and development rates within ASEAN. Socially, ASEAN is highly diverse, with a rich plurality of ethnic groups, languages and other cultural representations.19 ASEAN countries depict hugely disparate levels of economic development. This includes some of the world’s wealthiest countries (Singapore, Brunei), and some of the poorest (Myanmar and Laos).20 Commercially, ASEAN states have been historically open to foreign trade, ensuring their development with many extra-regional partners.21 This can be seen in the ‘ASEAN-Plus’ approach to negotiation. This transfers intent by the region to enter agreements with other major regional powers – China, Japan and Korea – not just for the enlargement of market size, but also to ‘lessen the potential for domination of a single power and thus maintain the member states’ sovereign independence’, as Deinla has understood.22

Politically, not all ASEAN states are democracies. Similarly, not all have adequate interest in human rights.23 Rule of law in the region varies significantly, with high and strong institutionalisation of the rule of law in Singapore’s case, juxtaposed by very low and weak institutionalisation in such country cases as Laos and Myanmar.24 ASEAN presents similarly mixed results when it comes to the incorporation of human

20 Ibid.
21 Ibid.
22 Deinla, above n 2, 12.
23 Simon Hix, ‘Institutional Design of Regional Integration: Balancing Delegation and Representation’ in Miles Kahler and Andrew MacIntyre (eds), *Integrating Regions: Asia in Comparative Context* (Stanford University Press, 2013) 44.
24 Deinla, above n 2; however, it is contested that Singapore has a ‘rule of law’. Although Singapore certainly ranks high in RoL indicators, these same indicators do not consider other standards by which legal rules are enforced. See: Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press, 2012).
rights provisions in their constitutions and legislation. Some constitutions, such as Brunei’s, have no human rights provisions; while other states, including Vietnam and Singapore, have more extensive recognition of rights. Additionally, judiciaries in Southeast Asia are not as open to engagement with foreign or international sources, including on human rights, compared with judiciaries in Central America. This gives Southeast Asian states a characteristic dualist approach to human rights, while Central American states take a more monist and homogenised approach.

ASEAN also does not have any supranational features or even a regional judiciary that could provide redress and remedies for human rights violations. As this chapter goes on to develop, ASEAN’s deep engagement with the economic aspect of integration demonstrates neglect of other fundamental aspects of integration, such as human rights verification processes domestically and regionally. At the international level, ASEAN member states approach international human rights instruments in different and varied ways. Significantly, not all ASEAN states have ratified the International Covenant on Civil and Political Rights. Moreover, most have not ratified the first Optional Protocol of the Covenant that accepts the jurisdiction of the Human Rights Committee to review domestic acts and legislation under the Covenant.

Weak regard for human rights law in ASEAN is explained by the comments of states’ spokespeople who have declared that ‘ASEAN values’ do not follow the universalist

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26 Ibid.
31 Both Myanmar and Malaysia have not ratified this instrument: http://indicators.ohchr.org/.
32 Only the Philippines has ratified the first protocol, while Cambodia has only signed it. Meanwhile the rest are not parties: http://indicators.ohchr.org/.
intents and purposes of human rights. In contrast, according to Li-ann Thio, ASEAN attitudes seek to characterise Southeast Asian values as ‘disciplined, group-oriented rather than atomized, and valuing duty to the community over the assertion of rights’. This explanation is shared by authors such as Hsien-Li Tan who assert that human rights represent western values belonging to former colonial powers. One inference of those explanations is that opposition to human rights also makes it possible to justify intromission of sovereignty and non-intervention into ASEAN matters. Thio and other authors comment on this is that while human rights represent alienating threats to the dignity and distinctiveness of ASEAN member states, opposition to rights serves as an apology to authoritarianism and even evokes it as an alternative means of development.

Today, ASEAN is in a transformation process from a mere economic association towards a regional community. This new community has three divisions, or subcommunities: the Economic community (AEC), the Political-Security Community and the Socio-Cultural Community. In accordance with the ASEAN 2025 blueprint named ‘Forging Ahead Together’, the Political-Security Community has an objective to promote values related to democracy, the rule of law and the development of human rights and peaceful coexistence in the region. Meanwhile, the Social-Cultural Community develops the aspect of ASEAN related to quality of life, promotion of the rights of minorities, protection of the environment and preservation of identity and heritage. Lastly, the AEC is charged with promoting economic development in the region through the creation of an integrated regional economy that may compete at a global level.

In regard to the central importance of the regional economy in the integration process, there are differences in how Central America and Southeast Asia are pursuing deeper economic integration. Both regions have made this goal the flagship of their regional

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33 Thio, above n 18, 2.
34 Ibid.
35 Hsien-Li, above n 29, 64–65.
36 Thio, above n 18, 2.
38 Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together, signed 22 November 2015, Provision 7 and 8 and see ASEAN Political-Security Community Blueprint.
39 See ASEAN Social-Cultural Community Blueprint 2025
40 See ASEAN Economic Community Blueprint 2025.
enterprises. In Central America, states launched the first customs-union on the continent, following the EEC/EU model (between Guatemala and Honduras, and with El Salvador and Nicaragua wanting to join). In Southeast Asia, the counterpart is the ASEAN Economic Community (AEC). It was designed to position the region as a ‘global production-base’, and as such has been key to the region’s ongoing development and transformation after the Asian financial crisis of 1997-1998.41 In these respects, ASEAN has followed a different path of economic integration, compared with Central America (and Latin America), and also in contrast to Europe.

ASEAN has pursued its economic integration schemes based on trade-liberalisation and greater openness to foreign investment.42 This has led to fragmentation. The origins of this can be traced to decisions by member states to increase ratification of Free-Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) with other extra-regional partners. This led to fragmentation of commercial and investment governance schemes in the region, and to the erection of protectionist barriers between member states in ASEAN. This was a significant contribution to the 1997-1998 financial crisis.

B. *The ASEAN Way*

As explained, the notion of the ASEAN way encapsulates a distinct vision for Southeast Asian regionalism that transfers not only unique regional identity and contours, but also drives its principal purpose to respond to security threats through integration.43 In the practice of policy, the ASEAN way is exercised through intergovernmental dialogue between member states, with the aim of protecting their sovereignty. It is also practised through the process of creating and enforcing regional norms, and through the (limited) functions of regional institutions.44 The choice of intergovernmentalism is fundamental to the formation of regionalism in Southeast Asia because it respects the differences between ASEAN member states and the rich cultural diversity in the region. Significantly, ASEAN intergovernmentalism does not infringe on the sovereignty of member states.

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41 Deinla, above n 2, 2.
This has meant the regional organisation has acted only with the consensus of its members at every stage of development. 45

Thus the success of ASEAN evolution cannot be attributed to supranational levelling of national tariffs by supranational bodies, as in the case of Europe. Rather, ASEAN success can be seen in terms of persuasion, deliberation and consensus of member states and ASEAN officials to create norms and resolve disputes that threaten their objectives. 46 The result has been the slow development of an integration regime granting its General-Secretariat with very limited functions and capacity, and minimal construction of effective compliance mechanisms for regional norms. 47

Distinctively different to the EU, the ASEAN way represents an integration regime not bound to the creation of an autonomous union separated from state intervention, with independent and supranational institutions with powers to propose, supervise and execute policies to complete a single market for an ‘ever closer’ region. The latter signals that ASEAN is a ‘dialogical’ intergovernmental regime with a strategic intention was to create an integration process that benefits the respective nation-state building efforts of member states. 48 Again contrary to Europe, ASEAN has not needed or relied on a German-French kind of partnership to drive integration. Rather, ASEAN development has been conceptually conditioned by the actions of member states – every member – every step of the way. 49

The implication is that neither ASEAN nor its dispute settlement bodies nor courts of member states have transplanted the supremacy and direct-effect nature of regional norms, either judicially or conventionally. This did transpire in Europe, and controversially in Central America. In other words, ASEAN has not followed the EU path of creating an autonomous regime of law. Instead, it has created a regime based on the enhancement of member states through a complementary policy agenda. As Asian IR scholar Amitav Acharya clarifies this, it has been an agenda that is subsidiary to their own internal regimes. 50 In other words, ASEAN has created a regime embedded

45 Kahler, above n 6, 8.
46 Ibid.
47 Ibid.
48 Deinla, above n 2, 3–4.
49 Onestini, above n 12, 262.
in international law with a dualist relationship between it and domestic legal systems. At the same time, their norms do not have direct impact within legal systems. This is demonstrated by how ASEAN members prefer to use soft-law instruments.

The contours of the ASEAN way were legally recognised in the 2007 *Charter of the Association of Southeast Asian Nations*. The instrument upholds the principle of member states’ ‘respect for the independence, sovereignty, equality, territorial integrity and national identity’ of other member states, as well as the principle of non-interference in the internal affairs of member states.\(^{51}\) The *Charter* also prescribes the nature of the integration regime, gives it legal personality, institutional form and distinctive dispute settlement mechanisms. As former ASEAN Secretary-General Rodolfo Severino describes it, ASEAN is an integration project made by member governments and as such it works by consensus and in the self-interest of members.\(^{52}\) One impact has been that ASEAN institutional development is limited by state activity. It has meant that the integration process is steered by meetings of functionaries of the executive, based on the socialisation (via diplomacy) of rules between its member states.\(^{53}\) This resembles the SICA decision making process, where executives dominate all facets of norm creation and implementation.

In terms of institutional design, the ASEAN way presents a stark contrast to Europe’s supranational system and – to a degree – Central America’s hybrid system. Although there are dispute-settlement arrangements to which members are appointed, as Beckman argues, these international dispute-settlement panels have been untested which makes it difficult to predict whether the procedure intensifies regional integration or enhances monitoring and compliance of norms. This is because Chapter VII of the ASEAN Charter does not require member states to use the dispute-settlement system in case of disputes. This is in stark contrast to the EU judicial system. At the same time, a lack of strong dispute-settlement arrangement has not undermined ASEAN’s capacity to act as a ‘regional architect’. As Cremona et al show, ASEAN member states have successfully

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\(^{51}\) *Charter of the Association of Southeast Asian Nations* Signed 20 November 2007 2624 UNTS 223 (Entered into Force 15 December 2008) Art. 2.1 [a] and [e] (‘ASEAN Charter’).


built partnerships through ASEAN and wider regional forums like ASEAN plus and ASEAN Regional Forum to further their own goals.

In terms of regulatory design, ASEAN rule-making powers are exclusively imparted to the ASEAN Summit.\(^{54}\) This means that regional norms are approved by consensus of regional executives. The multiple ministerial councils are delegated the function of providing recommendations and drafting final versions of instruments to be signed at Summits.\(^{55}\) ASEAN Committees and *ad hoc* groups like the Eminent Persons group produce inputs for policy development.\(^{56}\) The Secretariat plays a similar role as a policy formulation body. As discussed later in the chapter, the Secretariat also aids the Ministerial Council in obtaining information to assess compliance with blueprints (plans) by part of member states.\(^{57}\)

However, as former ASEAN Secretary-General Severino has discerned, alongside the intergovernmental nature of ASEAN and member states’ deep attachment to the ASEAN way, another trait characterises Southeast Asian integration. This involves economic openness to the rest of the world and to the international market.\(^{58}\) Particularly between 1980 and 1990 this openness meant that ASEAN countries individually ratified an extensive array of FTAs and BITs with other extra-regional partners.\(^{59}\) Yet these actions attest more to rivalry than mutuality. They involved member states competing for foreign investment and developing extensive prerogatives to attract foreign investors. Adverse impacts include the inability of respective ASEAN member states to respond to the 1997-1998 financial crisis in the region.

The financial crisis was fuelled by rapid credit expansion in the region that led to asset price inflation.\(^{60}\) The corporate and banking sectors were too weak or unwilling to respond, leading to the depreciation of most currencies in the region. This led to rapid withdrawal of foreign investment capital, and consequently to economic recession.\(^{61}\)

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\(^{54}\) Deinla, above n 2, 171.

\(^{55}\) Ibid.

\(^{56}\) Ibid.

\(^{57}\) Ibid 172–173.

\(^{58}\) Severino, above n 48, 5.

\(^{59}\) Dent, above n 19, 185–196.

\(^{60}\) Cho and Kurtz, above n 11, 25.

\(^{61}\) Ibid.
1997-1998 Asian financial crisis made ASEAN member states more aware of the limitations of their regional arrangement and motivated them to seek solutions.\(^{62}\)

During the same period, Central America was facing its own serious issues. The ECLAC and IDB had presented its report for the restructuring of the Central American integration programme. They proposed a reform model for the SICA that augmented its intergovernmental character and took powers away from regional institutions. This proposal was rebutted by key regional bodies (the Central American Court and PARLACEN), thus stalling the reform process. From this moment, Central American integration was side-lined from the regional strategic policy agenda. Yet, the jurisprudence of the Central American Court as well as regional scholarship defended supranationalism. This shows evident neglect of highly relevant experiences elsewhere, such as the ASEAN response to its ensuing crisis.

From their side, the regional nature of their financial crisis gave ASEAN members a new platform to respond as a collective.\(^{63}\) This ultimately led ASEAN member states to rethink their integration strategy, an exercise that showed attention to the rise of China in the global market and a rivalry-inducing aim to re-attract foreign investment and capital.

III. ASEAN’S RECONCEPTUALIZATION PROCESS

The focus of analysis in this part is on the transformation process in ASEAN following its 1997-1998 financial crisis. ASEAN’s post-crisis modernisation is a significant point of comparison with Central America concerning the latter’s incapacity to effectively reform or modernize its integration process. Since 1994, the SICA has been in a continuously unsuccessful reconceptualization process. Included in the reasons for this is the asserted failure by part of Central American states to agree on short, medium and long term goals and purposes for their integration program. The on-going reconceptualization process had been hoping to launch reform to help SICA institutions regain previous impetus through re-structure. No concrete action eventuated, to the current time.

Contrary to Central American integration inaction, ASEAN countries managed to transform regional integration after the 1997-1998 financial crisis. The crisis afforded an opportunity for member states to change their approach to integration and make new

\(^{62}\) Basu Das, above n 38, 16.

\(^{63}\) Cho and Kurtz, above n 11, 25.
efforts for accountability within the integration regime, without sacrificing the ASEAN way as the guiding image. It meant that to an extent ASEAN was able to supplant deep-seated protectionist and competitive tendencies, and to deliver a new route for integration characterised by an open-regionalism approach. The financial crisis made it necessary for ASEAN states to leave behind mistrust of each other and to search for a joint solution to economic problems. This was achieved by the formulation of ‘blue-prints’ and the localisation of international norms or concepts.

Particularly in the pluralist contexts of Southeast Asia, the localising of open regionalism has been important for the development of ASEAN’s integration regime. ‘Open regionalism’ refers to the plan that encourages states to liberalise their markets and conceive integration as a step towards the insertion of states into the global economy.\(^{64}\)

The analysis now turns to the ‘blue-print’ exercise and norm-subsidiarity process and their potential for producing specific understandings of how SICA should tackle fragmentation, which this thesis has traced to its lack of overarching legal structure, ad hoc development, and institutional over-expansion, in the context of strong executive dominance.

A. Blue-print System

ASEAN’s solution to its 1997-1998 financial crisis involved a whole reconceptualization of integration. This was based on the creation of a single market in the region, to enable Southeast Asia to become a production base for the many FTAs ratified by ASEAN member states.\(^ {65}\) This approach to integration, as Jacques Pelkmans notes, is predicated on two conceptual grounds considered twins: a single market, and the promotion of the region as a ‘production base for segments of global value chains’.\(^ {66}\) This new concept of integration was presented in the 1997 *ASEAN Vision 2020*, and later reaffirmed in the 2003 *Bali Declaration* on the ASEAN Economic Community.\(^ {67}\) The *ASEAN 2020 Vision* calls for ‘closer economic integration within ASEAN’.\(^ {68}\) On its part, the *Bali Declaration* envisages the creation of the ASEAN Economic Community (AEC), to create a

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\(^{64}\) On a previous discussion on the topic see Chapter 3, Title IV, part C.

\(^{65}\) Basu Das, above n 38, 16.


\(^{67}\) Siow Yue Chia and Michael G Plummer, *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions* (Cambridge University Press, 2015) 75.

competitive ASEAN economic region with a ‘free flow of goods, services, investments and freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020’.  

To help implement the vision of an AEC, the ASEAN Summit created a ‘High Level Task Force’ on ASEAN economic integration. As noted by Plummer and Chia, the Task Force came up with four recommendations: first, to accelerate ASEAN integration by laying down clear deadlines for specific objectives, particularly in the areas of tariffs, non-tariff measures, customs, services, investment, intellectual property and finance; second, focus on eleven priority sectors, such as agro-based products, transport, production, healthcare, tourism and other intra-ASEAN trade; third, adopt the ‘ASEAN minus X’ formula, meaning a multi-speed integration scheme to enable ASEAN members to integrate in their own time into whichever economic schemes they chose; and, fourthly, establish new institutional mechanisms such as compliance processes and bodies. The task force laid down the features of ASEAN’s new integration process from which a blue-print emerged. That blue-print introduced the exercise that would effectively reshape ASEAN governance and introduce new accountability procedures in the integration process.

Following the recommendations of the High-Level Task Force, ASEAN’s reconceptualization was devised as a staged sequence of initiatives. The first initiatives started around 1992, focused on creating the ASEAN free-trade area. Yet it took until after the conceptual development of the AEC for the first blue-print to be formally adopted. This was in 2007 at the 13th ASEAN Summit. In its subsequent evolution, ASEAN has relied on subsequent blue-prints focused on changing conditions and ways to achieve further and deeper economic integration.

In alignment with the ASEAN way, blue-prints are not binding instruments but rather policy documents that set out goals considered necessary for member states. Blue-prints articulate specific and time-bound aims and actions to be taken by ASEAN member states. This enables ASEAN states, through a mixture of short, medium and long term

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69 Bali Declaration Signed 7 October 2003 Provision B(1) (‘Bali Declaration’).
70 Chia and Plummer, above n 68, 75.
71 Ibid 76.
72 Deinla, above n 909, 163.
73 Inama and Sim, above n 51, 48.
74 Ibid 46.
goals and purposes, to adapt the integration process to changing needs related to respective deficiencies, incapacities and non-compliance issues. An early example of this function was the development of blue-prints for the challenges of political security, and economic and sociocultural integration, to be achieved between 2009 and 2015.\textsuperscript{75}

As an innovation within ASEAN, the blue-print system represents not only a systematic plan of action for states, but also presented the first and only accountability procedure by which ASEAN member states could measure their performance across specific periods of time. This accountability procedure was termed the AEC Scorecard.\textsuperscript{76} The scorecard is the only monitoring procedure by which member states can pressure others to comply.\textsuperscript{77} In this respect, the ASEAN accountability scheme resembles the WTO more than the EU, as Inama and Sim note. The limits of this resemblance beyond its function to review policies of a member state mean that it stops short of adopting a WTO-like mechanism for reporting findings on non-compliance, to which Inama and Sim drew attention.\textsuperscript{78} They explained the reason is the perception in ASEAN that if they had included a similar mechanism it would likely produce negative data for the scorecard.\textsuperscript{79} The authors note that the intergovernmental character of ASEAN, where the organisation acts in good faith of its member states as established in international law, is seen as making it politically unworkable to advocate further scrutiny of ASEAN states.

Since it is dependent on implementation by member states, the ASEAN scorecard represents an imperfect accountability mechanism. It depends on states measuring themselves and reporting their own performance to the ASEAN Secretariat.\textsuperscript{80} The secrecy involved in the production of scorecards, many of which contain simple ‘yes’ or ‘no’ questions, circumvents open-ended methodology norms and hence accurate measurement compliance.\textsuperscript{81} Also, the lack of supranational or domestic overview inhibits accountability to review compliance, either by regional or domestic entities. As such, comity is the sole accountability process. As discussed later in this chapter, the non-reliance on ‘hard’ benchmarks gives scorecards like blue-prints the characteristics of

\begin{footnotesize}
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\item\textsuperscript{75} Ibid.
\item\textsuperscript{76} Ibid 49.
\item\textsuperscript{77} Ibid.
\item\textsuperscript{78} Ibid 50.
\item\textsuperscript{79} Ibid 51.
\item\textsuperscript{80} Ibid 55.
\item\textsuperscript{81} Ibid.
\end{itemize}
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‘soft-law’ international instruments, that is, non-binding in nature and thus reliant on moral pressure to act as promised.

In 2007 the *ASEAN Charter* was signed to give effect to this new integration movement and to symbolically highlight the scope and norms of its reconceptualisation. The new instrument gave ASEAN legal personality, providing the organisation with a stronger presence in the region.82 The *ASEAN Charter* not only reaffirmed a new path to economic integration, but in the words of Reuben Wong, presented a ‘political renovation’ of ASEAN as a ‘more complex dynamic’ entity.83 Member states had sought to create a new proactive rather than reactive ASEAN, one that was fully capable of asserting its international legitimacy.84 In the economic domain of reconceptualised integration, ASEAN’s success relied on reengineering ‘open regionalism’ to fit a new scheme that could deliver economic development levels beyond those seen during the 1990s.

Since the 1997-1998 financial crisis, ASEAN has been fundamentally engaged in the process of creating a single market (AEC) for Southeast Asia to become a global production base. As such, ASEAN has managed integration functionally as a mechanism to bring foreign direct investment and to compete with more powerful actors. The basis of this was an ‘open regionalism’ model. That model presented a mutualising conception to curtail the legacy of member states acting as economic rivals.85 The *Bali Declaration* specifies the objectives of the AEC as the establishment of a single market, and a shared production base. This is again mentioned in the *ASEAN Charter* as one of the purposes of the organisation.

It is emphasised that these instruments represent an ‘open regionalism’ approach. This has previously been defined as a process to promote liberalisation of commerce and attraction of foreign investment from outside the Southeast Asian region as the pillars of development. Open regionalism highlights the utilitarian value of integration strategies as complementary pathways to the entry of states into the international market.86 Noticeably, in Central America this is a similar conceptual guide instituted within the

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82 Wong, above n 28, 245.
83 Ibid.
84 Ibid 245-246.
85 Chia and Plummer, above n 68, 75.
Guatemala Protocol, the SICA’s economic arm. In the case of ASEAN, the Bali Declaration incorporates the policy view that the establishment of both objectives, the single market and the production base, is a strategy to promote the region’s economic competitiveness in the international market.

Notwithstanding these codified aspirations, the AEC is less usefully characterised in terms of the creation of a single market. The integration regime is more accurately seen as a means to attract foreign direct investment that could position ASEAN member states within global supply chains and strengthen the economic capacity of these ‘smaller’ states in broader Asia, as Basu Das notes.87

The current blueprint, the AEC Blue-print 2025, sets forth the new guidelines and objectives that ASEAN member states need to implement to achieve further economic integration. In its first part, the Blue-print articulates the goals for AEC to meet by 2025. The Blue-print also includes detailed key elements needed to accomplish deeper integration, specifically for ‘Trade in Goods’,88 ‘Services’,89 ‘Investment’,90 ‘Financial integration’,91 movement of skilled labour,92 as well as multiple other economic and commercial targets. Further, the Blue-print sets out an ‘implementation mechanism’, which, in accordance with the ASEAN way makes the Economic Community Council, an intergovernmental body, accountable for the implementation of the Blue-print.93 To accomplish its mandate, the Council, through the ASEAN secretariat, is responsible for monitoring implementation of the Blue-print using the scorecard system over three-year intervals.94

The blue-print system could also be characterised as a move towards more intensive accountability for ASEAN. It represents a flexible and evolving instrument able to adapt to the prevailing contexts of member states. Generally, and by ASEAN standards it represents a first exercise for compliance with regional norms. However, as discussed later in this chapter, even with the scorecard system, ASEAN still faces many challenges

87 Basu Das, above n 38, 18–19.
88 The ASEAN Secretariat, ‘ASEAN Economic Community Blueprint 2025’ (The ASEAN Secretariat, 2015) 3–5.
89 Ibid 6.
90 Ibid 7.
91 Ibid 7–10.
92 Ibid 11.
93 Ibid 36.
94 Ibid 37.
with accountability towards compliance with regional norms. In addition, the scorecard system seems to be only properly implemented in the economic domain of integration. In other areas of integration, such as political and social aspects, it encompasses just aspirational gestures and goals.95 A concerning example is human rights. Although there has been a level of rights developments in Southeast Asia in respect to an intergovernmental body and regional charter, no such adequacy pertains to accountability mechanisms to ensure scrutiny of human rights compliance or to enforce protection.96 This exemplifies clear prioritisation in the case of ASEAN member states: first, advancing economic integration and leaving areas such as human rights to the internal affairs of states; and second, maintaining the state as the centre of the integration scheme, in both norm production and enforcement.

Momentarily leaving aside the deficits of the ASEAN blue-print system, it transfers significant prospective lessons for Central American regionalism and SICA. These concern the challenges of executive domination and lack of accountability shared with ASEAN. The blue-print system targeted such challenges in the ASEAN case by providing a ‘soft-law’ alternative to regional governance. It represents a policy strategy of political viability. Through the soft-law mechanism of the blue-print, ASEAN has been able to produce a well-targeted governance scheme based on a series of short, medium and longterm goals and purposes to fulfil its integration program – which in the case of ASEAN is the creation of a coherent production hub in the region.

In the contrasting case of SICA, the Central American entity has failed to promote a coherent governance scheme related to economics. This is demonstrated by its many ‘short and aspirational’ treaties. These have spilled over to institutional aspects of integration, leading to incoherently planned over-expansion by SICA. The lack of short, medium and long term objectives, stemming from the absence of a substantive guiding image for the SICA, has impeded the development of integration and has been a source of conflict.

The ASEAN blue-print process is highly suggestive for adaptation to the contexts of Central America, exceeding the value of European tactical measures for planning. Since it is embedded in soft-law the blue-print could be organically developed in Central

95 Deinla, above n 909, 47.
96 *ASEAN Human Rights Declaration*, Principle 7.
America as a means to maintain member states’ interest in integration and lessen the legacy impact of executive-led sentiment. Specifically, the blue-print exercise could curtail the capacity of each Central American regional secretariat to work separately. This would involve identifying and implementing direct short, medium and long term objectives. Time-bound assignment of responsibilities would be likely to minimize regulatory capture. Ultimately an accountability scheme could be introduced in the spheres of regional institutions and executive power, which is elaborated in the following section.

B. Norm-subsidiarity

On one level, the ASEAN way represents norms of regional governance and comity values between member states in Southeast Asia. A more significant quality is how it effectively localises foreign instruments and interventions and international norms. This process is referred to by authors including Amitav Acharya as ‘norm subsidiarity’. This effect is transferred by comparative approaches that go beyond both universalist and reductionist tendencies and are contextually sensitive to local conditions. As the analysis now shows, ASEAN has achieved this in multiple economic spheres, mainly investment and associated trade domains characterised by internationalised norms. At the core of this lesson from ASEAN is its ability to conceptually transform foreign and global norms into socially accepted local norms, in contexts of investment and trade. The result has been characterised as ‘inconsistent practice of international law’, or ‘misinformed practices’, by Beckman et al.97 However, for the ILC Study Group on Fragmentation, a more liberal view is that it is an example of regionalism ‘in terms of application’.98 In this view, ASEAN shows how integration can be achieved via a strong intergovernmental approach whilst following a process of constitutive localisation. The latter is where international norms are applied to the region by defining how they are to be implemented in the local contexts of member states.99 In significant ways this has enabled ASEAN to reengineer and localise foreign concepts and norms in accordance with regional values.100

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97 Beckman et al, above n 52, 39.
99 Ibid.
100 On reengineering, see again discussion in Chapter 5, Title III, part D and Scott Stephenson, ‘Constitutional Reengineering: Dialogue’s Migration from Canada to Australia’ (2013) 11(4) ICON 870, 874.
ASEAN success in these respects has been and continues to be derived from and dependent on what Amitav Acharya calls localisation of ‘open regionalism’. This results in the localising of foreign and global norms in the region through the creation of a single market and production base. Acharya notes that as a general rule ‘usefulness and relevance’ are more specifically realised through the process of ‘constitutive localization’ within a region. For Acharya, constitutive localization significantly supports the socialisation or diffusion process of foreign or international norms within a group of states. It does so by laying the grounds for and the conditions that could ‘persuade’ member states to implement and enforce them. Acharya names this process ‘norm subsidiarity’, whereby local actors develop new rules and offer new understanding of international rules that reaffirm global rule in the regional context.

Drawing on Acharya’s analysis, ASEAN legal norms can be characterised in the following ways. First, the norms are substantively global or international, drawn from an international order. Specifically, they replicate WTO, general BITs, or human rights principles. Second, the legal norms are procedurally local, following the intergovernmental nature or inter-state negotiation of the ASEAN instruments. This is mainly exhibited through the creation of regional rules by informal means or through soft-law.

An example that demonstrates this characterisation is the development of the ASEAN Comprehensive Investment Area (ACIA), adopted in 2012. This new framework reformed the 1987 ASEAN Agreement for the Promotion and Protection of Investments. The new ACIA contained distinctive traits that are different to previous liberalisation models. This can be seen in the shift of investor protection, drawing ‘from both ASEAN and non-ASEAN sources’ to promote ASEAN’s production base. Consequently, ACIA has the capacity to address and protect competitive advantages of ASEAN member states to create a favourable investment climate. For example, as Chia and Plummer argue,

102 Ibid 225.
103 Ibid.
104 Acharya, above n 46, 96; see also: Beckman et al, above n 52, 17–18.
105 Beckman et al, above n 52, 18–19.
106 Ibid 43.
108 Chia and Plummer, above n 68, 80.
by having an ‘open regionalism’ or FDI-oriented model with an integrated economy investors appear more inclined to seek resources from the resource-rich states of Indonesia, Myanmar and Vietnam, low-wage labour from Malaysia, and labour-intensive industries from Singapore.\(^\text{109}\) Also, investors are evidently attracted by the free movement of capital and skilled labour between ASEAN states, which facilitates the intra-regional movement of management and technically-skilled personnel.\(^\text{110}\) This illustrates ASEAN’s strategic survival policy of avoiding mistakes of the pre-financial crisis stage and creating an investment-attracting regime that engages with global actors and investors under ASEAN rules. More technically, the ACIA serves as an anchor and meeting point of the FTAs and BITs that ASEAN member states have individually ratified with extra-regional partners. As such, the ACIA serves to extend the benefits for investors from individual extra-regional BITs, giving them regional effect through the consolidation of the single market.

The preceding analysis enables further observations of ASEAN localisation efforts in regard to ASEAN’s position on human rights. Human rights localisation is visible in the ASEAN case as a step towards establishing a new intergovernmental body and declaration. As earlier identified, the ASEAN Charter was the result of newfound cooperation and commitment by part of the ASEAN states. At the level of the centre, ASEAN sought to transform itself into a proactive actor, meaning it developed a catalytic role regarding human rights without derogating from the ASEAN way. This case of constitutive localisation of human rights is interesting in how it avoided the fate of a strong human rights mechanism being repelled by member states. It managed this by developing an evolutionary ‘step-by-step’ scheme as a platform for dialogue and debate by member states.\(^\text{111}\) This makes the ASEAN Charter more than a static base for discussion and debate. It was able to achieve a dynamic that in step with the ASEAN Human Rights Declaration served additional human rights developments. Wong found this to be evident in the establishment of the ASEAN Commission in Promotion and Protection of the Rights of Women and Children, for example.\(^\text{112}\)

\(^{109}\) Ibid.

\(^{110}\) Ibid.


\(^{112}\) Wong, above n 28, 246.
Yet, as intimated, the norm subsidiarity has concerning limits. While the *ASEAN Human Rights Declaration* transfers new recognition of the topic, its wording hampers the effect. Again, the declaration recognises many international human rights standards but the ensuing localisation process (norm subsidiarity) submits them to local circumstances that are delimited by political will of executives to comply with the standards. Significantly, neither the human rights Universal Declaration nor its provisions are mentioned in the ASEAN blue-prints. This reflects the ordains of orthodox economic development and regional governance. It indicates that the ASEAN measure is driven by orthodox aims and capacities of stronger member states to engineer a ‘production hub’. The collateral damage has been neglect of social conditions related to the workplaces of citizens especially in less strong member states.

Putting aside the adversities of norm-subsidiarity to identify other facets of ASEAN’s intergovernmental approach that carry value for Central American integration, makes it useful to focus on their experiences of socialisation and localisation of norms that do not resort to a regional judiciary. This is refreshingly different to Europe’s and Central America’s regional experiences. The difference has enabled ASEAN to consensually develop regional policies where member states have concurred on the application and limits of state sovereignty. ASEAN’s success in this domain surprisingly has been assisted by the will of executives to reengineer foreign concepts, or a norm subsidiarity of global rules. This mutuality has enabled the capacity of ASEAN to reinvent itself after its crisis and present itself to the world as a welcoming safe environment for foreign investment.

ASEAN member state use of soft-law approaches in treaty-making has been a key part of the process of ‘norm subsidiarity’. Soft-law norms, in the context of international law, are rules that do not provide signatories with specific rights and obligations.113 Such ‘rules’ are therefore not enforceable or cannot transfer legal consequences for states. However, soft-law rules may express or reveal norms that give content to other hard rules.114 In the ASEAN context, this means, as Kuijper *et al* write, the ‘bindingness’ of ASEAN treaties, whatever their subject-matter, remains in the hands of member states, who retain ultimate authority over the domestic effect of the treaties and the interpretation they may give to

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114 Ibid 239.
The result is the establishment of legal regimes, embedded in treaties, that prescribe ‘regulatory benchmarks’ open to interpretation by each member state. This contrasts markedly with a legal regime that establishes ‘hard targets’. Consequently, the selection of ‘benchmarks’ tends to follow ASEAN member states’ preferences and enables them to retain control over their internal affairs, rather than creating an overall regional authority. ASEAN is thus founded on the use of cooperation mechanisms to promote compliance, rather than the use of hard-law standards.

As discussed, as an example of soft-law approaches to regional governance, the AEC blue-prints have had direct impact in producing new accountability within the ASEAN integration regime without sacrificing the ASEAN way. With the blue-prints, ASEAN has created targeted goals within an intergovernmental scheme. The ensuing scorecard enables member states to maintain a certain degree of control over the progress of integration. As Deinla argues, integration is thus driven by effectiveness of rule-making and clear implementation strategies. Deinla further discerns a spill-over effect on the governance and regulatory aspects of ASEAN, whereby it promotes the development of clear goals and purposes – which in turn enables successful cooperation between state authorities and private actors. Having a clear system of rules and outcomes and specifically the accountability procedures for ASEAN states mean that foreign investors feel secure about their investment environment.

The blue-print system could significantly improve integration in Central America with its goal-setting agenda and concrete benchmarks – and its accountability schemes. The shared variable with ASEAN of having a dualist relationship with domestic legal systems in a monist setting, could mean that international sources have a more extensive reach in the domestic realm. As such, blue-prints, albeit being soft-law instruments, are nevertheless sources of law and can be enforceable internally by domestic courts. The Central American Court of Justice has referred to soft-law declarations, such as the Alliance for Sustainable Development of Central America (ALIDES), which promotes a new view for Central America integration, ruling that it has the same status as executive

115 Kuijper, Mathis and Morris-Sharma, above n 49, 67.
116 Ibid 68.
117 Deinla, above n 909, 47.
118 On this legal instrument, see discussion in Chapter 2, Title II, part B.
As such, they may not inflict on domestic norms, but are judicially enforceable. This is because they do not contain the same potential as hard-laws to conflict with domestic or constitutional norms, but rather they respect the domestic hierarchical sentiments of domestic judiciaries. By doing so, soft-law norms have come to respect the limits imposed by both the Tegucigalpa and Guatemala Protocols.

Bearing that in mind, it could be inferred that blue-prints have the potential to become schemes of accountability not only between executives of states (via scorecards), but also between executives within states. This could mean that domestic courts as well as domestic citizens could require executives to fulfil their obligations under the blue-print system, thereby advancing impetus in the integration process. This scenario is demonstrated, as noted, in the use of human rights in the Central American region, whereby international instruments (even soft-law ones), have been given effect within domestic legal regimes. Ultimately the potential for accountability demonstrated in the thesis would involve soft laws that have a different application in Central America to ASEAN; yet their objectives of providing benchmarks and accountability would remain similar.

IV. LIMITS TO INTERGOVERNMENTALISM

The intention now is to elaborate and try to move beyond the limits of intergovernmentalism under the ASEAN way. The analysis is focussed on the weakness of states’ accountability mechanisms in the ASEAN integration regime. It also shows how managerialism could become an issue in executive-led regional arrangements of the kind ASEAN established. ASEAN was founded in a period of history (1960s) defined by decolonization and the Cold War. Consequently, it was a time when member states were particularly protective of their own sovereignty. This led ASEAN to become a regional arrangement bereft of strong ‘supranational’ institutions, particularly of a judicial kind. As a result, ASEAN has primarily relied on diplomacy via the work of the Foreign Affairs Ministries of member states. Their diplomatic efforts have been marked by regional struggles among states. This has generated efforts by Foreign Affairs Ministries to stage Presidential Summits aimed at achieving greater interaction and

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120 Ibid.
deeper cooperation amongst members, while facilitating norm-socialisation in the process. The heavy reliance on diplomacy and skilful negotiation has led, at a slow but steady pace, to increased interaction and subsequent better acceptance of regional norms. Negotiation and diplomacy has also facilitated the development of a dispute-resolution scheme, where disputes are resolved primarily by conciliation and mediation. The backdrop to its adoption is that states had become disillusioned with the existing dispute settlement scheme to tackle economic disputes.

In these ways and with these limitations ASEAN has been successful in converting itself into an economic community with clear conceptual objectives, and with the capability of reengineering foreign ideas and global norms to promote that vision. Regarding the limitations however, ASEAN’s model of intergovernmentalism presents specific challenges for integration. Due to ASEAN’s norm subsidiarity and socialisation, the organisation has consolidated itself through various intergovernmental agreements, many of which are soft-law instruments. ASEAN’s intergovernmental nature has also led to the creation of a regional structure with basic and limited regional institutions. This has led to compliance issues, with low-levels of implementation and monitoring of regional norms, and failure to systematise regional instruments, as discussed in reference to the scorecard system.

Moreover, the dispute settlement scheme has not been effective in facilitating adherence to regional instruments or ensuring compliance. As Beckman et al explain, ASEAN’s experience of non-compliance does not stem from member states relentlessly breaching their obligations, but rather from a practice consolidated during the region’s foundational period. Chesterman argues that since its origins, ASEAN has not created or even focused on a system for monitoring obligations. The resulting enactment of soft-law ‘declarations’ without binding objectives is a clear example of that practice. The impact has meant the development of different attitudes and responses to the obligations

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121 Piris and Woon, above n 908, 66.
124 Beckman et al, above n 52, 42.
126 Wahyuningrum, above n 112, 24.
assumed by each member state, reflecting their respective comfort levels rather than mutuality. 127

The intergovernmental approach raises some further issues and challenges. First, as Kuijper et al point out, there is a lack of coordination between ASEAN regulations in achieving the blue-prints. 128 The plethora of state agencies across the region with responsibilities for implementing ASEAN regulations has created disparity between states regarding standards as well as speed of implementation. Further, while soft-law approaches intrude less on sovereignty, in the contexts of ASEAN it has led to the creation of a large web of complex institutional governance, necessitating heavy intergovernmental negotiation. 129 This creates other challenges for ASEAN integration, such as managerialism and a lack of accountability of actors who exercise regional functions and powers. 130

The problem of managerialism in ASEAN is visible in how law enforcement is delegated to specialised intergovernmental and national bodies, which in contexts of fragmentation such as ASEAN work separately from and non-cohesively with other developments. For example, fragmentation has produced uneven levels of integration in economic domains. Priority sectors like manufacturing lead the way for economic development, while underrated primacies such as labour standards for protecting workers lag behind. 131

The problem of fragmentation is the problem that states are still the main custodians of rights. It has meant that the charter and mechanisms of the regional human rights body have been developed to ensure the realisation and exercise of human rights reflect national as well as regional contexts. The focus is on sensitivity to ‘economic, legal, social, cultural, historical and religious backgrounds’ 132 and on the need to secure ‘national security, public order, health, safety and morality’. 133

In addition, because the region has various member states that are not full democracies, questions remain how ASEAN can uphold its legitimacy in the region. Such concerns are coupled with worry about the lack of strong monitoring systems, and the questions...
this raises about ASEAN member states’ commitment to regional integration. As the 2006 Eminent Persons Group report found, the problem is not ASEAN’s aversion to dispute settlement, but rather the organisation’s weak monitoring system.\textsuperscript{134}

Regarding the European case of integration, investigated in Chapter 6, the ECJ has been a socialising actor that has transformed the European integration landscape. This can be attributed to Europe’s ‘subjectivised’ interpretation of its treaties, which creates a direct connection between the ECJ, individuals and domestic courts. However, supranational courts are no guarantee of deeper norm socialisation, as exemplified by Central American experiences of integration.\textsuperscript{135} The case of ASEAN shows purposeful avoidance of introducing supranational bodies in its governance scheme. However that choice has generated an unwanted impact, namely, dependency on the region’s executives.\textsuperscript{136} It has meant that ASEAN norm-creation and development is separate from and lacking participation of other domestic bodies such as parliaments or courts.\textsuperscript{137} Thus, although ASEAN member states have committed to compliance with regional norms there are no accountability mechanisms to monitor and enforce this.\textsuperscript{138}

The lesson is that without any accountability procedures to scrutinise member states and intergovernmental bodies, rationalism can undermine the production and enforcement of norms.\textsuperscript{139} In this respect the case of ASEAN displays a Janus-like structure of compliance. One side shows the capacity of member states’ executive bodies to reengineer and enforce regional norms. The other side depicts an absence of executive scrutiny mechanisms by regional or domestic means. It means that ASEAN both presents a new and catalysing approach to deeper regional integration in Southeast Asia, while creating non-compliance challenges that stem from failure to create crucial monitoring bodies of domestic and/or regional kinds. In addition, the choice of soft-law instruments has led to fragmentation of the integration system, impeding ASEAN’s socialisation of regional norms. This implies that while regional judiciaries may not be necessary for the socialisation of norms and the spread of transformative discourses, monitoring bodies are needed to effectively determine the compliance of member states. These bodies could

\textsuperscript{134} Beckman et al, above n 52, 35–36.
\textsuperscript{135} See Chapter 4, Title IV.
\textsuperscript{136} Deinla, above n 909, 129.
\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid 128.
\textsuperscript{139} Beckman et al, above n 52, 30.
then provide a platform for domestic bodies, either parliaments or courts, to become active members of the integration processes.

V. CONCLUSION

The chapter has shown that the ASEAN case presents constructive comparison with European judicial supranationalism. The key insights from ASEAN involve its development of an intergovernmental system whereby states negotiate, agree and implement deeper integration at different speeds, without need for tough supranational entities or judiciary. This is in stark contrast to the EEC/EU Balassian model and shows more proximity to Central America’s social approach to governance. In such approaches, ASEAN, and SICA even more, have not relied on a regional court to develop the core guidelines and characteristics of its integration system. Far from it, the reliance is on clear, concrete and detailed rules to achieve integration.

The blue-print system is presented as a highlight of ASEAN intergovernmental approach. It respects local governance values (the ASEAN way), by serving as a central connection point for the web of BITs and FTAs. Its establishment of detailed and concrete rules has meant that ASEAN could present itself to foreign investors as a safe and secure investment environment. Moreover, such rules have enabled ASEAN to overcome – to a limited extent – an aversion to regional scrutiny. This has led to a clearer focus on technical and economic development without undue politically compromise. More significantly, ASEAN’s intergovernmental approach has been able to improve its previous governance and open-regionalism flaws. It has created a cohesive platform that anchors and draws together the web of BITs and FTAs that member states have individually ratified.

The blue-print exercise has become an invaluable tool in the sum total of these developments. It transfers deep implications for Central American integration. This concerns the ability of blue-prints to deal with conceptual and managerial challenges in contexts of deep fragmentation. In the case of Central America this refers to the multiplicity of short treaties characterised by vague aspirations and absence of short, medium or long term goals and purposes. In such cases, the blue-print system has the potential to transmit a planning methodology that does not require executives to relinquish their rule but rather that they take the long view. Note that the blue-print is executive driven. It carries the potential to establish a series of accountability measures
for compliance with integration norms. This is not yet a well-developed feature in
ASEAN, but a transplant could tackle this through a series of short-, medium- and long-
term goals that are revisable and embedded in the ASEAN-minus formula. As such, this
allows for multi-speed integration, while still maintaining certain coherence in the
development of the integration project.

It is expected that the scenario of the blue-print with its soft-law nature would look very
different in Central America. This is because the Central American integration scheme
has a monist relationship with its multiple domestic systems. As such, it could find
different interpretation on enforceability, depending on the decisions of courts, regional
or domestic. Also, in accord with the Tegucigalpa Protocol, the provisions of each blue-
print would change the scope of its effects, depending on the realities of each country.
Yet, ultimately the blue-print system transfers overall merits as a soft-law instrument
that is effectual for goal-setting, providing guidance, and monitoring implementation,
with scorecards that help secure member states’ compliance. In short, the blue-print
could help resolve significant challenges in the SICA.
CHAPTER 8.
CONCLUSION

I. INTRODUCTION

The thesis has sought to tackle key challenges facing the legal regimes of the Central American Integration System (SICA) by posing the following research question: What solutions can comparative regionalism offer to improve the SICA’s legal regime, so it can better address the challenges it faces? The twin goals of the research question are to understand the nature and causes of the challenges facing SICA and to identify possible future directions. To this end, the thesis draws comparative insights from the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) and adapts them to reflect distinctive features of Central American regional governance.

The findings of this investigation are set in this concluding chapter which examines key implications for the reform of SICA, and as well for scholarship on Central America and comparative regionalism. The structure of this chapter is as follows. The next Part (II) reviews the objective of identifying the problems and historical causes of the SICA legal regime. Part III reviews the objective of identifying implications for comparative legal methodologies of the approaches that Europe and Southeast Asia took in their integration programmes. Part IV proposes solutions to the identified problems of the SICA legal regime. The proposed solutions are first the need for the Central American Court of Justice to thoroughly contextualise its transplantation approach so that reengineering of foreign concepts reflect the defining features of Central America. The second proposal is to prepare a regional rights’ charter in Central America. The third potential direction for future development involves introducing blue-print methodologies for SICA planning, implementation and monitoring purposes. Part V explains that the above proposed solutions would also help tackle the issue of the US-DR-CAFTA as a competing regime of SICA. The expectation is that if member states implement the proposed solutions they would find new reason to work and strengthen SICA and thus relegate the US-DR-CAFTA to spheres of commercial relations with the US. Part VI proposes new pathways for research on Central American integration and comparative regionalism at the global level.
II. IDENTIFYING THE PROBLEMS OF SICA

The thesis has been focused on resolving the historical problems of the SICA legal regime through a contextualised approach grounded in the necessity for social justice through human rights. Within Central America, legal scholarship has tended to be highly descriptive and abstract. It takes the form of ‘non-problem’ based research. Hence, contexts and values are neglected in the functional approaches to integration taken by orthodox legal scholars. In contrast, this thesis has developed a functional approach that is informed by history and multiple social contexts.

Initially, to identify the problems of the SICA legal regime, the thesis drew on international relations theory, in particular social-constructivism, to analyse historical, legal and political sources, as well as jurisprudence of domestic high courts and the Central American Court of Justice. The analysis identified two predominant historical legacies underlying the challenges that SICA legal regime currently faces, namely, executive state-led dominance and vulnerability to external influence. ‘Executive state led dominance’ is the dominance of executives in governance at both domestic and regional levels, and an associated overriding desire to preserve state autonomy and sovereignty at the regional level. The legacy of ‘vulnerability to foreign influence’ is apparent in two situations. The first situation has involved the interventions of strong actors like Spain, the US and the EU to define the contours of Central American regionalism and relations among SICA member states. This has persisted throughout the history of Central American state and region-building. The second legacy is the propensity of Central American scholars and judges to transplant foreign doctrines into the region. The legacies have colonial origins and have manifested themselves throughout the different historical regional arrangements in Central America, including SICA. They shape the SICA legal regime at conceptual, institutional and judicial levels, as the next section explains.

A. Conceptual level

At the conceptual level, the SICA legal regime embodies the following problems: fragmentation, inconsistent ratification, and the creation of a competing regional regime. ‘Fragmentation’ refers to how the SICA legal regime has become split into multiple subsystems. Stemming from historical legacies of executive state-led dominance and the preservation of sovereignty and autonomy within the regional arrangements, member states have created an integration legal regime through ad hoc development. The consequence is regional arrangements without an overarching legal structure. The upshot has been ratification of short treaties. These are flawed by the omission of short, medium and long term objectives that are necessary to effectively and successfully plan and implement and monitor the objectives established for the integration programme. Additionally, the lack of an overarching legal structure and ad hoc development has led to the fragmentation of the SICA legal regime into different specialised subsystems, with no formal mechanisms of interaction between them.

The second conceptual problem involves inconsistent ratification of treaties by member states. The problem reflects executive state-led dominance and has resulted in a situation where not all states have ratified all the SICA treaties. Consequently they are not all bound by the same legal obligations, but instead only to those treaties they have signed. An example of the disarray is that not all states are parties to the regional parliament, to the regional court, or to many of the SICA subsystems.

The third conceptual problem is the ratification of the US-DR-CAFTA that has created a competing legal regime to SICA. This reflects the region’s vulnerability to foreign influence. SICA’s failure to provide a cohesive regional regime that could fulfil its objectives and purposes ultimately led member states to sign up to a new competing legal economic regime in the region, the US-DR-CAFTA. The new economic legal regime provided by the US-DR-CAFTA contained stronger enforceable legal obligations and higher protection of investment and labour rights of individuals. The US-DR-CAFTA also included a provision purporting to give its norms superior status to SICA norms. This conflicts directly with the Tegucigalpa Protocol, which establishes its supremacy over other instruments, whether of regional or extra-regional nature, in integration matters.
B. Institutional level

At the institutional level, the SICA legal regime faces the following serious challenges: executive dominance, institutional over-expansion, and failure to provide effective remedies for breaches of law and individual rights. The historical problem of executive dominance in the Central American integration project persists with strong bias in the SICA legal regime towards executive-led integration. This manifests in executives’ overriding control of SICA constitutive treaties and many of the Central American nations’ constitutions. Executives monopolise all aspects of decision-making processes and at all levels of implementation of regional norms. They face no concrete accountability procedures or institutional balances. The absence of clear guidelines at regional level has meant executives have acted in their own self-interests, many times derailing the integration programme.2

Turning to the SICA’s ‘institutional over-expansion’, this is a product of the ad hoc development and fragmentation of its legal regime. Currently the SICA comprises over 100 institutions, all which compete for leadership. It has led to regulatory capture of regional agendas in the respective subsystem of each institution, and subsequently to a weakening of regional authority. ‘Regulatory capture’ characterises and results from managerialism in the SICA that flouts accountability schemes needed to review and control enforcement of regional policies.

On the issue of the failure by the SICA to provide remedies for breaches of law and individual rights, this is largely because the SICA legal regime has not incorporated any enforceable regional integration rights and procedures by which individuals could seek redress for violation of their rights at the integration level. Individual civil and political rights are protected under domestic constitutions. However, regional integration rights, such as freedom of movement of people goods and investment, and other associated rights like labour standards and social security, have not been recognised at the regional level. This leaves a gap in their protection, which is the subject of a proposal below for a regional rights charter.

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2 See Chapter 4, Title 2, part A.
C. Judicial level

The judicial challenges identified in the thesis are centred on efforts by the regional court and Central American scholars to define and characterise regional law. A fundamental issue is that the regional court’s statute presents a dysfunctional reading of the SICA’s constitutive treaties. The statute gives the regional court power to review and determine the legality of the compatibility of domestic laws with regional laws. This is contrary to determinations in the SICA constitutive treaties, which grant domestic courts the power to review the compatibility of regional laws with domestic ones. This has led to the non-ratification of SICA’s statute by Costa Rica, Panama and Belize. It has further catalysed the development of case law that conflicts with domestic provisions of member states. In addition, the regional court has created problems regarding its transplant via adjudication of a series of European concepts into the region. Of specific concern are supremacy and direct effect.

The use of these European constructs has led the Central American Court of Justice to declare itself the ‘supranational constitutional court’ of the region. The regional court has also used these same transplants to declare the supremacy of regional norms over other extra-regional instruments, such as the US-DR-CAFTA. This was done in disregard of previous case law of US-DR-CAFTA arbitral panels on the relationship between both regimes of law. This thesis has argued that these European constructs/concepts do not respond to the reality of plurality of sources outside and within SICA. In other words, the Central American Court of Justice has failed to acknowledge other jurisprudence and case law from domestic courts and arbitral panels that have interpreted the limits of SICA law, effectively isolating itself from potential dialogue. This is demonstrated first by how these European constructs contradict provisions of SICA’s constitutive treaties, and second by backlash from domestic courts, which has included domestic courts declaring ‘unconstitutional’ some of the provisions of the regional court’s statute. However, the regional court and scholars continue to push forward with the simplistic transplant of these, as well as other, European constructs within SICA.

III. INSIGHTS FROM COMPARATIVE REGIONALISM

Having identified the conceptual, institutional and judicial problems that inhibit the effectiveness of the SICA legal regime in meeting its goals, the thesis turned to problem-solving. It sought understandings that could resolve the problems in ways that would
reflect the features and contexts of Central American governance and regionalism. The defining features of Central American governance, at both domestic and regional levels, are clearly focused on social justice through human rights. This is the core transformative value of Central American constitutionalism and regionalism. The hierarchical dimensions of Central American monism give constitutions and human rights supreme status in the region. Integration norms have inferior status to domestic legislation and are equivalent to executive decrees, but nevertheless are understood to have both speciality and *primacía* status when they are in conflict with domestic legal provisions.³

The problems of the SICA legal regime discussed have local specificities related to the social and legal contexts of Central America, but similar problems arise in other regional integration arrangements around the world. The thesis undertook a comparative regionalism approach to investigate if and how other regional integration systems contained possible solutions to the problems facing Central American integration. The comparative legal methodology facilitated a solution to SICA’s judicial problem of legal transplants, as employed by the Central American regional court. It helped demonstrate the necessity in transplants for careful consideration of intrinsic features, historical legacies and drivers of Central American governance and regionalism. The methodology also enabled insights from other integration regimes around the globe that could resolve SICA’s conceptual and institutional problems. This involved the integration experiences of Europe (EEC/EU) and Southeast Asia (ASEAN). Specifically, the European experience offers a partial solution to SICA’s judicial problem, while ASEAN offers a solution to SICA’s fragmentation and institutional over-expansion. The methodology is significant. By looking beyond Europe to the experiences of ASEAN, the thesis has moved away from the Eurocentric bias of Central American scholarship, looking to other comparative experiences that share with Central America similar features of integration.

### A. Insights from Comparative Legal Method

A central concern in the thesis has been that historically Central American (and Latin American) jurists and courts, including the Central American Court of Justice, have engaged with foreign sources in a decontextualized and reductionist fashion. They have identified concepts and ideas from other transnational regimes (predominantly European),

³ See discussion in Chapter 2, Title IV, part E.
which they applied without contextualisation to the case of Central America. The thesis has noted that decontextualization is common to civilian-type legal systems, due to an historical tendency to take legal sources and principles at a high level of abstraction with the aim to enable application in a wide variety of contexts. This has been observed by authors including Carducci and Castillo, who recently described the predominant approaches in Central American scholarship as “non-problem based” or highly theoretical and conceptual work, most of which lacks solid methodological base or critical analysis. Abstraction has enabled legal transplants to move more freely transnationally and without proper contextual analysis of their impacts into Latin America (and Central America).

Two examples were discussed. The first is the regional court’s transplantation of the notions of supremacy and direct effect without consideration for the limits and provisions contained within SICA’s constitutional instruments. The second is the transplantation of European principles and models into Central American scholarship by local authors without adequate analysis of suitability for application in the region. The failure to conduct contextual analysis in the process of enacting these transplants has led to backlash by domestic courts. The most serious was when the Central American court transplanted the doctrine of supremacy in disregard of provisions of the SICA constitutive treaties. The intention was to inform the body of case law, calling for the primacy (primacía) of regional norms. Because these transplants were made without proper contextual analysis, domestic courts have declared ‘unconstitutional’ provisions of regional treaties and the competencies of the regional court and overruled its decisions. In their place, domestic

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4 On this discussion more broadly, refer to Chapter 5, Title II.
6 Carducci and Castillo Amaya, above n 2, 10.
courts have called for new ways to understand the nature and hierarchy of Central American law in the region.\textsuperscript{8}

To tackle the challenges that have plagued Central American approaches to transplantation, particularly the non-contextualization of foreign legal sources that a reductionist functional approach conditions, the thesis sought insights through a reflective, contextual approach to comparative legal methodology. This produced understandings of the value of previous successful transnational transplants into Central America namely the \textit{amparo} and \textit{constitutional block}. They are outstanding examples of where judges and scholars were critically and contextually aware of their circumstances. The examples demonstrate that transplants can be successful when accompanied by adequate reflexive contextualisation that incorporates the features of Central American governance. The lesson of these successful examples of transplantation is that comparative regional methodologies must seek to bridge the ‘universal’ and ‘parochial’ and derive a transnational scenario that contains both benefits and risks of comparison with other integration enterprises.\textsuperscript{9}

\textbf{B. Insights from the European Integration Experience}

Europe has been the main comparator in Central American legal scholarship. Yet, as a result of inadequate methodology by scholars and the Central American Court of Justice, previous transplants from European integration have largely been unsuccessful. Their analysis neglected the history and context by which the European integration experience was able to consolidate its supranational features. The European system embraced the \textit{supremacy} and \textit{direct effect} doctrines, thereby consolidating a rich monist legal approach to regional law that integrated it with domestic law. However, these doctrines reflect different legacies when transplanted into other regional integration contexts. In Central America, although regional norms have a certain direct applicability in domestic contexts, the SICA’s main constitutive treaties (particularly the \textit{Tegucigalpa} and \textit{Guatemala} Protocols) expressly restrict their direct effect when this would affect local or constitutional norms. These same provisions place the review powers of regional

\textsuperscript{8} Refer back to Chapter 4, Title IV, part C: on the specific judgment, see again: \textit{Inconstitucionalidad 71-2012 (Judgment)} (Unreported, Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador).

\textsuperscript{9} See again chapter 5, Title II, part A.
norms (and the application of the proportionality principle)\(^{10}\) on the side of domestic courts.

The limits imposed by regional treaties mean that the European doctrines of *supremacy* and *direct effect* have limited applicability in Central America. Instead, the valid insight from the European case is the need for dialogue between the regional court and domestic courts to ensure that regional laws align with domestic laws. This is the case in Europe resulting from the development of dialogue on ‘preliminary references’ and ‘remedies’, and the introduction of a regional integration rights’ charter in response to backlash from domestic courts in Germany, Italy and, more recently, Spain. The backlash meant that the regional court had to seriously consider the pluralism of sources and the development of new forms of interaction between supranational and domestic bodies. This shows that in Europe the notions of *supremacy* and *direct effect* have evolved over time, in part in response to backlash by European domestic courts. This pattern could help provide a substantive reason to develop a process of judicial dialogue between the Central American Court of Justice and domestic courts and other judicial bodies.

**C. Insights from the Southeast Asian Experience**

ASEAN does not have a regional judiciary and, although it possesses a dispute resolution scheme, this has not been tested by member states. Instead, ASEAN has relied on informal and diplomatic avenues to resolve disputes. ASEAN has evolved as an overwhelmingly intergovernmental enterprise, due in part to specific colonial experiences and highly diverse backgrounds of member states. The colonial and diversity factors, plus certain historical events like the *Konfrontasi*, consolidated a regional attitude to regional governance. This has given rise to demands for protection of sovereignty and non-interference by extra-regional actors and states. This distinctive attitude is referred to as the ‘ASEAN way’.

The ASEAN way is transferred policy-wise by the blue-print system. The thesis presents this as a fundamental lesson for Central American regionalism and the SICA. Since the mid-20\(^{th}\) century, a failing in Central America is the adoption of short treaties and instruments to develop the integration programme. Many of the treaties merely set out a basic institutional design and aspirational principles, omitting short, medium and long

\(^{10}\) See discussion in Chapter 6, Title V.
term goals and purposes. As a result, SICA member states have resorted to ratification of other treaties, thus expanding their governance over and against SICA. The outcome is a complex and fragmented regime, with over 100 institutions. Conflicts have broken out between the institutions and executives who dominate all facets of the integration regime. ASEAN suffers from similar situations of bias. Yet, in contrast to SICA, it has been able to take steps to consolidate its cooperation systems, to produce deeper integration. The thesis attributes this largely to the use of blue-prints.

The ASEAN blue-print system is considered especially suitable for bridging the gap in SICA between institutional cohesion and heavy fragmentation. Blueprints are soft-law instruments, with varying schedules and levels of compliance. This has enabled the ASEAN-Minus formula, based on WTO provisions, to bring about deeper integration of ASEAN states because the states are given the liberty to choose which regional norms and obligations they could fulfil. The blue-print further gives states the capacity to mediate and intervene, via diplomacy, when other states have not fulfilled their promised obligations.

A similar blue-print system could respect the executive-driven nature of Central American governance and at the same time provide for more systematic compliance with regional rules of law. In contrast to Europe, where regional rules and institutions enjoy a high level of authority and compliance, SICA (and ASEAN) have encountered resistance to this. Chapter 4 showed how SICA faced backlash from domestic courts against the regional court, which in many cases declared its competencies ‘unconstitutional’. In the case of Southeast Asian integration, attachment to the ASEAN way reflects the wariness of states to external norms. Nevertheless, Chapter 7 showed that ASEAN was able to reconceptualize its integration programme (after its 1997-1998 financial crisis) through the blue-print system. It set out concrete steps to achieve its goal of a production base.

The blue-print system represents a first attempt by ASEAN to introduce accountability mechanisms into its intergovernmental integration arrangements. However, as Chapter 7 pointed out, the blue-print system has limitations that would need to be carefully worked on for transplantation. The key problem is that it is voluntary; it is also self-examined; consequently it does not give regional agencies the capacity to determine if integration objectives have been fulfilled, or to impose concrete measures to ensure compliance.
IV. PROPOSED SOLUTIONS TO THE IDENTIFIED PROBLEMS OF THE SICA LEGAL REGIME

Preparation of the thesis coincides with an important time for SICA reforms. In 2017, the newly elected SICA Secretary General launched a new review programme of SICA. The Secretary General’s programme set out the following lines of action: provide new effectiveness to the General Secretariat; achieve systemic coordination among SICA institutions (‘integrating integration’); establish relationships with new partners; reposition the SICA in the regional agenda (‘living integration’); and include gender rights in the integration process.

This section sets out innovations in the thesis that address the Secretary General’s review objectives. Included is a ground-breaking approach that accentuates the necessity to contextualise intended transplanted concepts and doctrines from other regional systems. There are specific recommendations for mechanisms that could foster dialogue between the regional and domestic courts. The first recommends preparation of a regional integration rights charter. The second involves adoption of blue-prints to clarify aims, purpose and roles of SICA institutions, and accountability in meeting them.

A. Contextual Approach to Transplants: Adapting Primacia at the Regional level

Further on the recommendation of contextualisation, the thesis identified a judicial problem related specifically to transplantation of European doctrines of supremacy and direct effect by the Central America Court of Justice. The regional court has renamed supremacy as ‘primacía’, thus creating conceptual confusion. Domestic courts had conceptualised primacía as not having a supremacy effect and respective to the principle of constitutional supremacy enshrined in domestic constitutions and SICA treaties. Thus the move by the regional court to transplant the European doctrine and define SICA norms as having higher hierarchical status to constitutions and other treaties (including the World Trade Organisation and US-DR-CAFTA) led to backlash. There were calls for the regional court to redefine the nature and limits of the SICA legal regime in terms of domestic legal systems, so as to respect the constitutional supremacy of member states.11

11 See discussion in Chapter 4, Title IV, part C.
The thesis identified a potential transplant that could be expected to have success in solving this judicial problem in SICA. This is the Spanish concept of *primacía* or first-choice application of regional law.\(^{12}\) That doctrine provides an understanding of the place of regional law that is consistent with the Central American sentiment of hierarchy of laws. This interpretation would also be much more sensitive to the provisions of the *Tegucigalpa Protocol*. It has the potential to develop a vision of Central American monism that domestic courts as well as governments could be more willing to accept. It is also an interpretation of law that fits better with the pluralism of sources within Central American integration governance. Further, it has the potential to tackle the unwanted effects of extra-regional treaties, such as the *US-DR-CAFTA*, as discussed below.

B. *Regional Integration Rights’ Charter for Central America*

A regional rights’ integration charter is a vital recommendation. It is needed to address the judicial problem of dialogue and the institutional problem of effective remedies for breaches of law and individuals’ rights. A new regional integration charter has the further potential to respond to the aims of the General Secretariat’s action plan for the achievement of systemic coordination and inclusion of rights in the integration process.

On the value of a regional charter to tackle the problem of judicial dialogue, it is notable that the *European Charter of Human Rights* was itself the result of dialogue between regional and domestic institutions. It subsequently provided a pathway to solving the issues of hierarchy. This meant granting a new competence in the European judiciary, limited to European integration norms. It also defined the specific scope of governance on which the regional court may act, and on which domestic courts would defer to its authority. As such, it alleviated potential tensions between regional and domestic courts and avoided clashes of regional and domestic norms.

A charter of this kind could give concrete effect to the principles of speciality and *primacía* as established by the domestic courts, thus respecting the features of Central American governance and regionalism. This could help avoid scenarios of conflict of laws and devise deferential approaches to the regional court. This would mean a regional charter that specifically grants a speciality jurisdiction to the Central American Court of Justice, to domestic courts, as well as to other judicial bodies, which contains recourse to

\(^{12}\) On the discussion of *primacía* in Central American, see Chapter 2, Title IV, part E. On the discussion of the Spanish notion of *primacía*, see Chapter 6, Title II, part B, section 1.
the expertise and speciality of the regional court in interpreting SICA law via preliminary reference procedure.

A regional rights charter could also resolve the further problem of breaches of law and individuals’ rights at the regional level. To this end, the charter could conceivably specify which organs (domestic and regional) have powers to review SICA norms, and which have powers to review domestic norms implementing regional policies. Following the European charter, these would only apply to integration matters and revision for breaches of law and individuals’ rights in the SICA legal regime.

A regional rights’ charter in Central America would plausibly include rights of freedom of movement of individuals, goods and capital, investment, and other associated rights concerning labour, social security, welfare, and non-discrimination. The likelihood is that it would not include civil and political rights, since these are limited to domestic courts and are ultimately justiciable at the Inter-American level by the Inter-American Court of Human Rights. As such, a regional rights’ charter would seek to avoid competition between the Central American Court of Justice and the Inter-American regional court.

Ultimately, an integration rights charter is consistent with the special significance that Central American states give to human rights in their domestic constitutions. This could help make the charter a valuable tool for expanding Central American regional governance that legitimises potential actions of Central American institutions, domestic and regional.

C. Introducing the Blue-print Exercise in SICA

The thesis has presented strong reasons why the ASEAN blue-print system could help achieve better coordination among SICA institutions and establish new relationships with extra-regional partners. As an intergovernmental exercise it carries capacity to address the conceptual and institutional challenges of fragmentation, over-expansion and executive dominance.

Being intergovernmental means a blue-print system would fit the executive orientation of the SICA legal regime. That orientation is problematic, as discussed. At the same time, it has shaped some very successful moments of SICA. For example, Chapter 3 discussed

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13 See discussion in Chapter 2, Title II, Part B.
the implementation of regional policies to establish the first common market in the 1960s, and the return to democracy in the late 1990s. A further example is how intergovernmental action is currently being reinvigorated by a push towards a customs union in the region by Guatemala, Honduras and El Salvador. However, these instances of executive-led implementation need to be systematically captured. The creation of a comprehensive blue-print for SICA would provide a first step. It could lay down a common path for all the SICA’s subsystems. As it has done in ASEAN, the blue-print could subsequently establish the next steps where all states commit to similar obligations emanating from the multiple subsystems. The short-term goal could feasibly prepare the inclusion of a Central American regional rights’ charter. Additionally, it could reform the SICA institutional framework, consolidating mandates into fewer stronger regional institutions, eliminating those without a concrete function or that duplicate functions.

After institutional restructure, and ratification of a right’s charter, a blue-print could establish medium-term objectives for SICA including the reform and ratification process of SICA treaties. Usefully this could include the introduction of guiding principles of interaction between the multiple subsystems. The long-term aims and purpose could beneficially include the inclusion of those SICA states who remain outside the customs union currently comprising Guatemala, Honduras and El Salvador. Long-term objectives would also constructively include future steps towards deeper economic integration, as set out in the Guatemala Protocol.

Reviewing the problem of fragmentation in greater depth, the blue-print exercise could be used to remedy treaty and institutional fragmentation by setting out a common platform for developing all regional action and institutional developments. The platform would not require new treaties or institutions, but instead would serve to integrate their scope into a unified line of action. Since the blue-print involves systematic planning and steps for implementation, there is an inherent quality to designate obligations for states and regional bodies. In other words, the blue-print could become both an intergovernmental and judicial accountability scheme for bodies already in place. In ways that ASEAN lacks, Central American regionalism has a comparative advantage concerning accountability. This is the existence of intergovernmental and judicial accountability bodies already in place in the structures of governance. Yet they need strengthening in the face of fragmentation. A blue-print system could establish the specifications for standards and
objectives to which states and regional bodies could be held accountable. Ideally there would be short, medium and long term objectives for scrutiny of accountability in bodies such as the executive commissions, and the Economic Secretariat.\(^\text{14}\) A cautionary note needs to be added that the blue-print system could not eliminate the SICA’s managerial trait or its heavy executive dominance. At the same time, it could establish an accountability aspect that transforms the current hegemony.

V. BENEFITS OF THE SOLUTIONS PROVIDED BY THIS RESEARCH THESIS: A COMPETITIVE SICA AT THE GLOBAL LEVEL

Since 1994, SICA has been unable to take any effective steps towards reform or modernisation to deal with the problems this thesis has focused on. In the context of the SICA 2017 review programme, this focus could plausibly add new impetus towards reform. The reform would need to be fundamental. This refers to the historical legacy of external influence from other states and regions. The creation of the SICA was a specific response to Central America’s impending departure from the US sphere of influence. Yet the prevailing influence continues to come from outside Central America. Member states have shown preference to negotiate and ratify Free-Trade Agreements with states outside the SICA, rather than acting as a regional unit.\(^\text{15}\) SICA states have ratified a series of different commercial commitments and ignored SICA rules in the process. Moreover, in some negotiations with common partners, such as the US, SICA member states have negotiated different positions and separately.\(^\text{16}\)

The most notable example was the ratification of the \emph{US-DR-CAFTA}, which created a competing economic legal regime within Central America. The US ‘influence’ was predicated on their perception that the SICA legal regime as too inefficient to promote a strong platform for US investors in the region. The SICA regime failed to provide adequate protection for investment or individuals, particularly on labour issues. The

\(^{14}\) To refresh, the Economic Secretariat (SIECA), different to the General Secretariat, has been granted the power to review state activity in order to determine if it complies with regional norms. See debate in Chapter 4.

\(^{15}\) Kati Suominen, ‘Monitoring Regional Integration: The Case of Central America’ in Phillipe De Lombaerde, Antoni Estevadeordal and Kati Suominen (eds), \emph{Governing Regional Integration for Development: Monitoring Experiences, Methods and Prospects} (Ashgate, 2008) 65.

ratification of the *US-DR-CAFTA* reinforced the weaknesses and inefficiencies of the SICA and introduced new pressures on the SICA legal regime.

This is where the strength of a recommended regional rights charter lies. It could greatly enhance the SICA legal regime through an action framework – a charter – that recognises regional integration rights and identifies procedures to safeguard individuals’ rights, locally and internationally. This could provide SICA with new credentials for investment security inside and outside the region. The development of short, medium and long term timeframes could provide more certainty for investors and individuals in the region regarding their rights. A higher ‘subjectivation’ of SICA norms, through the recognition of rights in the region, and the creation of detailed blue-prints is likely to elevate regard for SICA, thus enhancing the attraction of foreign and domestic investors. Specifically, a competitive SICA legal regime is needed to attract investors in an environment of small countries, given that investors prefer to invest in a singular unit. Ultimately, a more competitive SICA could transform the role of SICA where its work was specifically applied to commercial relations with the US.

VI. FUTURE DIRECTION FOR NEW RESEARCH

The intention in this thesis has been to open new pathways for regional studies and comparison between them. This relates to opening inquiries that are not only about methodologies for comparative regionalism, but also inquiries that centre on Central America in global studies of regionalism.

A. Developing a Methodology for Comparative Regionalism

Comparative regionalism lies at the crossroads of comparative constitutional law and comparative international law. The thesis has found that both these spheres contain benefits for comparative regionalism methodologies. European scholarship has ‘dominated’ Central American doctrinal and legal development. In its review of Central American legal construction since the foundation of the region, the thesis found that the predomination of foreign concepts persists in the normative acceptance of European scholarship as the integration model for Central America. The dominance of foreign scholarship is demonstrated by the ‘Janus-faced’ nature of Central American comparative

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assessments. On one side can be seen the assessment of scholarship from Europe and abroad that Central American integration is unsuccessful in its failure to adequately follow European standards or replicate the conditions of European integration. On the other side can be seen assessment of scholarship from within the Central American region that uncritically adopts European constructs without sensitivity to contextual differences in Central America, creating, in William Twining’s words, a ‘black-letter’ law unresponsive to its reality.18

Methodological improvements for comparative regionalism are likely to be found in the insights and methodologies of CCL. Like constitutional systems, regional arrangements are created by legal instruments, in this case treaties that are determined and regulated by law and composed of institutions. SICA is a regional arrangement with deep historical and constitutional connotations. It was the product of a larger constitutional and peace-building process and reflects many of the constitutional traits of the constitutive domestic legal systems. At the same time, like the domestic constitutional systems, the Central American Court of Justice has engaged inadequate methodologies to transplant foreign doctrines. The thesis has shown this by drawing on CCL. The latter enabled a critique of the Central American Court of Justice methodology used to transplant the European doctrines of supremacy and direct effect. It further provided insights that could resolve the problem. This entails a shift away from reductionist analysis of exporting legal systems, and reengineering the transplants to reflect the importing contexts. This is viable, as seen in the discussions of successful examples of reengineering in Central America that were informed by key features of Central American transformative constitutionalism.19

Comparative regionalism is a new field of study.20 It could benefit from CIL and CCL understandings. The thesis undertook to explain this by developing a methodology for comparative regionalism that is informed by history and contexts in Central America, but also draws on the experiences of regional arrangements around the globe.21 Such

19 See discussion in Chapter 5, Title III.
21 Ibid.
arrangements have been steadily expanding since the 1990s. These include understudied examples such as Africa, Caribbean, Middle East, Central Asia, and more. While the thesis narrowed its focus to investigate one relevant example of comparative regionalism, ASEAN, this relevancy is considered to extend to regional arrangements beyond Central America.

B. Insights from Central America for Global Studies of Regionalism

Central American regionalism has been a largely unexplored geographical area in comparative scholarship. Further, regional studies has overlooked its rich, and sometimes tragic history. This needs correcting because the historical contexts inspire enormous respect for the resilience of the integration project. There is a history of civil conflict, foreign intervention, and struggle with repression. Yet, the Central American integration enterprise has been enduring and resilient. This continues currently with new impetus and new challenges depicted by the 2017 reform process. The region’s dynamism and creativity show up in the multiple historic stages of state-building. Federal reunification attempts, the creation of the first international organisation on the continent, the establishment of the first international court globally, and the creative responses to domestic conflicts and regional peace processes, are all strong evidence of dynamism.

Central American integration has been shaped not only by the history of its own region, but also by transnational movements and politics. Central American integration is as much a Central American affair as it is a global one. Events have established a place for Central American integration in the global environment. In current times, the region’s state building is increasingly linked to transnational enterprises and objectives. This is demonstrated by recent international missions to combat corruption in Central American states. This constitutes a current example of intervention by the international community based on a now-familiar methodology of ‘one size fits all’. This points to ongoing reasons to advocate contextualised comparative methodologies to engender effectiveness in important initiatives like anti-corruption. Central America has become a laboratory for

24 Börzel and Risse, above n 20, 641.
the importation, application and exportation of global ideas and further investigations could contribute much to legal scholarship beyond studies of integration.

While studies of Central America are marked by the influence of transnational ideas of regionalism and its legal constructs and concepts, Central America also offers a case study to critique and contest these constructs and concepts. Specifically, Central America provides comparative experiences that counter assumptions made in orthodox European and South American studies of regional integration. As the thesis demonstrates, Central America is a highly relevant regional context for critiques of the application of doctrines such as *supremacy* and *direct effect*, commonly adopted by many regional courts around the globe. Such critiques speak to the limits of the orthodox European approach to integration with its heavy focus on the judicial. The Central American experience challenges not only generalised international and supranational adjudication theories, but further illustrates the need for studies of regional law to include other modalities of integration, including intergovernmentalism.

Moreover, the Central American integration experience also challenges global public (post-sovereignty) legal studies, which are embedded in the European integration experience and aspire to a form of global constitutionalism and supranational governance. Central America offers a rich source of case law that provides an interpretation of regional norms that are directly limited by fundamental rights and by the delegation of competencies by national institutions. This is similar to those found in the German Constitutional court’s *Solange* case law and reiterated in recent judgments. The thesis highlights the benefits of exploring this case law comparatively, along with other intrinsic legal developments in the European and other integration regimes. In the final instance, the goal and purpose of future research projects needs to shift the focus away from the singularities of an integration regime. Instead, research needs to shed further light on the points of interaction between regional and domestic norms. This

25 See again discussion in Chapter 6, Title II, part A.
28 Bundesverfassungsgericht [German Constitutional Court], 2 BvR 1961/09, 29 July 2018 [27].
approach could engender powerful insights for both domestic constitutional systems and for regional integration.
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C. Legislation and Treaties

Central America

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Charter of the Organization of Central-American States, Signed 12 December 1962, 2 ILM 235

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Constitución de La Confederación Centroamericana de 1842 [Constitution of the Central-American Confederation of 1842]


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Ministers of Economic Integration Council], Signed 13 February 2003, Intrumentos Jurídicos Del Sistema de Integración Centroamericana 666

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Europe


Treaty Establishing the European Coal and Steel Community, Signed 18 April 1951, 261 UNTS 11 (Entered into Force 23 July 1952)

Treaty Establishing the European Community, Opened for Signature 25 March 1957, 298 UNTS 11 (Entered into Force 1 January 1958)


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Southeast Asia


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Universal
