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OF BLIND PEOPLE, ELEPHANTS AND THE PACIFIC ALLIANCE INTEGRATION: INSTITUTIONALIST ACCOUNT AND PROPOSALS FOR CHANGE

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ABSTRACT

The Pacific Alliance (PA) presents itself as a sui generis 'mechanism for regional integration' comprising Chile, Colombia, Mexico and Peru. In this thesis, I examine the main institutional features of the PA, the factors that explain these institutional choices and to what extent its institutional framework is suitable to support the objectives of the PA in the long-term. The scope of the thesis is threefold: descriptive, explanatory and normative.

I take an interdisciplinary and eclectic approach to study the institutional dimension of the PA. I base my analysis on insights from new institutionalisms — constructivist and rational institutionalisms — while following a legal orientation when reading and applying new institutionalisms. I also employ international institutional law to assess the international legal status of the PA. At the methodological level, the thesis uses qualitative methods — doctrinal and empirical analysis — to address the research questions.

The core argument I develop in this thesis is that rational factors, such as cooperation problems and characteristics of the PA members in the aggregate, and ideational factors explain the PA's institutional design. External institutional environments also contribute to explain PA's institutional architecture. Institutional entrepreneurs have carefully crafted organisational and task-related decentralisation, the scope of issues covered, the rules for control, and the array of adjustability devices in its institutional rules. PA's institutional design is also the result of the revisited neoliberal program amplified at the regional level through the open regionalism and deep integration programs and the frames of flexibility and pragmatism.

I contest, based on empirical evidence, claims about the sui generis nature of the PA's institutional model of economic regionalism. I also challenge established views about its non-political and non-ideological foundations.

I demonstrate that the PA represents an informal intergovernmental institution (IIG). The PA is not an international organisation invested with international and domestic legal personality. Organisational structures in the PA follow a spectrum of formal and informal arrangements. These structures have, in many instances, responded to what I call demand-based or problem-based approaches in their establishment. Growth and specialisation of organisational structures take place through informal means, which evidences the effects of the ideas of flexibility and pragmatism that frame the PA and its regional integration process.

The thesis shows that the PA relies heavily on soft-law reinforcing its political basis. Mandatory commitments or hard-law approaches refer primarily to the construction of a free trade area as of today while soft-law is predominant in several areas that comprise its large economic and non-economic cooperation pillar.

I maintain that the PA's current institutional framework does not equip it to respond to the needs for policy coordination and harmonisation, and the development of other regional public goods associated with the goals of its economic regionalism project.

From a normative stand, as the PA evolves it will require institutional adjustments to deal with the tasks of (i) information production and management; (ii) decision making; (iii) administration; (iv) monitoring; (v) dispute resolution; and (vi) enforcement/punishment. The PA needs to introduce elements of centralisation and delegation, such as a Secretariat, to perform some of these tasks.

This thesis has significance for policy entrepreneurs, government officials and academics by mapping and explaining the institutional approach that PA architects have taken, how it has evolved, and the benefits and shortcomings arising from it. The thesis is a tool to inform policy decisions regarding institutional changes to the PA. I test the explanatory power of rational and constructivist approaches from new institutionalisms, proposing an eclectic analytical framework to grasp better the PA's institutions at the empirical level. With the restrictions of a case study for potential theory building, the thesis also speaks to the institutionalist literature. It makes incremental developments that extend rational institutionalism insights to explain some of the PA's treaty provisions.

DECLARATION

This is to certify that:

(i) the thesis comprises only my original work towards the Doctor of Philosophy (Law);
(ii) due acknowledgement has been made in the text to all other material used; and
(iii) the text and argument of this thesis is fewer than the maximum word limit in length, exclusive of tables, maps, bibliography and appendices. However, footnote referencing practice means that the total length is 117 880 words.

Ana María Palacio Valencia

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Ana María Palacio Valencia, 'La Alianza del Pacífico y el Mercosur en la Gobernanza Regional del Comercio de Servicios' (2018) 6 *Revista Latinoamericana de Derecho Comercial Internacional* [Ana María Palacio Valencia, 'The Pacific Alliance and Mercosur in the Regional Governance of Services Trade' (2018) 6 (1) *Latin American Journal of International Trade Law*.

Ana María Palacio Valencia and Pierre Sauvé, 'The Collaborative Economy: Prospects and Challenges for the Pacific Alliance' (2019) 6 Latin American Journal of International Trade Law.

Ana María Palacio Valencia, 'Marcos regulatorios de servicios e inversiones en la Alianza del Pacífico y Mercosur: ¿Convergencia a normas del siglo XXI?' (Serie Comercio Internacional No 143 (LC/TS.2019/51), CEPAL, 2019) [Ana María Palacio Valencia, 'Regulatory frameworks for services and investments in the Pacific Alliance

and Mercosur: Is there convergence towards 21st century rules?' (International Trade Series No 143 (LC/TS.2019/51), ECLAC, 2019)]

The Blog Shaping the Pacific Alliance (*http://pacificallianceblog.com/*), edited and founded by me, is also the result of the research project that culminates with this thesis and an effort to actively engage with and communicate the outcomes of my research to a broader audience.

The Blog includes the first online library of academic literature and research about the Pacific Alliance. This library is the closest to a population of academic publications about the PA that I built over the last five years. The library represents a significant public good in itself for the academic community that contributes towards incremental knowledge about the PA and more broadly economic regionalism.

A summary of this research project is also available through video at the following link: *https://www.youtube.com/watch?v=71eoPVmpKdY*

General Abbreviations

ABAC	APEC Business Advisory Council
AEO	Authorised Economic Operator
ALBA	Bolivarian Alternative for the Americas
APEC	Asia Pacific Economic Cooperation
ARCO	Pacific Rim Forum (Spanish acronym)
ARPPI	Agreement for the Reciprocal Promotion and Protection of Investment
ASEAN	The Association of Southeast Asian Nations
BIntLE	Behavioural International Law and Economics
BITs	Bilateral Investment Treaties
IDB	Inter-American Development Bank
CABEI	Central American Bank for Economic Integration
CACM	Central American Common Market
CAF	Latin American Development Bank (Spanish acronym)
CAN	Andean Community (Spanish acronym)
CAPs	Conformity Assessment Procedures
CARICOM	Caribbean Community
CARIFTA	Caribbean Free Trade Agreement
CEAP	The Pacific Alliance Business Council (Spanish acronym)
CELAC	The Community of Latin American and Caribbean States (Spanish acronym)
CER	Australia New Zealand Closer Economic Relations Trade Agreement
CMF	The Council of Ministers of Finance (Spanish acronym)
COIL	The Continent of International Law Project
CP-TPP	Comprehensive and Progressive Agreement for Transpacific Partnership
ECLAC	United Nations Economic Commission for Latin America
ECCM	East Caribbean Common Market
ECA	Economic Complementation Agreement
EC	European Communities
EEC	European Economic Community
EU	The European Union
FEALAC	The Forum for East Asia-Latin America Cooperation
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GAN	High-Level Group (Spanish acronym)
GFC	The Global Financial Crisis
IADB	Inter-American Development Bank
ICJ	International Court of Justice
ICST	International Centre for Trade and Development
IEC	International Electrotechnical Commission

IFIAP	Investment Facilitation Instance for the Pacific Alliance (Spanish acronym)
IIA	International Investment Agreements
IIRSA	Initiative for the Integration of the South American Infrastructure
IGI	Inter-Governmental Institution
ISDS	Investor-State Dispute Settlement
ISO	International Organization for Standardization
LA	Latin America(n)
LAFTA	Latin American Free Trade Association
LAIA	Latin American Integration Association
MERCOSUR	Southern Common Market (Spanish acronym)
MCCA	Central American Common Market
MILA	Latin American Integrated Market (Spanish acronym)
MRAs	Mutual Recognition Agreements
NA	Not applicable
NAFTA	North American Free Trade Agreement
NCMs	Non-Conforming Measures
NIA	No Information Available
NGO	Non-Governmental Organisation
NT	National Treatment
MFN	Most Favoured Nation
NSAs	Non-State Actors
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OECS	Organisation of Eastern Caribbean States
PA	The Pacific Alliance
PECC	Pacific Economic Cooperation Council
PTR	Permanent Tribunal of Revision
PPP	Purchasing Power Parity
PPH	Patent Prosecution Highway
PwC	Price Waterhouse
RDII	Rational Design Project
RIAs	Regional integration arrangements
SADC	South American Defence Council
SELA	Latin American and Caribbean Economic System (Spanish acronym)
SICA	Central American Integration System (Spanish acronym)
SMEs	Small and Medium Size Enterprises
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TiSA	Trade in Services Agreement
TPA	Trade Promotion Agreement
TTMRA	Trans-Tasman Mutual Recognition Arrangement
UNASUR	Union of South American Nations (Spanish acronym)
UN	The United Nations

US	The United States of America
USSR	Union of Soviet Socialist Republics
WGI	The Worldwide Governance Indicators
WTO	World Trade Organization

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I INTRODUCTION

'Institutionalist insights, backed up by careful empirical studies of international institutions broadly defined, can help international lawyers and policymakers to design more effective and durable institutions and regimes.'[1] This statement by Anne-Marie Slaughter reflects on the inherent conundrum that policy designers face when they attempt to develop regional frameworks for cooperation.[2] These challenges refer not only to the establishment of institutions but also to the way in which they are designed in terms of the functional attributes, competences, and (technical and financial) capabilities given to them to fulfil their purposes.

Bearing in mind the context in LA where regional institutions proliferate with fragmented and overlapping regionalism projects,[3] the Pacific Alliance ('PA') emerged in 2011 as a new institution attracting a great deal of international attention. The PA comprises Chile, Colombia, Mexico, and Peru and presents itself as an integration mechanism under the ideas of open regionalism,[4] deep integration, flexibility and pragmatism. The arrival of a new regional institution prompts several concerns and views on the prospects of its effectiveness, considering the large amounts of resources and time that states invest in these types of projects and the sunk costs of undertaking them.

The thesis examines the design features of the PA, their rationale, and their suitability for achieving its goals. It is also interested in its institutional practices and informal rules because of their influence on the effectiveness of institutional frameworks despite the empirical limitations in mapping those practices and informal rules. In examining the rationale of the institutional design, the thesis assesses the role of interstate cooperation problems, characteristics in the aggregate of the PA members, and ideas.

An eclectic approach that uses new institutionalism approaches — rational institutionalism and constructivist institutionalism — to address the above concerns forms the basis for understanding outcomes and shortcomings in the institutional framework underpinning the PA. The insights from new institutionalisms are complemented by accounts of the research program on comparative regionalism, particularly comparative institutional design.

The purpose of this thesis is threefold. First, it has a descriptive scope by mapping the actual institutional framework and dissecting its components based on the empirical information that I gathered and other secondary sources. Second, it has an explanatory aim by providing an eclectic analytical framework to understand the reasons behind the

1 Anne-Marie Slaughter, International Relations, Principal Theories, [13].< https://www.princeton.edu/~slaughtr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG.pdf>.

2 See below Ch 3, Part (II) (A) (1).

3 This is not a characteristic specific to regional integration in LA. See, eg, Carlos Closa and Lorenzo Casini, *Comparative Regional Integration: Governance and Legal Models*, (Cambridge University Press, 2016) 26-30; See also Detlef Nolte, 'Regional Governance from a Comparative Perspective' in Víctor M González-Sánchez, *Economy, Politics, and Governance Challenges* (Nova Science, 2016) 1, 3.

4 See below Ch 4, Part (II).

institutional arrangements within the PA. Third, it has a normative goal by proposing adjustments to the current institutional design features of the PA to strengthen it and provide it with tools that in the long-term could help the PA in coping with demands for further and deep(er) integration. Based on empirical inputs and considering factors such as political and institutional contexts, cooperation problems, and underpinning ideas, I examine the hurdles to implementing the proposed adjustments.

Following theoretical approaches from new institutionalisms, the underlying premise of this thesis is that institutions matter for the progress of economic regionalism, while institutional design has an impact on the achievement of their goals.[5] However, these are not the only factors influencing the final outcomes of regionalism, which cannot rely on institutions and legal architecture alone. These elements are not drivers in themselves, but I understand them as relevant contributing factors that support the project of regionalism in the long-term.[6]

Part II of this introduction summarises the research problem in Section A. Section B outlines the theoretical approach. Section C delimits the scope of the thesis, including the issues that I address and exclude from the analysis. Section D presents the limitations of the thesis and the overall research.

Part III summarises the main argument and outlines the policy implications of the thesis. From a descriptive stand, the thesis maintains that the PA is an IIGI and it is not an international organisation bestowed with legal personality. The PA has an intergovernmental nature, consensual decision-making, and a decentralised organisational and task-related structure; this institution follows an informal approach to institution-building (structures and rules). From an explanatory stand, I argue that PA members have made institutional choices that can be explained not only as the result of rational and utility maximising selection, but also because of the prevailing ideas. From a normative stand, I claim that the PA's informal institutional structures negatively impact on its effectiveness to achieve its far-reaching goals.

Part IV of this Chapter explains the qualitative methodology of the thesis that combines doctrinal and empirical research. The thesis encompasses a case study — the institutional framework of the PA — taking primarily a top-down approach as it is concerned with the role of the PA members, and institutional arrangements that are the result of interstate negotiations. The top-down approach examines formal organisational structures that are in place in the PA and their relationship to practices and informal structures. The empirical research entails interviews to capture the perceptions and ideas of stakeholders about the PA, its operation and organisational structure.

5 See generally Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) 3-4. See also Amitav Acharya and Alastair Iain Johnston, 'Comparing regional institutions: an introduction' in Amitav Acharya and Alastair Iain Johnston (ed*), Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press, 2007) 1, 10-1. See also Ignacio Bartesagui and Maria Eugenia Pereira, 'Regional Cohesion in the Regional Integration Processes in Latin America and the Caribbean' (2016) 11 (1) *Journal of Technology Management and Innovation* 93, 100-1.

6 Edward Moxon-Browne, 'The Role of Institutions in Regional Integration: A Comparative Reflection' in Louis Brennan and Philomena Murray (eds), *Drivers of Integration and Regionalism in Europe and Asia: Comparative Perspectives* (Routledge, 2015) 69-81.

The thesis contributes with detailed insights on the PA's institutional framework, which continues to receive unsystematic attention in the literature about the PA. The primary focus of this literature gravitates around the economic impact of the PA,[7] the challenges and opportunities that the PA faces,[8] and the PA's geopolitical implications for regionalism(s) in LA.[9] This thesis brings to the current debate the institutional dimension of the PA that the existing literature only addresses in passing.[10]

The final Part of this introduction is a synopsis of the structure of the thesis and the issues addressed in the subsequent nine Chapters.

7 See, eg, Adrian Blanco Estévez, 'The Pacific Alliance: a Road Ahead towards Integration' (Wilson Center/Latin American Program, January 2015); Jose Duran Lima and Daniel Cracau, 'The Pacific Alliance and Its Economic Impact on Regional Trade and Investment: Evaluation and Perspectives' (International Trade Series No 128, ECLAC, December 2016); Jose A Hernández Bernal y Luis G Muñoz-Agudelo, Comercio y Evolución de la Alianza del Pacífico' (2015) 24 *Equidad y Desarrollo* 97-118 [Jose A Hernández Bernal and Luis G Muñoz-Agudelo, 'Trade and the Development of the Pacific Alliance' (2015) 24 *Equidad y Desarrollo* 97-118]; Roberto Abusada-Salah et al, *Dimensiones y Efectos Económicos de la Alianza del Pacífico* (Konrad Adenauer Stiftung, 2015) [Roberto Abusada-Salah et al, *Dimensions and Economic Effects of the Pacific Alliance* (Konrad Adenauer Stiftung, 2015)]; Samuel George, 'Los Pumas del Pacífico: un Modelo Emergente para Mercados Emergentes' (Bertelsmann Foundation, 2014) [Samuel George, 'Pacific Pumas: an Emerging Model for Emerging Economies' (Bertelsmann Foundation, 2014)].

8 See, eg, John E Spillan, and Nicholas Virzi, *Business Opportunities in the Pacific Alliance: The Economic Rise of Chile, Peru, Colombia and Mexico* (Palgrave Macmillan, 2017).

9 See, eg, Barbara Kotschwar, 'Will the Pacific Alliance Succeed in Latin America After Other Trade Pacts Have Failed?' Peterson Institute for International Economics, RealTime Economic Issues Watch, (23 May 2013) <http://blogs.piie.com/realtime/?p=3586>; Carlo Dade and Carl Meacham, 'The Pacific Alliance: An Example of Lessons Learned' (Center for Strategic & International Studies, 2013); Detlef Nolte and Leslie Wehner 'The Pacific Alliance Casts its Cloud over Latin America' (2013) 8 *GIGA Focus* 1; José Briceño Ruiz, 'La Iniciativa del Arco del Pacífico Latinoamericano: Un Nuevo Actor en el Escenario de la Integración Regional' (2010) 228 *Nueva Sociedad* 44 [José Briceño Ruiz, 'The Initiative of the Latin American Pacific Rim: A New Actor in the Scenario of Regional Integration' (2010) 228 *Nueva Sociedad* 44]; Maria Alejandra Gonzalez Pérez et al, 'Pacific Alliance: Bringing Back Open Regionalism to Latin America' (2015) May–August *Análisis* 21; Lorena Oyarzún-Serrano, 'The Pacific Alliance and the construction of a new economic regime? in Jose Briceño-Ruiz and Isidro Morales (eds) *Post-Hegemonic Regionalism in the Americas: Towards a Pacific Atlantic Divide?* (Taylor and Francis, 2017) 141, 145.

10 See, eg, Juan Pablo Pampillo Baliño, 'La Alianza del Pacífico y la integración jurídica latinoamericana. Antecedentes, balance y perspectivas' en Eric Tremolada Álvarez (ed), *La arquitectura del ordenamiento internacional y su desarrollo en material económica* (Universidad Externado de Colombia, 2015) 365 [Juan Pablo Pampillo Baliño, 'Pacific Alliance and the Juridical Latin-American integration. Precedents, assessments and perspectives' in Eric Tremolada Álvarez (ed), *The architecture of the international order and its economic development* (Universidad Externado de Colombia, 2015)] 365, 390, 392; Geneviève Marchini, 'La Alianza del Pacífico a ocho años de su creación. Balance critico y perspectivas' (2019) 7 *Anuario Latinoamericano Ciencias Políticas y Relaciones Internacionales* 75, 102-3 [Geneviève Marchini, 'The Pacific Alliance Eight Years after its Creation. Critical Balance and Perspectives' (2019) 7 *Anuario Latinoamericano Ciencias Políticas y Relaciones Internacionales* 75, 102-3]; Catherine Ortiz Morales, 'The Pacific Alliance as a Regional Actor: Success Factors for Regional Cohesion towards International Integration' (2017) 29 (1) *Desafíos* 49, 51-2, 71-2; [Monce Cristina Cepeda Aced, 'The Pacific Alliance: Challenges in the Pathway towards Integration' (Study Series No 13, Konrad Adenauer Stiftung, 2015) 77; Bartesagui and Pereira, above n 5, 100.

II FRAMING OF THE PROBLEM, AND SCOPE OF THE THESIS

This Part enunciates what I see as the overarching problem of the thesis. I outline the matters examined in the thesis and the dimensions and concerns that are not discussed here.

A *Research Problem and Questions*

The PA was informally established in 2011 and formally set up in 2012 with the signature of the *Framework Agreement of the Pacific Alliance* ('*Framework Agreement*'), which defines the organisational structure for operating.[11] This accord sets the basis of the institutional rules. The PA members have opted for a decentralised intergovernmental model to pursue deep integration towards the progressive liberalisation of goods, services, capital, and people flowing across the member states. The scope and topics that PA members are willing to address in this forum continuously increase. Yearly presidential declarations broadly outline new mandates and activities for the PA to work on. At the same time, a growing number of ad hoc working groups, committees and networks are created to deal with the institutional demands of implementing the objectives of the mechanism and the presidential declarations.

As primary and secondary sources suggest and empirical data confirms, member states have implemented a decentralised model of governance for the PA. This model is paired with a decision-making process built on consensus not only at the top level but also at the managerial and technical levels. A decentralised institutional model has benefits regarding flexibility, lower transaction costs in the short-term, and rooted respect for state sovereignty. However, the current institutional choices also come with risks that could compromise the PA's ability to deliver regional policy integration and other regional public goods. A decentralised institutional model also makes accountability difficult which can hinder the effectiveness of the PA in achieving its goals.

This conundrum illustrates the problem addressed in the thesis arising from an unresolved tension. It is necessary that the PA ensures an adequate institutional framework pushing towards institutional enlargement, centralisation and delegation of tasks to deal with regular interstate cooperation and collective action by the PA member states. In contrast, the constraints towards institutional adjustments emerging from the underpinning ideas and negative perceptions about the performance of pre-existing regional institutions in LA create resistance to 'upgrade' or enlarge the current organisational structures and legal regime.

This situation raises an important set of questions. First, what comprises the PA's institutional framework? Second, what factors explain the design features of its institutional framework and how? Third, to what extent, does the institutional framework support the intended objectives of the PA, particularly deep integration to advance towards the free movement of people, capital, goods and services? Fourth, does the institutional framework require changes to better support these objectives, and what obstacles or challenges exist to implement such changes? These questions have not been addressed regarding the PA, while concerns about the current institutional

11 *Acuerdo Marco de la Alianza del Pacífico*, suscrito 6 de Julio de 2012 (entró en vigencia 20 de Julio de 2015) ('*Acuerdo Marco*')[*Framework Agreement of the Pacific Alliance* , signed 6 July 2012 (entered into force 20 July 2015) ('*Framework Agreement*')].

framework of the mechanism are briefly mentioned by some authors or intentionally eschewed by others.

B *Theoretical Approach*

The thesis follows an interdisciplinary approach that takes insights from institutionalist theories and international institutional law. The theoretical framework is based on rational institutionalism and constructivist institutionalism of the new institutionalisms in institutionalist theories.

The theoretical approach is also eclectic because it follows more than one stem of new institutionalisms in an effort to empirically grasp the institutional framework of the PA. The detailed insights provided by rational and constructivist approaches assist to address the research questions in ways that traditional integration theories (eg, neofunctionalist, intergovernmentalism) and new regionalism approaches cannot. Contrasting with integration theories, these approaches are concerned not with the regionalism project as such but with the working of institutions, and their design, decision-making process, and performance. Complementarily the thesis takes into account the views provided by the research program known as comparative regionalism,[12] particularly comparative institutional design. [13]

The thesis draws explanatory factors from rational and constructivist institutionalisms — interstate cooperation problems, characteristics of the states in the aggregate, and ideas —to explain the design features and institutional choices made by the PA members in its establishment. The insights of rational and constructivist institutionalisms also assist to identify the limitations of the current institutional framework in moving towards deep integration and the free movement of factors, and the potential risks of the status quo for the PA.

Complementarily, comparative institutional design offers not only an understanding of the variations across regional institutions but also highlights the need to take into account history and context, which I refer to as external institutional environments.[14] Comparative exercises across regional institutions help in assessing the accuracy of claims about the sui generis and unique character of the PA institutional design.[15] Comparative institutional design also provides insightful explanations about institutional design features that are a response to the general challenges of intergovernmental cooperation and regional coordination notwithstanding political and socioeconomic conditions of particular regions. I do not draw systematic comparisons

12 Alberta Sbragia, 'Review Article: Comparative Regionalism: What Might it be? (2008) 46 *Journal of Common Market Studies* 29; Alex Warleigh and Ben Rosamond, 'Theorising Regional Integration Comparatively' (Paper Presented at the ECPR Joint Sessions of Workshops, Nicosia, 25-30 April 2006); Tanja A Börzel 'Theorizing Regionalism: Cooperation, Integration and Governance' in Tanja A Börzel and Thomas Risse (eds) *Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016) [Kindle 1150]; Tanja A Börzel, 'Comparative Regionalism a New Research Agenda' (KFG Working Paper Series No 28, Freie Universität Berlin, August 2011) < *https://eustudies.org/conference/papers/download/33* >.

13 See, eg, Amitav Acharya and Alastair Iain Johnston (eds*), Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press, 2007). See also Closa and Casini, above n 3.

14 See below Ch 5, Part (IV).

15 See below Ch 5, Part III (C).

between the PA and other regional institutions but I use the insights and findings of existing comparative exercises in the realm of institutional design of regional institutions to shed light on the options available to the PA regarding institutional upgrading.

Supplementarily, international institutional law informs the legal analysis undertaken in the thesis. This is required to examine legal rules that are part of the broader institutional framework encompassing the PA. It assists in addressing questions such as the legal nature of the PA, the type of commitments undertaken by PA members, and the emerging legal regime. Thus, the thesis attempts to build a bridge between two academic disciplines —international relations and public international law.

C *Scope of the Thesis*

This thesis is concerned not with the PA as a whole but with its institutional dimension and how it supports other dimensions of the PA, particularly the economic dimension. The answers to the above-mentioned questions shed light on the institutional dimension of the PA, specifically its nature either as a sui generis model for economic regionalism or one example more of informal institutionalisation in economic regionalism.

I examine in this thesis the main institutional features of the PA, the factors that explain these institutional choices, how these factors explain these choices, and to what extent its institutional framework is suitable to support the objectives of the PA in the long-term. Thus, the scope of the thesis is threefold: descriptive, explanatory and normative.

In the descriptive realm, I map the institutional framework of the PA, comprised of a continuum of formal and informal institutional structures and rules. I also grasp significant institutional practices shaped over time through regular interstate interactions. I aim to provide a detailed picture of the formal and informal arrangements that made the PA institutional framework. This exercise that I undertake in Chapter 5 has not been conducted in the literature about the PA as of today.

A few preliminary assessments have tackled the organisational structure of the PA attempting to characterise its composition and operation.[16] In some cases these studies

16 The Pacific Alliance: The Future of Latin American Integration? Analysis Documents Series 1, Centre for International Studies Gilberto Bosque, July 2014) 7 <http://centrogilbertobosques.senado.gob.mx/docs/Doc_Analisis_Jul2014.pdf> 15-17, 60; Eric Tremolada, 'La Alianza del Pacífico: ¿una organización consecuente con sus objetivos? en Eric Tremolada (ed), *Repensando la Integración y las Integraciones* (Universidad Externado de Colombia, 2013) 234, 248-249 [Eric Tremolada. The Pacfic Alliance: is it an organisation consistent with its objectives? in Eric Tremolada Álvarez (ed), Rethinking Integration and the Integrations (Universidad Externado de Colombia, 2013) 234, 248-249]; Fabian Novak and Sandra Namihas, *The Pacific Alliance: Situation, Prospects and Proposals for Consolidation* (IDEI, Konrad Adenauer Stiftung, 2015) 75-85; Jairo Andrés Castaño Peña, 'Análisis y Perspectivas de la Alianza del Pacífico' (2016) 64 (1) *Estudios de Deusto* 281, 301 [Jairo Andrés Castaño Peña, 'Analysis and Prospects of the Pacific Alliance' (2016) 64 (1) *Estudios de Deusto* 281, 289-291; Permanent Secretariat, 'The Pacific Alliance within the Latin American and Caribbean Integration' (Report SP/Di No 1-13 SELA, May 2013) 5-7; Secretaría Permanente, 'Evolución de la Alianza del Pacífico' (SP/CL/XL.O/Di Nº 11-14, SELA, Noviembre 2014) 19-22 [Permanent Secretariat, 'The Evolution of the Pacific Alliance' (SP/CL/XL.O/Di Nº 11-14, SELA, November 2014) 19-22].

stress the need for a supranational regime as a prerequisite for success,[17] for achieving deep integration, or the aim of a common market.[18] They also stress the requirement that it becomes an international organisation.[19] Some of this literature takes the European Union a template, without giving careful consideration to the contextual and historical issues that have prevented the adequate implementation of supranational regional institutions in LA through the previous attempts of the Andean Community, the Caribbean Community and the Central American Integration System.[20] More importantly, this literature overlooks the differences in cooperation problems between the European Union and the PA while ignoring the ideas behind each of theirs institutional design choices. Conversely, other authors assert the need to develop a bureaucratic institutional model that is light, without providing further explanations on what it entails.[21]

Cartography of the PA institutional framework is a mandatory exercise to unravel the reasons behind its design.[22] Tackling questions of facts — what the institutional framework is and what comprises it — is necessary before addressing questions of law or policy, as Orford stresses in her work on description.[23]

17 Carlos Malamud, *La Alianza del Pacífico: un Revulsivo para la Integración Regional en América Latina* (27 Junio 2012) Real Instituto Elcano < http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/america+latina/ari46-2012> [Carlos Malamud, *The Pacific Alliance: a Wake up Call for Regional Integration in Latin America* (27 June 2012) ElCano Royal Institute < http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/america+latina/ari46-2012 >]; Chirstine Daniels, 'The Pacific Alliance and Its Effect on Latin America: Must a Continental Divide be the Cost of a Pacific Alliance Success? (2016) 37 *Loyola of Los Angeles International & Comparative Law Review* 153, 168-9; Francesco Seatzu, 'The Alliance of the Pacific: A New Instrument of Latin American and Caribbean Economic Integration? in Marco Odello and Francesco Seatzu (eds), *Latin American and Caribbean International Institutional Law* (TMC Asser Press, 2015). See also Marchini, above n 10, 75, 102-3; Pampillo, above n 10, 365, 390-4.

18 See Castaño Peña, above n 16, 301; Lorena Oyarzún Serrano y Federico Rojas de Galarreta, 'Alianza del Pacífico en América Latina ¿Contrapeso regional? (2013) 8 (16) *Cuadernos sobre Relaciones Internacionales, Regionalismo y Desarrollo* 9, 16.

19 Mario Andrés Arroyave Quintero, 'La Alianza del Pacifíco y el Ocaso de la Comunidad Andina: hacia una Nueva Configuracion Interregional en Latinoam**é**rica' en Eduardo Pastrana-Buelvas y Hubert Gehring (eds), *Alianza del Pacífico: mitos y realidades* (Editorial Universidad Santiago de Cali, 2014) 117, 139 [Mario Andrés Arroyave, 'The Pacific Alliance and the Sunset of the Andean Community: towards a New inter-Regional Configuration in Latin America' in Eduardo Pastrana-Buelvas and Hubert Gehring (eds), *The Pacific Alliance: myths and realities* (Editorial Universidad Santiago de Cali, 2014) 117, 139].

20 See Amitav Acharya and Alastair Iain Johnston, 'Conclusion: institutional features, cooperation effects, and the agenda for further research on comparative regionalism' in Amitav Acharya and Alastair Iain Johnston (eds), *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press, 2007) 244, 459. See also José Briceño Ruiz, *Las teorías de la integración regional: más alla del eurocentrismo* (Ediciones Universidad Cooperativa de Colombia, 2018) 180-7 [José Briceño Ruiz, Theories on regional integration: beyond the eurocentrism (Ediciones Universidad Cooperativa de Colombia, 2018)]180-7. For a critique of non-contextual and acritical application of European theories to regional institutions in LA.

21 Guillermo Fernández de Soto, 'La Alianza del Pacífico: un ejemplo para la integración regional' (2015) 39 *Actualidad Jurídica Uría Menéndez*: *Tribuna Abierta* 7, 17 [Guillermo Fernández de Soto, 'The Pacific Alliance: an example for regional integration' (2015) 39 *Actualidad Jurídica Uría Menéndez*: *Tribuna Abierta* 7, 17].

22 Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609, 625.

23 Ibid 624.

Mapping the institutional framework of the PA is also a step to grasp the content of its main design features. These features comprise: (i) the scope of the regional institution in terms of issue and areas covered, (ii) the level of centralisation of tasks, (iii) the rules providing for control, and (iv) the adjustability of arrangements. Knowing institutional design features and what characterises them is significant because of the role these features play in the decision-making, the general administration, the monitoring of compliance with agreements, the enforcement capabilities, and the management of conflicts in interstate cooperation. The content of these features would ultimately determine the ability of the institutional framework to effectively support the PA's objectives.

In the explanatory realm, I endeavour to shed light into the factors explaining the main institutional features in the PA in Chapters 6, 7, and 8. To explain the reasons behind the most salient features of the PA institutional framework I propose an eclectic framework in Chapter 3. I explain the design features through the lenses of existing cooperation problems, characteristics of the cooperating states in aggregate, and prevailing ideas. Complementarily, I take into account institutional environments surrounding the establishment of the PA.

Understanding the institutional environment and drivers behind the creation of this new regional institution is a necessary step to characterise and explain the institutional features of the PA.[24] As Keohane asserts: 'To understand the conditions under which international cooperation can take place, it is necessary to understand how international institutions operate and the conditions under which they come into being.' [25] I endeavour to elucidate these conditions in Chapter 4.

In the normative realm, I problematise in Chapter 8 the institutional features and other institutional aspects that the PA deploys, identifying the benefits, capabilities, and shortcomings that they have for the PA. In Chapter 9, I put forward recommendations that support incremental institutional adjustments to deal with the tasks of (i) decision making; (ii) administration; (iii) monitoring; (iv) information production and management; (v) dispute resolution; and (vi) enforcement/punishment. I discuss proposals to introduce centralisation features and delegation to deal with some of these tasks in the long-term.

As institutional theories suggest, current institutional structures, ideas and practices along with the context will impact any future changes to these structures. The thesis examines the constraints and hurdles for institutional change in the PA and the risks of maintaining the current structures in light of the long-term objectives.

Based on new institutionalisms approaches, my normative assumption in addressing the research questions is that institutional structures should be instrumental in pursuing the goals that member states have set; they should be functionally equipped to support and facilitate the process of region-building.[26] An adequate institutional framework congruent with an expanding agenda is a necessary factor, although not sufficient, to accomplish the goals.

24 See below Ch 4, Part IV.

25 Robert O Keohane, 'International Institutions Two Approaches' (1988*) International Studies Quarterly* 32 (4) 379, 380.

26 See below Ch 3, Part II (A).

In trying to keep the thesis to a manageable endeavour I exclude from the investigation a systematic analysis of domestic institutional factors of the PA member states such as domestic interests and preferences and national political contexts. However, I examine these domestic factors in so far as they related to the 'characteristics of the PA members in the aggregate'.[27] Furthermore, I do not propose to debate the social dimension of the PA and its institutional implications but rather concentrate on the economic dimension. Addressing the social dimension with the due care and depth would require an entire thesis in its own right.[28] In taking this path, I acknowledge the risk of compartmentalisation of issue areas and the difficulties to draw linkages in the future. However, the works of the PA members in the social dimension are still embryonic and unsystematic.

Finally, the thesis time frame of analysis focuses on the 2007–2019 (first semester) period, comprising the conception, establishment and early stages of the PA. However, the consideration of external institutional environments makes necessary to examine regional institutions that were established prior to the PA. The thesis refers to other periods as far as it is instrumental in explaining institutional design within the PA. Moreover, the normative scope of the thesis also demands to consider future institutional changes that will be influenced by the institutional evolution within the time frame 2007–2019. Thinking in institutional terms, as Heclo points out, requires stretching the time horizon back and forward.[29]

D *Limitations of the Thesis*

As a previous advisor to the Colombian Ministry of Trade, Industry, and Tourism, I was part of the negotiating team on issues concerning further integration in the PA from 2013 to 2014. This direct intervention in the process provides me with 'insider' knowledge but could potentially bring preconceptions and prejudgements at the time of planning the research and collecting and analysing data. I have attempted to minimise the risk of biases through various strategies.

Regarding empirical research on interviews, the sampling process ensured as far as possible the participation of 'objective experts' in the stakeholder group of academics and civil society. The sampling and selection of potential interviewees also considered the balanced participation of representatives of the four members and in the case of academia it extended to experts from Argentina and Uruguay. I gathered the data through semi-structured interviews that provided enough leeway for issues to emerge or to be brought up by the interviewees. I refrained from providing information to the interviewees on my previous experience within the PA or the nature of this work before or during the interviews to minimise the risk of influencing their responses. I endeavoured to maintain personal reflexivity through self-critique and auditing, although complete separation from personal frames was not possible.

27 See below Ch 3, Part III (B).

28 See below Ch 10, Part V.

29 Hugh Heclo, 'Thinking Institutionally' in Sarah A. Binder, R A W Rhodes, and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2009) 731, 738.

Some limitations arose in the empirical research, which ideally envisioned equal numbers of participants per country throughout the three groups of stakeholders comprising civil society and academia, government, and industry.[30] Despite multiple efforts, the endeavour was particularly challenging in relation to Mexico and the civil society stakeholder group. I draw some preliminary inferences regarding the interests, knowledge/information, and sense of priority that these actors place on the PA. I later tested these inferences through secondary documentary sources and academic writings to confirm or reject them.

Moreover, limitations on the size of the sample, which encompasses 38 interviews, are associated with constraints regarding economic resources and timelines to conduct the research. However, 38 interviews are considered a representative number, taking into account that 30–35 interviews are the minimum suggested in some sources to reach saturation.[31] Other sources state that the important concern is to reach saturation without pointing out a specific number.[32] In brief, a consensus on the 'ideal' number of interviews is not reached in the literature,[33] but for the purposes of the thesis I consider the sample numbers adequate.

Finally, taking a qualitative case study approach to research presents limitations as to the generalisability or transferability of the findings and explanations provided in this thesis.[34] However it is my view that the benefit of obtaining detailed empirical information on the institutional framework of the PA outweighs the shortcomings regarding the generalisability of the findings for theory generation.[35] Despite these limitations, some of the explanations about the institutional design of the PA help in testing the application and suitability of explanatory factors from new institutionalisms approaches — cooperation problems, characteristics of the states in the aggregate, and institutional ideas.[36]

Moreover, the intended audience of the research is not only academia, but also public sector officials and policy entrepreneurs in the PA. The targeted audience also justifies the case study methodology and the qualitative method against the shortcomings of making transferable conclusions to different settings.

III ARGUMENT OF THE THESIS

This thesis has descriptive, explanatory, and normative aspects. From a descriptive stand that is empirically grounded, I sustain that the PA is an IIGI. The institutional framework in the PA embodies organisational and task-related decentralisation;

30 See below Part IV (B) (1).

31 This refers to the point where new data is not emerging from the interviews, or when the interviews start to provide the same answers.

32 Sarah Elsie Baker and Rosalind Edwards, 'How many qualitative interviews is enough: expert voices and early career reflections on sampling and cases in qualitative research' (Review Paper, National Centre for Research Methods) < http://eprints.ncrm.ac.uk/2273/4/how_many_interviews.pdf >.

33 Ibid 19, 23.

34 Alan Bryman, *Social research methods* (Oxford University Press, 4th ed, 2012) 71; Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Research* 926, 934-5, 940, 947.

35 See, eg, Webley, above n 34, 937.

36 See above Part B; Ch 3, Part III (B) (B); Ch 7; Ch 8.

consensual decision-making and agenda-setting; and an intergovernmental approach to pursue economic regionalism. The PA does not comprise an international organisation bestowed with international and domestic legal personality. Overall, these features and the features of scope, and control allow me to contest the sui generis character of the institutional model that the PA follows.

From an explanatory stand, I argue that cooperation problems; characteristics in the aggregate of the PA members; and prevailing ideas — paradigms, programs and institutional frames — explain the design features of the institutional framework in the PA. Among the cooperation problems prevailing at the time of establishment were uncertainty about the state of the world. This problem partially explains the nature of the *Framework Agreement* as an incomplete contract and the high degree of adjustability in its provisions, such as the low precision in its substantive terms, including its objectives.

The negative perceptions about the performance of regional institutions in LA also play a role in the institutional outcomes of the PA. These perceptions created an external institutional environment that prevented regional institutions in LA from becoming institutional prototypes in the PA design. Moreover, these negative institutional environments fuelled the uncertainty about the state of the world problem in the negotiation of the PA's *Framework Agreement*.

The ideas of open regionalism, deep integration, flexibility and pragmatism complementarily explain design features and other institutional choices more generally. The programs of open regionalism and deep integration — a regional amplification of the neoliberal program revisited — help to explain the commercial and economic focus of the PA from its inception. These programs have strongly determined the issues and areas covered in the first years of the PA and the evolution in its work agenda. Particularly the idea of deep integration has served to model the content and scope of the *Commercial Protocol*. This treaty epitomises a new generation PTA dealing with behind the border restrictions to trade and investment.

The institutional frames of flexibility and pragmatism partially explain the decentralised approach to institution-building and the low legalisation and informality characterising the PA. Growth and specialisation of organisational structures in the PA take place through informal means, which evidences the effects of the ideas of flexibility and pragmatism that frame the PA.

From a normative stand, I argue that demands to further economic regionalism towards the free movement of goods, services, capital, and people in the PA will require adjustments to the institutional framework. The PA continuum of hard-law and soft-law rules depicts efforts towards deep integration in the sense of new generation or 21st century preferential trade rules. However, these rules are far from being a comprehensive economic regime amongst the four members or one that could support deep(er) integration towards the free movement of factors. Effectiveness, understood as the long-term realisation of these goal, will require introducing centralisation and delegation of some of the tasks that underline long-term interstate cooperation.

The realisation of the PA goals demands policy coordination and harmonisation, and the development of other regional public goods. These demands cannot be supported

through the current organisational structures and the limited scope of its economic rules. Institutional entrepreneurs should mobilise incremental adjustments, including integrating a centralised administrative body with medium-term agenda-setting, coordination and monitoring roles. Shortcomings of intergovernmental approaches to rule setting could be addressed through periodic rounds of treaty negotiations that help to build political support for package deals. Principles-Based regulatory harmonisation could also assist to address the shortcomings of its current regulatory regime. Investment and trade facilitation will also demand rules and operative structures, including technological developments.

IV QUALITATIVE METHODOLOGY

The thesis design comprises a case study on the institutional framework of the PA. This type of research design offers the most appropriate avenue to provide detailed descriptions, interpretations, [37] and explanations that answer the research questions.[38] A case study about the institutional framework of the PA provides in-depth analysis of the organisational structures, institutional rules, foundational ideas, and institutional practices.

I also use a qualitative approach to address the research questions.[39] The qualitative approach is twofold because it uses doctrinal analysis and empirical analysis. This approach is justified by the complex set of research questions referring not only to legal issues but also to the institutional subject matter in a broader sense. Moreover, a preference towards a policy-oriented focus makes this combination of approaches suitable to the thesis.

A *Qualitative Doctrinal Analysis*[40]

The thesis uses the doctrinal legal research method to address underlying law questions,[41] such as the legal nature of the PA and the interpretation of treaty texts that form the legal basis of the PA[42]. Moreover, the thesis identifies the law developing within the PA, because law constitutes a part of the institutional setting of the PA, a formal source of rules shaping and constraining the behaviour of the members and other actors in the PA. The task of identifying and examining the emerging legal regime of

37 Frans L Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar, 2017) 112-14.

38 Robert K Yin, 'Case Study Research: Design and Methods' (Sage, 2nd ed, 1994) 6.

39 See above Part II (A).

40 Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong (Eric) Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 40.

41 Terry Hudchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law*, (Taylors and Francis 2013) 7, 9. See also Dobinson and Johns, above n 40, 23.

42 Authors refer to different legal methodologies. Sánchez asserts three methodologies in legal research: (i) legal-doctrinal; (ii) socio-legal; (iii) legal philosophy. See Manuel Sánchez Zorrilla, 'Methodology in Legal Research: particular characteristics and general guidelines for researching in Law' (2011) 14 *Revista Telemática de Filosofía del Derecho* 317-58. See also Dobinson and Johns, above n 40, 16-45.

the PA requires the use of deductive and inductive reasoning to reach findings and draw conclusions about its nature and scope.[43]

Understanding the content and meaning of the law [44] and the type of obligations arising from the law is an interpretative task involving doctrinal legal analysis. This step is mandatory to move into empirical questions such as the practices related to the law and their ways of implementation.[45] This second set of questions moves to the realm of socio-legal research and in that way relates to the second methodological approach of the thesis — empirical analysis.

The examination of the institutional rules, organisational structures, ideas and practices of the PA member states takes primarily a top-down approach. This top-down approach entails examining states' behaviour as primary actors in the regionalism project. This standpoint is also responsive to contextual and practical circumstances of LA where states have played a key role in driving regionalism.[46] However, this approach does not prevent me from examining the institutional implications of the participation of other actors in the process of regionalisation or region-building.

To undertake doctrinal legal analysis, the research relies on primary sources,[47] such as treaty documents, other plurilateral and multilateral agreements between PA member states or government bodies, legislative, and constitutional materials within the member states, and secondary sources. Legal writings on international institutional law support the examination of some of the legal issues addressed in this thesis. I consider the legal literature about the PA when relevant for the thesis, although it is limited in number and depth. Secondary sources for analysis include journal articles, reports, working papers and policy documents that assist with the normative task of the thesis.

Other scholarly writings on regional integration and regionalism as well as the literature on new institutionalisms inform and support the thesis.

B *Empirical Analysis*

The thesis incorporates qualitative empirical analysis to address the research questions for two reasons. First, this is a convenient methodological approach for capturing stakeholders' individual perceptions and observations about the PA, particularly its institutional framework. Second, it is an appropriate tool to explore institutional ideas and practices developing and evolving within the PA.

I map ideas and institutional practices through interviews that grasp perceptions and beliefs of the governmental actors involved in the PA. I also gather the views of

43 Hudchinson, above n 41, 12-3.
44 Dobinson and Johns, above n 40, 16, 19.
45 Hudchinson, above n 41, 11, 17, 28.
46 Andrés Malamud, 'Jefes de gobierno y procesos de integración: las experiencias de Europa y América Latina' en Philippe de Lombaerde, Shigeru Kochi and José Briceño Ruíz (eds), *Del regionalismo latinoamericano a la integración interregional* (Fundación Carolina/Siglo XXI 2008) 137, 152 [Andrés Malamud, 'Chief Executives and Regional Integration: the Experiences of Europe and Latin America' in Philippe de Lombaerde, Shigeru Kochi and José Briceño Ruíz (eds), *From Latin American regionalism to interregionalism* (Fundación Carolina/Siglo XXI 2008) 137, 152].
47 Dobinson and Johns, above n 40, 23.

interviewees representing different stakeholders that interact with the institutional structures of the PA or study them. I acknowledge that empirical evidence collected through the interview method represents the subjective meanings of participants for understanding the reality.[48] However, this methodological approach suits the theoretical approach underpinning the thesis, enriching the understanding on the role of ideas, and informal institutional practices considered by constructivist institutionalism.

I use empirical analysis of legal documents and secondary sources to confirm the relevance of specific ideas — open regionalism, deep integration, flexibility, and pragmatism. This exercise provides evidence on the frequency in which these terms are used when referring to the PA and its institutional framework. It also offers substantial evidence on the content and scope that different actors give to these ideas.

This methodological approach takes on board the need to conduct more empirical studies on regionalism in LA[49] by addressing this concern in the particular context of the PA.

1 *Data Collection*

Regarding the research design, as mentioned before, it comprises a case study: the PA institutional framework.[50] The use of the empirical methodology in this case study is primarily aimed at gaining information on three enquiry points: stakeholders' perceptions of the PA; stakeholders understandings of the operation of organisational structures within the PA, including practices adopted or observed; critical views of stakeholders on the way institutional structures operate and ways for improvement. Empirical research, particularly interviews, also helps me gain a better understanding of the contexts, which could otherwise suffer from relying exclusively on documentary sources that are often produced for particular intended audiences.[51]

Primary data was collected from August 2016 to March 2017. I gathered data through semi-structured face-to-face interviews and Skype interviews of 38 persons. I interviewed three groups of stakeholders comprising government officials; trade associations; and civil society and academia in each of the members.[52] The sample was designed to obtain views from:[53] (i) persons who had direct involvement in the institutional framework of the PA; (ii) persons who had interaction with the institutional framework of the PA, (iii) persons who had previously researched or had publications on the PA; and (iv) persons representing an organisation characterising a stakeholder group in the case of civil society.[54] For reasons of anonymity I do not include a list of participants in this thesis.

48 Webley, above n 34, 931.

49 See, eg, Susanne Gratius (ed), *Mercosur y NAFTA: Instituciones y mecanismos de decisión en procesos de integración asimétricos* (Iberoamerica Editorial Vervuert, 2008) 12 [Susanne Gratius (ed), *Mercosur and NAFTA: Institutions and Mechanism for Decision Making in Asymmetrical integration processes* (Iberoamerica Editorial Vervuert, 2008) 12].

50 Bryman, above n 34, 66-2; Webley, above n 34, 939.

51 Webley, above n 34, 939.

52 See below Appendix A.

53 Bryman, above n 34, 418.

54 Webley, above n 34, 934.

I gathered other secondary sources as part of my literature review that I use for specific empirical queries on the role of ideas, including journal articles, reports issued by member states during pro-tempore presidencies, studies conducted by think tanks, and the limited academic writings on the institutional dimension of the PA.

2 *Data Analysis*

I analyse interview data through two qualitative paradigms. This approach is to some extent a reflection of the broader theoretical framework underpinning the thesis.[55] These qualitative archetypes correspond to the post positivist paradigm in the sense that I attempt to grasp the institutional and organisational reality of the PA and document it from a centred position. However, in analysing this reality I also find that mapping the informal rules and practices is a constructivist exercise, because rules and practices could also be seen as the result of the participants constructions. They are the product of the participants' representations of their own behaviour that contributed to build those practices (ie, government officials). Thus, a more interpretivist/constructivist paradigm emerged in the way I analyse the data.

A content analysis of this primary data through thematic points and recurring themes sheds light on foundational ideas, institutional practices, informal institutions and the operational day to day 'life' of the PA.[56] Interpretation of stakeholders' perceptions over the state of affairs, performance of the institutional framework of the PA and their reactions towards potential changes provide me with important inputs when considering proposals for adjustment to the organisational structure and potential hurdles to implement them.[57] In some instances the interpretation of the empirical data serves either to confirm some of the proposals for adjustment or withdraw them. This process unfolds in a primary inductive way throughout two non-lineal stages of the data analysis.[58]

A preliminary analysis of the interviews takes place during the process of data collection to refine some of the questions and withdraw those ones that allow for thematic duplication.[59] This preliminary process is mindful of keeping some level of standardisation across the interviews to make the answers comparable at a later stage. This examination helps me to identify issues of primary concern when they are recurrent points.

In the first stage of analysis of the interviews, I examine the interview transcriptions in detail to identify passages with overarching themes, name them and develop initial codes and sub-codes.[60] I use the data management system MaxQDA to assist me with this task; although I also interpret the data.[61]

55 See Ch 3, Part III.
56 See Bryman, above n 34, 289-1. Cf Webley, above n 34, 941. Cf Carol Grbich, *Qualitative Data Analysis, An Introduction* (Sage, 2nd ed, 2013) 189, 195.
57 Carla Willing, 'Interpretation and Analysis' in Uwe Flick, *The SAGE Handbook of Qualitative Data Analysis* (SAGE, 2014) 136, 147. See below Ch 9, Parts II and III.
58 Webley, above n 34, 929.
59 Ibid 931.
60 Bryman, above n 34, 579-0.
61 Webley, above n 34, 941.

At a second stage, I establish links between the codes and refine them. The codes are grouped and then merged after identifying common topics between them to avoid overlaps or repetition. With the help of the management system I quantify the frequency of particular themes emerging within the data to assess their relevance and strength. I also consider divergence in the patterns to the answers to inquire into the reasons for those different responses. The management system also supports the process of drawing connections between the demographics of the participants and their responses.

Secondary sources contribute to my understanding of the views and concerns of specific stakeholders and the meaning that they attribute to the ideas of open regionalism, deep integration, flexibility, and pragmatism. These sources help to confirm or disregard the relevance of some of the themes emerging from the analysis of primary data. I compare the emerging themes against secondary sources to identify consistencies and differences. To a limited extent, these sources also provide additional information on the operation of organisational practices and rules in the PA.

V CHAPTER OUTLINE

This research has a descriptive, explanatory, and normative scope organised in ten Chapters. Chapter 2 is explanatory and uses doctrinal analysis and international institutional law. It addresses the current legal nature of the PA answering the query, as to whether the PA is an international organisation bestowed with international and domestic legal personality. The Chapter contributes to answering the question of what comprises the PA's institutional framework. I argue in this Chapter that the PA is not an international organisation endowed with legal personality, according to its constitutive documents and institutional practices of its members.

Chapter 3 is a building block of the explanatory scope of this thesis by spelling out the theoretical framework. This framework is based on new institutionalisms — specifically, rational institutionalism, with insights from constructivist institutionalism — and international institutional law. Complementarily, I use the views provided by the expanding research program on comparative regionalism, particularly comparative institutional design. This Chapter also addresses fundamental notions that I use in the thesis to provide a common ground for readers.

I argue here that an interdisciplinary theoretical approach that involves new institutionalisms and legal analysis is better suited than traditional integration theories, economic integration theories, or new regionalism approaches to address the thesis problem and research questions. I draw from rational and constructivist institutionalisms to propose an eclectic analytical framework that relies on multiple factors to explain the institutional design of the PA.

Chapter 4 is a building block to address the question about the factors explaining the design features of the institutional framework of the PA. This Chapter traces the evolution of regionalism and regional institutions in LA, placing them into the conceptualisation of 'waves of regionalism'. I delve into the economic and political ideas surrounding the advent of regional institutions during these waves and review the

challenges faced by each approach to regionalism. I finalise this discussion by setting out the regional context from which the PA emerged.

I conclude in Chapter 4 that cooperation problems such as distribution problems, commitment problems, and enforcement problems have been present throughout the lifespan of these regional institutions in LA. Collectively, these problems have also posed challenges to the consolidation of several of these regional institutions. The Chapter also provides evidence to support the view that ideational factors and ideas on economic development have played a crucial role in the emergence and change of regional institutions in LA.

Chapter 5 has a descriptive scope. This Chapter directly addresses one of the key questions of the thesis: what comprises the PA's institutional framework? This Chapter maps and categorises the current institutional framework of the PA. It proposes a novel way to characterise the PA's institutional framework, based on the conceptual understandings in Chapter 3.

I characterise the PA's institutional arrangements, comprised by a continuum of hard-law and soft-law instruments operating at the bilateral and plurilateral levels. I demonstrate that the PA's legal regime presents a low degree of formalisation (legalisation). Institutional rules in the PA are predominantly soft-law, while hard-law commitments are limited to commercial and double taxation matters.

I argue that organisational structures within the PA have emerged and continue to expand informally, despite the rhetoric against developing them. These structures encompass a web of formal and informal bodies more intricate than what PA governments claim them to be. I maintain that organisational structures in the PA respond either to a demand-based approach or a problem-based approach. These categories that I observed on the ground do not exclude one another. By demand-based approach to institution-building, I mean that institutions and organisational structures are established at the request of specific interest groups. By problem-based approach, I mean that PA members decide to develop regional structures to work on problems that have a regional base or a shared national scope.

Chapter 6 has a twofold scope: descriptive and explanatory. This Chapter addresses the research question on the factors that explain institutional design in the PA. It sheds light on which (rational) factors have influenced the institutional design of the PA and its present features. I describe the status of four PA features, according to the analytical framework in Chapter 3. These features are scope; centralisation; rules for control; and adjustability of arrangements. I explain the cooperation problems underlying the negotiation of each of the few international agreements that comprise the PA's legal regime in light of their specific objectives and the overall PA's objectives. I describe and explain what the characteristics in the aggregate of the PA members were during the negotiation and the decade before the PA. Describing these elements — PA's institutional features, cooperation problems, and characteristics in the aggregate — is a prerequisite to understand, in Chapter 7, in what ways the last two factors have influenced the design of the PA's institutional features.

I maintain in this Chapter that the PA features overall decentralisation of its tasks. The PA has limited aspects of centralisation in the dispute settlement, monitoring and

punishment realm. The scope of the PA's international and trans-governmental agreements moves around the economic area, including economic cooperation, although the PA opens up space for non-economic cooperation. Based on the consensus-rule that governs the PA agreements, I argue that the veto effect of this rule means that there is no formal or informal individualised control in the PA. Moreover, the PA offers an example of multiple adjustability mechanisms in treaty design.

I claim that, at the time of establishing the PA, political and economic uncertainty about the state of the world was the prevailing cooperation problem along with commitment problems. Problems of enforcement, domestic commitment, distribution, and coordination were relevant when negotiating the free trade area in the *Commercial Protocol*. The main underlying problem in the negotiation of the *Agreement to Homologate Double Taxation Accords* was coordination in a narrow sense. The negotiation of the *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance* primarily underlies commitment and non-strategic cooperation problems.

Based on empirical evidence, I assert that PA members show high levels of economic power asymmetries, paired with a high preference homogeneity and regime asymmetry. The number of fully participating members has remained four.

Chapter 7 has an explanatory scope. It examines how the cooperation problems and characteristics in the aggregate have influenced the features of the PA's institutional design. I use here the theoretical approach delineated in Chapter 3 and the findings in Chapter 4 regarding the implications of external institutional environments and regional patterns. I provide evidence to argue that the institutional rules of the PA's international agreements are carefully and rationally drafted to respond to the underlying cooperation problems of the negotiation, and the characteristics in the aggregate of the PA members.

The institutional design of the PA through features such as decentralisation and imprecise scope is the result of an underlying uncertainty about the state of the world present when negotiating the *Framework Agreement*. In turn, the *Commercial Protocol* provisions and institutional setting respond to several cooperation problems. Imprecision, NCMs, carve-outs and 'customised' commitments help to address domestic distribution problems in lieu of treaty reservations. The interaction of uncertainty about the state of the world and enforcement problems explains the presence of escape and exception clauses. Problems such as uncertainty about behaviour and preferences did not play a significant role in shaping the current institutional rules of the PA.

As for the characteristics of the PA member in the aggregate, I sustain that small and constant membership facilitates less legalised agreements in the presence of uncertainty about the state of the world. Regime symmetry and preference homogeneity rather than heterogeneity explain substantive democratic and constitutional requirements for membership to the PA.

Chapter 8 has an explanatory and normative scope. I take a constructivist institutionalist approach to explain the role of four ideas that I argue are underpinnings of the institutional arrangements of the PA. I explore the ideas of (i) open regionalism; (ii) deep integration; (iii) flexibility; and (iii) pragmatism. I claim that the notions of open

regional and deep integration are cognitive programs setting a roadmap on the scope and agenda of the PA. Frames of flexibility and pragmatism partially explain the informal approach of the PA to institution-building and the implementation of its goals.

From a normative stand, I address the research questions on the extent to which the institutional framework supports the intended objectives of the PA, and whether this framework requires changes. I maintain here that the current formal and informal intergovernmental and trans-governmental institutional structures and the legal regime are insufficient to respond to present and future demands for regional public goods and to cope with processes of deepening, enlargement, and agenda expansion.

Chapter 9 has a normative scope proposing several avenues to strengthen the organisational structure and legal regime of the PA. In dealing with the different tasks that support interstate cooperation, the PA members need to consider higher levels of centralisation and delegation than what they currently allow in the institutional framework. For instance, the PA members should set up a Secretariat with a decision-shaping role as well as monitoring and information management functions. The Chapter also engages briefly with the potential obstacles that any changes to the institutional framework will face.

Chapter 10 summaries the central argument of the thesis, the key findings of the research and proposals for future changes to the institutional framework of the PA. This Chapter also outlines the contributions for theory testing and theory building that I make in this thesis.

In brief, I argue in this thesis that rational factors, ideational factors, and the regional institutional environment are the underlying causes and contributing aspects to the current PA's institutional outcomes.

The PA embodies an IIGI with no international legal personality. The PA is an intergovernmental and consensual institution that features prominent organic and task-related decentralisation. The PA institutional structure also shows signs of trans-governmental collaboration. These features do not represent a sui generis institutional model to pursue economic regionalism.

From a normative stand, I claim that the current features and characteristics of the institutional framework of the PA are inadequate to respond to the needs for regional coordination, harmonisation, and the development of other regional public goods associated with its goals. This institutional framework is insufficient to support processes of enlargement, deepening, and agenda expansion.

The PA governments should incorporate incremental institutional adjustments that fit within existing institutional frames and programs. These changes include a Technical and Administrative Secretariat, reviewing the composition of the Council of Ministers and maturing the PA's legal regime.

This last Chapter presents avenues for further research on the institutional framework of the PA. From an internal view, future research could address the institutional demands arising from membership enlargement and the social dimension of the PA.

2 INTERNATIONAL STATUS OF THE PA

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I INTRODUCTION

This Chapter addresses the international and domestic legal status of the PA by examining whether it is an international organisation endowed with legal personality. It addresses one aspect of the question of what the PA's main institutional framework is. The analytical tools from international institutional law guide this critical appraisal.

The answers to these questions have direct implications for the legal capabilities and powers of the PA at the international level, principally its capacity to be the subject of rights and duties under international law. The PA's legal status impacts its ability to make decisions in an international context, while acting as a unit autonomous, to some degree, from its members. It is also necessary to understand the domestic legal status of the PA within the members and the powers it has vis à vis legal persons within the PA members.

Part II examines the concepts of international organisation and international legal personality. Based on these conceptualisations, Part III proposes integrative guidelines that rely on doctrinal legal analysis and evidence of institutional practices to determine the existence of international personality in the PA by pondering all the different factors.

Part IV applies the integrative guidelines to assess the PA's international status on organisation-hood and legal personality. This Part also reviews the domestic legal status of the PA within the PA members and third states. Part V briefs the main argument regarding the current legal status of the PA.

In this Chapter, I maintain that the PA does not constitute an international organisation. As a consequence, the PA lacks legal personality and therefore capacity at the international and domestic level within the PA members. This is due to the absence of an institutional structure capable of expressing an autonomous will from that of its collective of states. As of today, the entity does not enjoy any degree of functional, operational or financial independence to pursue its aims.

The institutional characteristic of independent will has direct implications for the assessment of the PA's legal personality and at the same time constitutes, in my view, a structural aspect of international organisations. The institutional structure of the PA and the practices of members reveal complete and effective control by the members of the functional, financial, and operational aspects of the PA. Moreover, there is no express intention to devote personality to the institution, while the formal (constitutive documents and subsequent agreements) and practical evidence suggest the contrary intention.

This situation does not prevent the PA from evolving into an international organisation with legal personality, provided that PA members adjust the constitutive documents as well as their institutional practices. More affirmative actions in this line are necessary to distinguish and establish a distinct and autonomous organisation capable of expressing its autonomous will towards the fulfilment of its own functions and objectives.

II CONCEPTUALISATIONS ON INTERNATIONAL ORGANISATIONS AND LEGAL PERSONALITY

Different sets of theoretical approaches under the umbrella of the international institutional law[62] and political science literature have answered the question of what constitutes an international organisation.[63] This thesis deals with theories under international institutional law.

Defining international organisations is complex, considering the broad diversity and differences across organisations. However, this Part examines several definitional aspects that the academic literature discusses as well as landmark jurisprudence of the ICJ on this issue. I study the role that international personality has within the conceptualisation of international organisations and take a view on this role to examine the PA.

Next, I refer to the several approaches on the source of international legal personality and what it entails for an international organisation to have international personality. In light of the doctrinal developments and the ICJ jurisprudence, I propose a framework for the practical assessment of international legal personality. Since international organisations need to operate at two different levels to pursue their functions — international and domestic — I examined the domestic legal personality of international organisations in relation to members and third parties.

My claim in this Part is that international organisations require some level of functional independence and autonomy to be able to express a will that is not the mere aggregation of the collective of states. This distinct will is a constitutional requirement of the international organisation and a foundational element for international legal personality. International organisations generally hold international and domestic legal personality because this is necessary to pursue their objectives and functions. Thus, international legal personality comes, as a consequence of the required distinct/autonomous will. International legal personality signifies that the organisation is a subject under international law capable of bearing rights and obligations. However, the particular content of the powers attached to the legal person depends on the competences demarked by the purposes and functions of the organisation.

A *Conceptualisations of What International Organisations Are*

This Part examines the definitions and requirements for an entity to be considered an international organisation according to scholarly writings on international institutional law.

The starting point for a legal analysis on the nature of the PA is that there is not a binding legal definition on what a public international organisation is or what characteristics an entity should comply with to be considered an international

62 Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2nd ed, 2009) 9.

63 The international organisations examined here are public intergovernmental organisations. Non-governmental international organisations (NGOs) and private international organisations (PIOs) (also known as transnational corporations) are not examined here.

organisation.[64] Thus, any reference to these aspects or possible classifications on the types of international organisations has doctrinal and heuristic effects in the field of international institutional law rather than legally binding consequences.[65] Only a simple reference to a concept of international organisation is made in the *Vienna Convention on the Law of Treaties* (*'Vienna Convention'*),[66] and later in the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, [67] which defined the concept as intergovernmental organisation, for the purpose of the conventions.

Schermers and Blokker understand international organisations as forms of cooperation that: (i) are founded through an international agreement between at least two states; (ii) have at least one organ with a will of its own; and (iii) are established under international law.[68] Schermers and Blokker take the view that a written constitution is not a requirement, since the agreement to establish the organisation could be expressed by other means. [69] On the second element they refer to the requirement that the organisation should be a new legal person capable of bearing rights and obligations. In their view, an international organisation is created without this capacity only in exceptional circumstances. [70] This view implies the need for international legal personality within international organisations. The third requirement more or less derives from the first requirement.

Klabbers states that:

> [I]nternational organisations are typically seen as entities set up by states to perform a given task or function, *based on a treaty and endowed with at least one organ* and some independent powers which enable it to formulate and *exercise, a will that is independent, to a greater or lesser extent, from the will of the aggregate of its members*.[71]

Amerasinghe refuses to provide a formal definition on international organisations, but proposes a set of characteristics for any public international organisation as follows:

(i) Established by some form of international agreement among states
(ii) Possess 'what may be called' a constitution
(iii) Possess organs separate from its members
(iv) Established under international law, and

64 Klabbers, above n 62, 6-7.
65 Henry G Schermers and Niels M Blokker, *International Institutional Law* (Martinus NIJHOFF, 5th revised ed, 2011) 36 [32]; Jan Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organization' (2013) 14 *Melbourne Journal of International Law*, 1, 4-5, 12; Klabbers, above n 62, 40.
66 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2 (1) (i).
67 *Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations*, opened for signature 21 March 1986, Doc. A/CONF.129/15 (not yet in force) art 2 (1) (i).
68 Schermers and Blokker, above n 65, 37 [33], 39 [36]. See also José E Alvarez, *International Organizations as Law Makers*, (Oxford University Press, 2005) 6.
69 Schermers and Blokker, above n 65, 38 [35], 40 [37], 1040 [1618].
70 Ibid 44 [44].
71 Klabbers, 'Unity, Diversity, Accountability', above n 65, 4 (emphasis added). See also Klabbers, *An Advanced Introduction to the Law of International Organizations* (Edward Elgar Publishing, 2015) 18.

(v) Generally, although not always, states and governments are its members[72]

In Amerasinghe's view the consequences of being a public international organisation are the international capacity distinct from that of the members and the treaty making capacity. In contrast, Klabbers suggests that the right to enter into international agreements; along with the capacity to bring and receive international claims; and to send and receive legations (ie, missions) are all indicators of the subjectivity —quality of the entity to be a subject— under the international legal system.[73]

In 2003 the International Law Commission, changing its previous position of avoiding a definition, proposed the following concept in the Draft Articles on State Responsibility (ILC Articles on State Responsibility):

> 'International organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International Organizations may include as members, in addition to States, other entities.[74]

In defining the concept of international organisation, the doctrine develops the characteristic elements outlined in Table 1.

Table 1 Definitional Elements of an International Organisation

Definitional Elements of the Concept					
Criteria	Virally[75]	Brownlie[76]	Sands & Klein[77]	Heredia[78]	Akande[79]
Membership	Association of states	Permanent association of states	Membership by states and/or other international organisations	Interstate composition essentially (Voluntary association of states)	predominantly of states

72 C F Amerasinghe, *Principles of Institutional Law of International Organizations* (Cambridge University Press, 2nd revised ed, 2005) 10.

73 Jan Klabbers, above n 62, 39-43.

74 *Report of the International Law Commission* UN GAOR, 64rd ss, Supp No 10, UN Doc A/64/10 (August 2009) art 2 (a). See especially *Topical Summary of the Discussion Held on the Sixth Committee of the General Assembly during its Sixty-Sixth Session, prepared by the Secretariat* A/ CN.4/650/ Add. 1 (20 January 2012) para 10.

75 Michael Virally, 'Definition and Classification of International organizations: A Legal Approach' in Georges Abi-Saab (ed) *The Concept of International Organization* (UNESCO, 1981) 50, 51.

76 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6ed, 2003) 649. He defines international organisations with legal personality and not just international organisations. These criteria refer then to legal personality in international organisations.

77 Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet and Maxwell 6th ed, 2009) 16 [1-028].

78 Jose Manuel Sobrino Heredia, 'El Estatuto Jurídico de las Organizaciones Internacionales' en Manuel Díaz Velasco, *Las Organizaciones Internacionales* (Tecnos, 12a ed, 2002) 60 [Jose Manuel Sobrino Heredia, 'The Legal Statute of the International Organizations' in Manuel Díaz Velasco, *International Organisations* (Tecnos, 12th ed, 2002) 44-7.

79 Dapo Akande, 'International Organizations' in Malcom D Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010) 252, 254.

Definitional Elements of the Concept					
Means of Establishment	Established by agreement	NA	Established by treaty or instrument governed by international law	Conventional based (international agreement)	under international law (treaty or other means)
Bodies	Permanent set	Equipped with bodies	NA	Permanent and independent organic structure (continuous operation of administrative bodies)	Autonomous
Objectives	Pursue objectives of common interests	Lawful objectives	NA	Pursue collective interests	NA
Functional Role	Through cooperation	NA	NA	NA	NA
Separation between Members and the Entity	NA	Distinction of legal powers and purposes between the organisation and its members (states)	Autonomous will distinct from that of its members	NA	Bodies having separate will from the members (in practice legal personality)
Emphasis on Legal Personality or Powers	NA	Legal powers exercisable in the international plane	Vested with legal personality	Legal autonomy/legal personality. Capable of expressing autonomous will from that of the members	NA
Power on Members	NA	NA	Capable of adopting norms addressed to its members	NA	NA

Source: Author's analysis based on multiple sources

Legal scholars refer to several definitional elements: (i) interstate based which means that although international organisations could be members of other international organisations, states predominately comprise them; (ii) establishment by international agreement, which also implies the need to be governed by international law; (iii) permanence of the general organisation and/or its bodies; (iv) autonomy or independent will of the entity from that of the members. From the several conceptual proposals some

scholars equate, relate or consider international legal personality to be the practical implication of an autonomous will.

Academic literature on institutional law refers to the role of international personality in several ways: (i) a requirement for an international organisation to function as an independent unit;[80] (ii) the most important constitutive element of an international organisation;[81] (iii) an attribute of the international organisation under international law;[82] or (iv) a consequence[83] rather than a requirement.[84] A majority view supports the requirement of international personality in international organisations,[85] with limited exceptions.[86] Minority stands defend the existence of international organisations with no international personality, while other more critical views question its existence in practice within the context of operational regional organisations.[87] Brölmann suggests that although in practice international legal personality seems to be a feature of all entities that qualify as international organisations, this does not mean that legal personality is a prerequisite.[88]

Similar to Brölmann's view, I argue here that international legal personality is part of the structure of an international organisation, but is not in itself an essential requirement. Concurring with Akande international personality is an expression of the definitional requirement of autonomous will. Despite being in the structure of the international organisations, legal personality is more a consequence of one of its requirements — the autonomy or independent will.[89] This explains why doctrinal approaches on the concept of international legal personality also stress the requirement for an autonomous will by way of an institutional design that allows the entity some functional independency, because it consequently allows the configuration of international personality.[90]

This relationship suggests in theory a two-stage test where the status of the entity as an international organisation is assessed first, and then international personality is

80 Schermers and Blokker, above n 65, 987 [1564].

81 Sands and Klein, above n 77, 473 [15-001]; Santiago Díaz-Cediel, 'La Alianza del Pacífico: un escrutinio jurídico al tenor del Derecho de las Organizaciones Internationales' (2016) 9 *Anuario Colombiano de Derecho International* 347, 362 [Santiago Díaz-Cediel, 'The Pacific Alliance: Judicial Scrutiny of the Content of the Law of International Organizations' (2016) 9 *Anuario Colombiano de Derecho International* 347, 362].

82 Peter H F Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers, 1994) 54.

83 Amerasinghe, above n 72, 10-11.

84 D W Bowett, *The Law of International Institutions* (Stevens & Sons, 4th ed, 1982) 339.

85 Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations & the Law of Treaties* (Hart Publishing, 2007) 75. See, eg, Ian Brownlie, above n 76, 649. See also Ian Hurd, *International Organizations: Politics, Law and Practice* (Cambridge University Press, 2011) 17.

86 For example, the organisation for Security and Cooperation in Europe (OSCE) is considered an international organisation lacking legal personality. See Tarcisio Gazzini, 'Personality of International Organizations' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook of International Organizations* 33, 46. However, the international personality of the OSCE is still subjected to debate. Cf Brölmann, above n 85, 85.

87 Piero Pennetta, 'International Regional Organizations' in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill Nijhoff, 2015) 70, 112.

88 Brölmann, above n 85, 19.

89 Akande, above n 79, 254; Cf Brölmann, above n 85, 19.

90 Brölmann, above n 85, 75-6.

determined. However, this two-stage test is difficult to sever when evaluating the nature of a particular entity. This difficulty arises from the fact that not only the notion of international organisation requires the distinct or autonomous will of the constituted entity, this will is also a foundational element to acknowledge international legal personality. Thus, in practice both stages of the test merge.

In the area of international institutional law the legal personality, what it entails, and how it is acquired attracts more interest than the actual question of whether an entity could be considered an international organisation.[91] The reason could be that the status as an international organisation is not normative and does not provide legal consequences. In contrast, the attribution of personality entails legal significance starting by the categorisation of the entity as a subject under international law capable of bearing rights and obligations.

B *International Legal Personality of International Organisations*

This Part considers three issues regarding the international personality of international organisations. First, it examines the theories that have emerged to explain the foundations of international legal personality: (i) an attributive approach that relies on the express attribution of personality; (ii) a subjective approach on personality that scrutinizes the express or implied will of the states as the foundation of personality, and (iii) an objective approach based on a criterion from which international law derives international personality. This examination about the theories takes into account the ICJ jurisprudence, mainly the landmark advisory opinion in the *Reparations* case.[92]

Second, Part B assesses the role of recognition by third states regarding international personality and whether it is necessary for an organisation to be granted such recognition. Third, I propose integrative guidelines for evaluating when a particular entity is bestowed with international personality. My claim here is that international legal personality is granted by the international legal order in which an organisation is meant to function. However, international law lacks the clarity that exists in most domestic legal systems that define, in a normative sense, the requirements for an organisation to be bestowed this quality. The absence of these express requirements on international personality in international law makes the integrative guidelines developed here useful. I delve into conceptual, jurisprudential and practical features to help in identifying, mainly in an inductive way, the existence of international personality.

1 *Conceptual Approaches and ICJ Jurisprudence*

Three different theories have emerged in response to the question of what creates international personality for an entity. A first approach states that international legal personality is the result of its express attribution in the constitutive documents of the organisation.[93]

91 Gazzini, above n 86, 33.

92 *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 (‘*Reparations*’) [1949] ICJ Rep 174.

93 Schermers and Blokker, above n 65, 988 [1565]. See, eg, Klabbers, above n 62, 47; See also Amerasinghe, above n 72, 79.

The subjective approach[94] emphasises the express or implied will of the members that endows the organisation with this quality.[95] When the attribution of personality is not expressed, the willingness of the founding states could be inferred from the powers given and actions the organisation is able to undertake.[96]

Seyersted[97] and others [98] advocate an objective approach in which legal personality derives from international law rather than from the will of the members.[99] The objective approach points to certain criteria that needs to be fulfilled by the organisation to be endowed with international legal personality under international law.[100]

According to Seyersted, [101] this objective criterion is non-being subjected to the jurisdiction of any other organised community. Later on this criterion is understood as the will exercised by the organisation independently to the will of its members.[102]

The Advisory Opinion of the ICJ in the *Reparations*[103] case serves to support both objective and subjective — doctrinal approaches in relation to international personality of intergovernmental organisations. [104] The ICJ delivered the advisory opinion by request of the United Nations General Assembly that inquired into the capacity of the UN to bring international claims in its own right and on behalf of its 'employees'. The issue arose because the UN wanted to bring a claim against the entity allegedly responsible for the death of a UN mediator and of its other agents during the Middle East civil unrest that came as a result of the establishment of the state of Israel.[105]

In the advisory opinion the ICJ did not address the question of whether the UN was an international organisation, but presumed that it was. Instead the ICJ focused on the

94 See, eg, Klabbers, above n 62, 47; Cf Nigel D White, *The law of international organisations* (Juris Publishing, 2nd ed, 2005) 44, 68.

95 Amerasinghe, above n 72, 79; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 169; Schermers and Blokker, above n 65, 988 [1565]. Sands and Klein, above n 77, 479 [15-014].

96 Gazzini, above n 86, 34.

97 Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations, (1964) 34 *Nordic Journal of International Law* 1 108,112; Finn Seyersted, 'The Legal Nature of International Organization' (1982) 51 (3-4) *Nordic Journal of International Law* 203.

98 Amerasinghe, above n 72, n 38; See also Schermers and Blokker, above n 65, 988 [1565].

99 Amerasinghe, above n 72, 79.

100 Seyersted argues that what is required for an organisation to be ipso facto a general subject of international law is to possess the objective characteristics of an organisation. It requires to: (i) have international organs established by two or more sovereign states; (ii) which are [the organs] not all subject to the authority of any state or organised community, but only to that of the participating states acting jointly through their representatives in such organs; (iii) which perform "sovereign" and/or international acts in their own name; (iv) which are not authorised by all their acts to assume obligations merely on behalf of the several participating states. See Seyersted, 'Objective International Personality', above n 97, 46-47; Jan Klabbers, 'Presumptive Personality: The European Union in International Law' in Martti Koskenniemi (ed) *International Law Aspects of the European Union* (The Hague, 1998), 240; White, above n 94, 38.

101 Seyersted, 'Objective International Personality', above n 97, 48, 90-3.

102 See eg, Klabbers, 'Presumptive Personality' above n 100, 241.

103 *Reparations* [1949] ICJ Rep 174.

104 See Amerasinghe, above n 72, 87-8; Klabbers, above n 62, 47.

105 *Reparations* [1949] ICJ Rep 174, 175.

question of whether the UN had international personality. To solve this enquiry the ICJ referred to the following aspects:

> It [the Charter] *has equipped that centre* [the Organization] *with organs*, and has given it special tasks. It *has defined the position of the Members in relation to the Organization* by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5) and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the organization and its Members. *Practice* — in particular the conclusion of conventions to which the Organization is a party — *has confirmed this character* of the Organization, *which occupies a position in certain respects in detachment from its Members* … It must be added that the *Organization is a political body*, charged with political task of an important character.[106]

The ICJ refers to several aspects that it found in the actual UN constitutive document: (i) The entity is equipped with organs or bodies; (ii) the delimitation in the constitutive document on the relation between members and the entity; (iii) the nature of the organisation as a political entity; (iv) the somehow distinct 'will' (position) of the organisation from the position of its members.[107] The Court also referred to the practice of the organisation as confirmatory of the character of the organisation.

Regarding the element of intention, the ICJ states:

> In the opinion of the Court, *the Organization intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality* and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and *it could not carry out the intentions of its founders if it was devoid of international personality*.[108]

The ICJ suggests examining the following aspects: (i) the intention of the members and particularly the founders; [109] (ii) the actual practice and actions performed by the UN.[110] In its opinion, the ICJ seems to state a matter of degree in relation to the international personality of the UN, when referring to 'a large measure of international personality'.[111]

A final aspect considered by the ICJ is illustrated in the following paragraph:

> Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter

106 Ibid 174, 178-79 (emphasis added).
107 Sands and Klein, above n 77, 478 [15-013].
108 *Reparations* [1949] ICJ Rep 174, 179 (emphasis added).
109 Cf Amerasinghe, above n 72, 81-3.
110 See, eg, ibid 82; See also Schermers and Blokker, above n 65, [1566].
111 Cf Schermers and Blokker, above n 65, 993 [1570]. The authors argue the need for a yes or no answer to the issue of legal personality. See also White, above n 94, 32, 44.

> of the United Nations. *But to achieve these ends the attribution of international personality is indispensable*.[112]

The ICJ refers to a functional role of the international personality, as it was essential in the case of the UN to fulfil its ends. The ICJ also reinforces this functional aspect of the legal personality when stating 'it [the organisation] could not carry out the intentions of its founders if it was devoid of international personality.'[113] However, this functional role that I claim is different to the functional test applied in determining the actual content of the powers and scope of capacities of an international organisation in light of its functions and purposes.[114]

The ICJ considered all these aspects when assessing the international personality of the UN, but the Court did not refer to them as necessary or characteristic elements of international personality.

It is my view that the elements that the institutional law literature examines to support the existence of personality — (i) the express or imply will of the founders, or (ii) the capacity of the organization to manifest an independent will — are not severable. For instance, it would be contrary to the general rules of interpretation of the *Vienna Convention*[115] to acknowledge the international personality of an organisation under international law when the actual treaty text stating the agreement of the parties provides expressly to the contrary or when from its provisions the contrary intention of the parties on the granting of personality can be implied. This is also the case when the positive intention cannot be implied from the treaty provisions such as the powers and functions conferred to the entity.[116]

2 *Recognition of International Legal Personality by Third Parties*

Scholarly literature on international and institutional law addresses the need for recognition by third parties (eg, non-member states and international organisations) of international personality. This issue also features in the *Reparations* case.[117] The significance of establishing a view on the role of third-party recognition is twofold. First, because it clarifies the role that recognition by third parties plays in relation to the international personality of an organisation. Is it a definitional element of personality? Is it a practical operational matter? Second, the external relational aspect of an organisation conveys recognition. Recognition is necessary to exercise the treaty-making capacity that is usually attached to international legal personality.[118] The query about recognition seems to have particular significance for regional organisations and non-universal organisations.

112 *Reparations* [1949] ICJ Rep 174, 178 (emphasis added).
113 Ibid 174, 179.
114 Ibid 180, 182-3.
115 *Vienna Convention*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31, 32.
116 But see Klabbers, 'Presumptive Personality', above n 100; Klabbers, above n 62, 49-50. For a presumptive view on international personality.
117 Hurd, above n 85, 18. From the political science perspective the need for recognition is seen as 'a product of a social process of institutionalization'.
118 Rachel Frid, *The Relations Between the EC and International Organizations: Legal Theory and Practice* (Kluwer Law International, 1995) 17-8.

In the case of the UN, the ICJ found that the Organisation was endowed with the capacity to bring claims against non-member states based on the objective international personality of the UN.[119] This objective personality arose from the fact that membership of the organisation at that time represented the 'vast majority of the members of the international community', which gave those states the power, under international law, to create an entity with objective personality and to be non-dependable on the recognition of such personality by its actual members.[120]

The views presented on this point by the ICJ motivated an unsolved debate in the academic writings as to whether recognition by third parties is a constitutive element for the international personality of international organisations.[121] Discussions also point to the need for recognition to qualify as an international organisation; and the need for individualised recognition to make that organisation opposable to non-members.

One standpoint sustains that the reasoning of the ICJ is applicable only to the UN and it is not viewed as a general rule.[122] However legal scholars have interpreted that other international organisations with a degree of universal and open membership could draw analogy from the *Reparations* case to claim objective international personality.[123]

This view argues that a different situation takes place in relation to other international organisations that could not be said to represent 'the vast majority of the members of the international community.' The views presented reflect on the need that international personality of international organisations such as regional organisations should be recognised expressly or impliedly by third parties (eg, states or other international organisations).[124]

This recognition could take place through an uncommon declaration, or by practice through third parties entering into relations with the organisation. This argument is based on the principle of *res inter alios acta* or relativity of treaties — the usual constitutive documents of international organisations.[125]

Conversely, the objective approach on legal personality relies on the ICJ reasoning on recognition to sustain that, regardless of the Court taking into account the number of members and the standing of the founding members of the UN, objective legal personality could be applied to all international organisations. Thus, it renders objective personality opposable to third states.[126]

In my view, a bottom-line point is the practical need that international organisations have to be recognised by states and other international organisations to pursue their purposes and functions through entering into relations with them. However, this does

119 *Reparations* [1949] ICJ Rep 174, 185.
120 Ibid.
121 Crawford, above n 95, 169.
122 Sands and Klein, above n 77, 479 [15-014]-[15-015].
123 D J Latham Brown, *Public International Law* (Sweet & Maxwell, 1970) 236; Schermers and Blokker, above n 65, [1568]-[1857].
124 Sands and Klein, above n 77, 479 [15-015]; Schermers and Blokker, above n 65, 1191 [1857].
125 Sands and Klein, above n 77, 479 [15-015].
126 See, eg, Crawford, above n 95, 171. See, also Akande, above n 79, 259.

not make recognition by third parties a constitutive requirement for legal personality per se.[127]

If a state or an organization decides not to enter into relations with another international organisation or expressly denies recognition of its international legal personality, it does not mean that such an organisation does not have personality as a consequence of this action.[128] For example, the USSR refused to enter into relations with the EC, but this situation did not mean the EC were precluded from having international personality or lost it as a result of the USSR position.[129]

However, as Klabbers points out, there could be a hypothetical extreme situation in which no other state or organisation would be willing to engage into relations with that organisation.[130] Granting personality to such an organisation regardless of the recognition by no other international legal person seems contrary to the principle of effectiveness in international law. The organisation would not be able to engage in any external relations. Does it deprive it from having international personality or is it an issue of inability to perform the external functions? I argue here that in this extreme case and following the principle of effectiveness this would be an exception to the general rule of granting international personality under international law, which does not make recognition a constitutive requirement of international personality in a general sense.[131] I claim that it is highly possible that the underlying reasons for such generalised non-recognition lie in the absence of actual constitutive criteria of international personality or even organisation-hood, for example that the entity was established to pursue unlawful objectives. I acknowledge that the chances for these generalise non-recognition are minimal. States and other international organisations seem generally willing to engage in relations with other organisations nowadays unless other political reasons prevented them from doing so.

The analysis presented clarifies my general view on the need of recognition by third parties and informs the assessment presented in Part IV on the role that third-party recognition has for the PA.

C *Domestic Legal Personality of International Organisations*

This aspect of the personality of international organisations deals primarily with the recognition of the status of the organisation as a legal person within the legal system of a state where the organisation operates.[132] Because international organisations also need to operate at the domestic level, not only within the members' territories, but also host states and third states, it is important to refer generally to their status and the recognition of legal personality under municipal law. The approaches followed by states vary, not only depending on the monist or dualist line that the state takes to the

127 Frid, above n 118, 8.
128 See, eg, Amerasinghe, above n 72, 90.
129 Manuel Díaz Velasco, *Instituciones de Derecho Internacional Público* (Tecnos, 16ta ed, 2007) 350 [Manuel Díaz Velasco, International Public Law Institutions (Tecnos, 16th ed) 350].
130 Klabbers, 'Presumptive Personality' above n 100, 48-49.
131 Cf Frid, above n 118, 18-9.
132 Bekker, above n 82, 71.

application of international law in the domestic context,[133] but also if a state is a party or a non-party to the international agreement creating the international organisation.

Constitutive treaties often refer to the capacity of the organisation to have rights and obligations under the municipal law of the members or to specific powers and competences that parties should grant to the organisation at the domestic level.[134] This reference can be general such as in the case of the United Nations Charter article 104, providing for the members' obligation to grant legal capacity to the organisation in their territories as may be necessary for the exercise of its functions and fulfilment of its purposes. Other constitutive treaties such as the *Ouro Preto Protocol* of MERCOSUR refer to attributions of legal capacity to perform specific acts at the domestic level such as the capacity to enter into a headquarters agreement with a host state, to acquire property, enter into contracts and be a party in legal proceedings.[135] Legal scholars understand that the express granting of these powers and capacity at the domestic level is a consequence of the express or implied attribution of legal personality to an entity.

These treaty provisions recognising legal personality at the domestic level only bind the members to the international agreement, notwithstanding the internal procedures that may be required for the international treaty to be effective at the domestic level. For some states that take a monist approach on international law, the treaty provisions will be applicable automatically in the domestic context of the member, binding national courts and other actors to recognise the domestic legal personality of the international organisation.[136] Other states may require additional procedures for the incorporation of the international treaty into domestic law within a member, for instance the cases of Chile, Colombia, Mexico, and Peru.

For non-member states the situation also varies according to the domestic law of the states. One option is to resort to the rules on conflict of laws prescribing that the 'personal law' of the international organisation defines its legal status and the capacity of a legal person.[137] The 'personal law' in the case of international organisations would be international law.[138] If under international law an organisation has (international) personality then national courts would recognise (domestic) legal personality in their jurisdictions.[139] Multiple jurisdictions are reported to accept this approach.

Another approach — more exceptional — is the one followed by the courts in the United Kingdom for organisations to which it is not a member. The domestic legal personality of the organisations will be recognised as long as the host state or any of its

133 Akande, above n 79, 260; Ian Brownlie, above n 76, 662.

134 Klabbers, *An Advanced Introduction*, above n 71, 17; Klabbers, above n 62, 44; Malcom Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 1299; Sands and Klein, above n 77, 480 [15-016].

135 *Ouro Preto Protocol: Additional Protocol to the Treaty of Asuncion, Establishing the Institutional Structure of MERCOSUR*, signed 16 December 1994, 2145 UNTS 298 (entered into force 15 January 1996) arts 35, 36 ('*Ouro Preto Protocol*') < http://www.mercosur.int/innovaportal/file/721/1/cmc_1994_protocolo_ouro_preto_es.pdf >.

136 Sands and Klein, above n 77, 477 [15-017]-[15-018].

137 Amerasinghe, above n 72, 70-1; Ian Brownlie, above n 76, 662; Sands and Klein, above n 77, 477 [15-019].

138 Shaw, above n 134, 1309.

139 Bekker, above n 82, 63.

members has granted legal personality to it.[140] Courts in the United Kingdom can also recognise domestic legal personality of the international organisation if the executive expressly recognises the international organisation.

Several scholars support the view that refusal to recognise the capacity to act in the domestic legal system of a state to an international organisation established by other states does not seem common.[141] This means that the recognition of legal personality in the domestic contest of a state, although dependent on the laws of that state, does not pose many practical hurdles, as long as international legal personality exists for that entity/organisation. Considering these practices on the recognition of legal capacity in domestic settings I assess in Part IV the situation of the PA in the domestic context of member and non-member states.

III Integrative Guidelines for the Assessment of International Personality

This Part outlines what I proposed as integrative guidelines for evaluating whether a particular entity is bestowed with international personality under international law. I developed them with a practical aim that ponders the different theoretical perspectives on the source of international legal personality, bearing in mind their limitations. I also considered the reasoning, the analytical and evidentiary tools examined by the ICJ.

(i) Constitutive documents and subsequent agreements between the parties to an agreement referring to the legal personality of the entity and the specific powers or legal capacity granted to it are not constitutive of international personality, but assist in its determination by implication. Along with the actual practice of the organisation they serve as evidentiary bases to probe the presence or absence of international personality.

(ii) Since constitutive documents of international organisations often take the form of treaties, their interpretation must be guided by the *Vienna Convention* stating that interpretation shall be conducted in good faith, in accordance with the ordinary meaning of words, in the context and in the light of its object and purpose. Thus, constitutive treaties may speak expressly or impliedly on the intention of members to bestow the entity with legal personality.

(iii) The need for independent and autonomous will of the entity from that of its members refers to an assessment criterion on the mandatory distinction between the organisation and its members in terms of their powers, rights, and responsibilities at the international level.[142] Determining the distinction requires attending to the express and implied content of the constitutive instruments (eg, the determination of organs and their functions) in conjunction with the practice of the entity.

(iv) The concept of distinct will is a legal fiction in itself. However, evidentiary elements can point to some level of independent action. Some institutional

140 Akande, above n 79, 260-1; Ian Brownlie, above n 76, 662.
141 Sands and Klein, above n 77, 482 [15-020].
142 See Akande, above n 79, 254.

features contained in the constitutive documents along with actual practices by the entity and or its members reflect either some degree of independence or the lack of it. These features and practices could also be found in subsequent documents.

(v) Despite some discussion and exceptions, writings on international institutional law find three typical indicators of international personality referred also as general legal capacity:[143] (i) the treaty making capacity related not only to the conclusion but to the entitlement to rights and obligations derived from it;[144] (ii) bringing and receiving international claims for international wrongful acts; (iii) the right to send and receive legations.[145] The areas in which the treaty-making power and international active and passive responsibility could be exercised depend on the objectives and functions of the organisation as well as its institutional law.

(vi) At the practical level some form of presumption of international personality for international organisations operates unless such personality is expressly denied in the constitutive document of the entity. If an international organisation performs an act that indicates international personality, such as the conclusion of a treaty, there is no evidence that this self-appointed capacity to conclude the agreement would a priori be challenged unless strong political considerations rather than legal determinations take place. Challenges to international personality take place more often in the context of cases involving international responsibility and when there is an interest that members (states) rather than the organisation itself be held responsible.

(vii) Organisations with more limited scope in terms of membership and regional base require some level of recognition by non-member states and other third parties in order to operate and be able to fulfil their external purposes and ends.[146] There can be expressed or implied recognition although it does not mean that recognition becomes a definitional aspect of personality.

IV IS THE PA AN INTERNATIONAL ORGANISATION WITH LEGAL PERSONALITY?

This Part considers the views outlined in Part II regarding the constitutive requirements of an international organisation. I apply the integrative guidelines on the assessment of international legal personality to examine whether the PA is an international organisation bestowed with international and domestic personality. This Part also considers the scarce scholarly literature that has addressed this question in relation to the PA.

My main contention is that the PA is not an international organisation endowed with international and domestic legal personality. According to the PA's institutional structure and practices the PA does not enjoy an autonomous will from the members

143 Bekker, above n 82, 63-4.
144 Cf Gazzini, above n 86, 41, 46.
145 Klabbers, above n 62, 40.
146 See, eg, Pennetta, above n 87, 111.

that would allow it to act independently — to some degree — to pursue its own objectives. The members exercise complete control over the functional, operational and technical aspects of the PA. This view is supported in arguments that attend to the constitutive documents of the PA, subsequent agreements, and current practices.

A *Assessment of the International Status and International Personality*

Academics have started to examine the legal nature of the PA with conflicting views on the question of its nature as an international organisation and/or its international legal personality.

Gardini was the first scholar to refer to this issue, but he was concerned with the enquiry on international legal personality.[147] The scholar limits his contribution to the assertion that the PA is deprived of legal personality, thus it is not able to sign international agreements on behalf of its members. He does not provide further explanations in support of his view and perhaps overlooks the fact that international personality entails the capacity to sign treaties in its own right rather than on behalf of the members. Quintero Arroyabe is concerned with the status of the PA as an international organisation and does not examine the issue of international legal personality.[148] The author asserts that the PA is not an international organisation. He argues that the PA is a mere economic agreement for the establishment of a 'deep regional integration area' without providing further support for his insight.

Díaz-Cediel[149] and others[150] claims that the PA lacks legal personality and the status of an international organisation. He supports his view in a twofold argument that despite relying in an objective approach to international personality enquiries also on the intentions of the members.[151] He examines the presidential declarations that represent to him soft-law. These documents speak on the intentions of the members. In his view the presidential declarations, before and after the entry into force of the *Framework Agreement* and this agreement in itself do not provide evidence that the members had the intention to create an international organisation with legal personality. These declarations refer to the PA as an 'initiative,' 'an area of regional integration,' 'a common space for integration,' but not a subject under international law.[152]

147 Gian Luca Gardini, 'The Added Value of the Pacific Alliance and "Modular Regionalism" in Latin America' on London School of Economics and Political Science, *International Affairs at LSE Blog* (25 June 2013) <http://blogs.lse.ac.uk/ideas/2013/06/the-added-value-of-the-pacific-alliance-and-modular-regionalism-in-latin-america/>.

148 Mario Andrés Quintero Arroyabe, 'La Alianza del Pacífico y el Ocaso de la Comunidad Andina: hacia una nueva configuración interregional en Latinoamerica' en Eduardo Pastrana Buelvas and Hubert Gehring (eds), *Alianza del Pacífico: Mitos y Realidades* (Universidad Santiago de Cali, 2014) 117, 119, 124 [Mario Andrés Quintero Arroyabe, 'The Pacific Alliance and the Sunset of the Andean Community: towards a new inter-regional configuration in Latin America' in Eduardo Pastrana Buelvas and Hubert Gehring (eds), *The Pacific Alliance: Myths and Realities* (Santiago de Cali University, 2014) 117, 119, 124].

149 Díaz-Cediel, above n 81, 347. See also Javier R Gallego Zuñiga, 'La Alianza del Pacífico, aspectos jurídicos organizacionales y de su sistema de solución de controversias' (2019) 194 *Estudios Internacionales* 75, 77 [Javier R Gallego Zuñiga, 'The Pacific Alliance, organizational legal aspects and its dispute resolution system' (2019) 194 *Estudios Internacionales* 75, 77-8].

150 See, eg, Castaño Peña, above n 16, 298-99.

151 Díaz-Cediel, above n 81, 351.

152 Díaz-Cediel, above n 81, 352-55.

Díaz-Cediel takes a checklist-deductive approach focusing on the common understanding that international legal personality is a constitutive requirement of any international organisation.[153] He refers to four necessary elements for an international organisation to exist.[154] These elements arrive from the ILC definition and what he claims are the elements acknowledged in the doctrine:[155](i) the constitution by an international agreement between states, creating international obligations;[156] (ii) the establishment by states[157] (iii) international legal personality;[158] and (iv) a defined legal structure with permanent bodies that have allocated functions. [159] Díaz-Cediel concludes that due to the lack of international personality the PA does not constitute an international organisation.[160]

Although Díaz-Cediel and I arrived at similar conclusions, the integrative guidelines I use in my analysis employ a balancing exercise rather than prioritising a particular approach or ticking the boxes of a list of requirements through deductive reasoning.

It is my view that the assessment of the status as an international organisation and international personality seems to be a two-stage process in theory, where the status as an international organisation is established before international legal personality is examined. [161]However, when the test is applied to a particular entity, the two stages of the test merge, because the determination of an international organisation and the existence of international legal personality rely on the same element: 'distinct or autonomous will'. This practical merger of the test is reflected in the following analysis.

I examine first the constitutional requirements of an international organisation. However, once I get to the independent will determination, I need to look at the implications that considering the PA either as having or lacking such independent will represent to establish its international personality. I claim that the organisational structure points to the lack of an autonomous will within the PA, separate to the will of its members. This is a point of appreciation and views are mixed.

The premise here is that granting legal personality to the PA does not say anything about the actual external acts of the organisation or the content of its personality.[162] Thus, conceding personality to the PA would only acknowledge that it is a subject under international law capable of acquiring rights and obligations.[163] The content of those powers and capabilities would depend upon the constitutive instruments as well as the objectives and functions of the entity.[164]

153 See above Part II (A).
154 See also Akande, above n 79, 257.
155 Díaz-Cediel, above n 81, 357.
156 Ibid 358-9.
157 Ibid 359-362.
158 Ibid 362-69.
159 Ibid 369-70.
160 Ibid.
161 See above Part II (A).
162 Akande, above n 79, 256-7; Schermers and Blokker, above n 65, 993 [1570]; Sands and Klein, above n 77, 477 [15-008].
163 Schermers and Blokker, above n 65, 993 [1570]; Sands and Klein, above n 77, 477 [15-008].
164 Shaw, above n 134, 1303.

Assessing the PA through the definitional aspects shows that it is the result of an international constitutive treaty — *Framework Agreement*. States signed this agreement evidencing not only its interstate membership but also that international law governs the agreement. The accord prescribes lawful objectives, including the creation of a deep integration area. The preamble expressly refers to the goal of making the PA a mechanism for concertation, convergence, political dialogue, and progress of the relations with the Asia Pacific. The *Framework Agreement* refers to an organisational structure creating the Council of Ministers and the Pro-tempore Presidency and assigning functions to these bodies.[165] It also refers to the GAN, created by presidential declaration, reaffirming its presence in the institutional structure of the PA.[166] These bodies enjoy stability and an aptitude to last over time thanks to their establishment through an international treaty that grants indefinite duration to the PA. However, these bodies are still non-permanent structures because their members gather to discuss topics of common interest as the regional agenda demands and to the extent that national priorities allow the time. The PA does not have a headquarters or permanent Secretariat. This institutional choice relates to the preference for a flexible and pragmatic institutional design.[167]

The capacity of the PA to express a separate and distinct will from that of the members is troublesome for acknowledging the PA as an international organisation. This situation has a direct implication in assessing its international legal personality.

The first difficulty in establishing the distinct will of the PA from the collective wills of the members is the current decision-making system, not only derived from the constitutive document but also the actual practices. As stated in the *Framework Agreement*, every decision taken by the Council of Ministers or any other agreement adopted within the PA requires consensus.[168]

The second difficulty lies in the de facto dependence of presidential leadership. Although presidential summits are not part of the formal organisational structure of the PA in practice, as several presidential declarations show, this is the main 'organ' directing the PA.[169] Mandates taken at this level are also adopted by unanimity. Presidential mandates are the source of 'soft' institutional developments most of the time since mandates are often addressed through the creation of ad hoc technical groups in charge of developing and expanding the work agenda. When examining the issue of independence in what they call RIAs, Haftel and Thompson claim that RIAS in which a ministerial council (or its equivalent) is the most relevant decision-making body are more independent than the ones dominated by heads of state.[170] I maintain that although the Presidential Summit is not part of the formal structure of the PA, which would point to the Council of Ministers as the primary decision-making body, the practice in the functioning of the PA shows a different outcome in decision-making.[171]

165 See above Ch 5, Part III (A) (1) (3).
166 See below Ch 5, Part III (B) (4).
167 See below Ch 8, Part II (C).
168 *Framework Agreement*, signed 6 July 2012 (entered into force 20 July 2015) art 5.
169 See below Ch 5, Part III (B) (1).
170 Yoram Z Haftel and Alexander Thompson, 'The Independence of International Organizations: Concept and Applications' (2006) 50 (2) *Journal of Conflict Resolution* 253, 258-9.
171 See below Ch 5, Part III (A) (1) (B) (1).

Evidence of the situation is the 14 Presidential Summits held since the mechanism was put in place in 2011.

The third difficulty is that actual legal representation of the PA is substantially limited. Due to the lack of a permanent Secretariat, the *Framework Agreement* prescribes that the Pro-tempore Presidency could represent the PA in affairs and acts of common interest only entrusted to it by the members on a case-by-case basis.[172] This provision could not be interpreted as granting powers to the Pro-tempore Presidency to enter into international agreements on behalf of the PA generally.

All the factors mentioned above point to the PA members complete and effective control of every single aspect of the PA. The limited instances in which the Pro-tempore Presidency could act refer more to the representation of the aggregate interests of the members rather than the PA's interests. The provision suggests that the Pro-tempore Presidency could serve as a spokesperson in the case that individual interests of the PA members coincided and provided that states grant the power to it in a specific situation. This is an arguable point because the difference between one and the other, to a certain degree, is a matter of appreciation. However, these factors indicate the absence of a PA's distinct will from that of its members collectively.

More flexible and less formalised institutional arrangements do not mean per se the absence of an international organisation and consequently lack of international legal personality. However, the constitutive agreement and other documents refer to the PA more as a mechanism rather than an international organisation.[173] The *Framework Agreement*, neither makes express reference to the international personality of the PA nor the specific powers and rights of the PA at the international level (or domestic level of the members). The situation makes clear that there is no express intention to attribute international personality to it and prevents from inferring a positive intention by the participating members. This evidence on its own is not conclusive of the negative intention, but I ponder this factor in conjunction with other objective criteria.

It is difficult to map the practices of the PA due to the challenging access to information documenting these practices and the recent creation of the PA. This difficulty could be because there are no practices that can be attributed to the PA as such, but to the members collectively or individually. Some of the practices documented demonstrate caution on the way members collectively refer to the PA or an actual legal limitation, which in my view is partially due to the issue that the *Framework Agreement* creating the PA only entered into force on July 2015. The governments of the members signed some agreements directly to give some operation to the PA before the *Framework Agreement* came into force.

Regarding the actual practices of the members when referring to the PA, Mexico is the only member that refers to the presence of international legal personality in its official

172 *Framework Agreement* art 7.

173 Consejo de Ministros, *Lineamientos para la Implementación de Proyectos de Cooperación entre la Alianza del Pacífico y Estados Observadores*, Alianza del Pacífico (29 Abril de 2015) < https://alianzapacifico.net/?wpdmdl=4388> [Council of Ministers, *Guidelines for the Implementation of Cooperation Projects between the Pacific Alliance and Observer States*, the Pacific Alliance (29 April 2015) < https://alianzapacifico.net/?wpdmdl=4388>].

sources.[174] These sources refer to the *Framework Agreement* as the instrument through which the PA acquires legal personality.[175] The Colombian Ministry of Foreign Affairs refers in several occasions to the PA as a flexible mechanism for cooperation; 'an area of deep integration'; 'a platform for economic and political articulation'; 'a strategy for integration'.[176] Colombia does not expressly refer to it as a subject or an international organisation. It does not attribute any legal personality or legal capacity to it in its official sources. However this aspect on its own does not seem indicative of any formal view by Colombia, since other regionalism schemes bestowed with international personality, such as UNASUR, CAN and MERCOSUR are also referred as 'mechanisms of regional integration' in the Ministry's web.[177] The Peruvian Minister of Foreign Affairs refers to the PA in similar terms,[178] while the Chilean Ministry of Foreign Affairs refers to it as integration and a trade bloc.

Pondering all these factors, the answer to the question of whether the PA constitutes an international organisation and from the legal point of view, whether it has international legal personality is in my interpretation negative. The intergovernmental structure makes it more challenging to distinguish between an independent will of the PA to that of the aggregate states comprising it. This situation in light with the actual practices and the way the organisational structure is designed and operates deprives it of independent international organisation-hood and international legal personality.

The PA practices prevent me from suggesting a presumption of international personality for the PA, because no affirmative actions on the use of specific capacities and powers in the international plane, such as the signing of an international treaty by the PA, allow for such presumption, as proposed by Klabbers.[179]

On the issue of recognition by third parties, it seems less probable that in the absence of any reference denying legal personality in the constitutive text of the PA and other

174 Unidad de Coordinación de Negociaciones Internacionales, *Alianza del Pacífico*, Secretaría de Economía de México <http://www.economia.gob.mx/files/transparencia/informe_APF/memorias/6_md_alianza_pacifico_sce.pdf> 5 [Coordination for International Negotiations Unit, *The Pacific Alliance*, Secretariat of Economy 5 <http://www.economia.gob.mx/files/transparencia/informe_APF/memorias/6_md_alianza_pacifico_sce.pdf>]; *Historia de la Alianza del Pacífico*, Secretaría de Relaciones Exteriores de México <http://embamex.sre.gob.mx/chile/index.php/component/content/article/197> [History of the Pacific Alliance, Secretariat of Foreign Affairs of Mexico <http://embamex.sre.gob.mx/chile/index.php/component/content/article/197>].

175 History of the Pacific Alliance, Secretariat of Foreign Affairs of Mexico <http://embamex.sre.gob.mx/chile/index.php/component/content/article/197>.

176 *Alianza del Pacífico*, Ministerio de Relaciones Exteriores de Colombia < http://www.cancilleria.gov.co/international/consensus/pacific-alliance> [The Pacific Alliance, Ministry of Foreign Affairs of Colombia < http://www.cancilleria.gov.co/international/consensus/pacific-alliance>].

177 *Unión de Naciones Suramericanas*, Ministerio de Relaciones Exteriores de Colombia <http://www.cancilleria.gov.co/international/consensus/unasur> [*Union of South American Nations*, Ministry of Foreign Affairs of Colombia <http://www.cancilleria.gov.co/international/consensus/unasur>].

178 *Perú: Política Exterior/Integración*, Ministerio de Relaciones Exteriores de Perú <http://www.rree.gob.pe/politicaexterior/Paginas/Integracion.aspx> [Peru/Foreign Policy/Integration, Peruvian Ministry of Foreign Relations <http://www.rree.gob.pe/politicaexterior/Paginas/Integracion.aspx>].

179 See above n 116.

international agreements between the PA members, third states or other international organisations would refuse a priori to enter into relations that imply distinct legal personality for the PA.[180] A large group of states have become observers and seem willing to establish relationships not only with the collective of the members but also with the PA. These aspects signal recognition of the mechanism and a willingness to enter into relations with the PA as a regional actor, which could eventually ease the path if the members decide to revise the nature of the mechanism.

An opposite minority view suggests that the PA complies with all the requirements to be considered an international organisation of intergovernmental nature bestowed with international personality.[181] Tremolada Alvarez supports this insight on the same objective, and to a less extent, subjective theories of international legal personality considered by Díaz-Cediel and I. He examines the *Framework Agreement* and the *Commercial Protocol* particularly. However, he does not consider any practice of the members or the actual entity when assessing the nature of the PA. His main argument is that the PA constitutes an intergovernmental organisation because its decisions would require the consent of every member to be binding upon it.[182] Tremolada Alvarez seems to be dealing with the questions of whether the PA is an international organisation and whether it has international legal personality as two connected queries by the requirement of a body capable of expressing an independent will to that of the members.

Tremolada Alvarez relies primarily upon the objective theory to suggest that the Council of Ministers is embodied with this function and is capable of expressing such an independent will based on the tasks allocated to this body; the members' obligations concerning the objectives of the organisation; 'the eventual' legal capacity; and the privileges and immunities that the PA agents 'would enjoy'.[183] In light of the rules established for the operation of this body along with the current practice of the PA Díaz-Cediel and my view on this point are completely the opposite to the insight of Tremolada Alvarez.

B *Domestic Legal Personality of the PA*

Since I argue here that the PA lacks international legal personality and the status of an international organisation the answer to the question about the legal personality of the PA in the domestic context of the members must be negative. Domestic legal personality and the consequential capacities and powers derived from it following their functional necessity could not be granted to an entity that lacks international legal personality. Incorporation of the international instrument by members to their respective legal systems can only be a reflection of the PA status under international law.

180 See above Part II (B) (2).

181 Eric Tremolada Alvarez, 'Does the Pacific Alliance Make the Insertion of Colombia in the Asia-Pacific Region Easier? (2014) 19 (2) *Papel Político* 721, 744-45; Eric Tremolada Alvarez, 'La Integración de la Alianza del Pacífico' en Eduardo Pastrana Buelvas and Hubert Gehring (eds), *Alianza del Pacífico: Mitos y Realidades* (Universidad Santiago de Cali, 2014) 145, 158-162 [Eric Tremolada Alvarez, 'The Pacific Alliance Integration' in Eduardo Pastrana Buelvas and Hubert Gehring (eds), *The Pacific Alliance: Myths and Realities* (Santiago de Cali University, 2014) 145, 158-162].

182 Tremolada Alvarez, above n 181, 158, 164-5.

183 Ibid 162, 165.

The PA is not a legal person. Therefore, it does not have the legal capacity to enter into contracts, institute legal proceedings in the territory of its members, and perform legal acts in its own right for the fulfilment of its objectives and functions. The PA lacks legal capacity to enter into legal relations not only with its members but also with third states. The PA is not a subject of rights and obligations under the domestic legal system of its members because it is not a subject of rights and obligations under international law. This assessment today does not prevent that legal personality at the domestic level would be acquired in the territory of the members and third parties, but provided that PA evolves to become an international organisation with international legal personality in the future.

V CONCLUSION

I maintain that the PA is not an international organisation mainly because its institutional structure and practices do not equip it with an independent will from the members that comprise it. The lack of a degree of functional, financial, and operational autonomy means that the PA members have deprived the PA of a distinct international personality. Consequently, the PA is a subject of rights and obligations neither under international law nor under the domestic legal systems of member and third states. Moreover, the PA lacks the juridical capacity to enter into legal relations with its members and third states.

Constitutive documents, subsequent agreements, and practices of the members do not provide evidence of positive intention to grant legal capacity to this entity to be a subject under international law. I argue that this is a deliberate omission, which means that members did not intend to create the PA as an international organisation with legal capacity. References to the PA as a mechanism, a strategy, an area, a bloc, and a forum in subsequent agreements and by individual members have been carefully crafted to withhold legal personality from the PA. This choice creates an institutional path that may be resistant to change, as I explain in detail in Chapter 9.

Since the PA is not a subject under international law, it does not have capacity to enter into international agreements or direct powers to act in pursuit of its purpose and functions. All the activities undertaken to achieve the objectives of this mechanism and the legal responsibilities derived from them should be attributed directly to the members individually. Because international legal personality has not been attributed to the PA, it is not possible to discuss its implied powers, as they simply do not exist.

From a broader theoretical perspective, my argument here is that international legal personality is part of an international organisation, although it is not a constitutive requirement. In my view, an autonomous will is the definitional requirement of an international organisation, while international personality is a manifestation of this definitional requirement. Therefore, legal personality is a consequence of one of its requirements — the autonomy or independent will.

This conclusion about the international legal status of the PA follows a rational institutionalist approach more generally because it acknowledges the careful drafting

of the agreement establishing the PA and the effects of institutional features that members purposefully chose.

This Chapter presents a view on the international legal status of the PA as of today answering the question as to whether the PA is an international organisation bestowed with legal personality. The negative answer to this enquiry is an input to characterise the institutional framework of the PA in Chapters 5 and 6 and to provide normative views about the current institutional framework in Chapters 8 and 9 of the thesis. From a functional perspective, the analysis in this Chapter allows assessing whether the legal status of the PA equips it with the necessary legal capabilities to support it in achieving its goals, particularly deep integration towards the free movement of factors. By making it clear what the PA is not — an international organisation bestowed with legal personality under international law — I also outline institutional features (eg, decentralisation) that help to answer the question of what the PA is from an institutionalist perspective throughout the thesis.

3 THEORETICAL AND ANALYTICAL TOOLS TO EXPLAIN INSTITUTIONAL DESIGN IN THE PA: AN ECLECTIC APPROACH

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I INTRODUCTION

This Chapter sets out the analytical framework of the thesis. The thesis relies on the new institutionalism approaches of rational institutionalism and constructivist institutionalism. I complement the new institutionalisms with the insights of the research program on comparative regionalism, principally the work of Acharya and Johnston about comparative regional institutional design.[184] International institutional law and doctrinal legal analysis are used in Chapter 2 to address the current legal nature of the PA and also in Chapters 5, 6 and 7 to examine the scope, relationship, and effects of the several sources of law that emerge as the legal regime of the PA.

De Lombaerde recommends for many research problems creative but critical eclecticism.[185] I have taken up his recommendation to use a theoretical approach that is not attached to a single theory or set of assumptions but draws upon the insights of several theories that complement and supplement each other. I argue that the questions posed by this thesis and its descriptive-explanatory-normative scope demand an eclectic approach.

Part II of this Chapter defines five key concepts that I employ throughout the thesis: regionalism; (regional) integration; cooperation; institutions; and institutional framework. This exercise is mandatory due to the unsettled scope of these notions, which vary according to the discipline and theoretical approach.

In Part III of this Chapter, I provide a brief explanation of why institutionalist accounts suit the purpose of the thesis. I suggest that these theoretical approaches are better than integration theories to address the research questions. I develop the rational explanatory framework and the scope of the analytical tools that I use subsequently in Chapters 7 and 8 to explain the reasons behind the institutional features and other aspects of the PA. I also outline the limitations of rational explanations to understand the institutional design within the PA. I then introduce additional analytical tools from the realm of constructivist institutionalism.

Part IV sets out the conclusions regarding the use of this eclectic theoretical approach. This Part outlines how the insights from several institutionalist streams could be used complementarily and supplementarily to better grasp the empirical situation of the PA.

I argue that an interdisciplinary theoretical approach that involves insights from new institutionalisms and legal analyses is better suited than traditional integration theories (eg, neofunctionalism, intergovernmentalism), economic integration theories or new regionalism approaches to address the thesis problem and research questions. I claim that the detailed insights of new institutionalisms provide unique assistance in tackling the research questions on the institutional framework of the PA. This is because new institutionalisms are concerned not with explaining regionalism and the regionalisation process as such but with the working of institutions.

184 See Acharya and Johnston above n 13.

185 Philippe De Lombaerde, 'Comparing Regionalisms: Methodological Aspects and Considerations' in Timothy M Shaw, Andrew Grant and Scarlett Cornelissen (eds), *The Ashgate Research Companion to Regionalisms* (Taylor and Francis, 2011) 31, 42.

The eclectic framework of analysis uses insights from rational and constructivist institutionalisms. It provides an understanding of the role of cooperation problems; characteristics of the cooperating states in the aggregate; ideas; and institutional environments not only in the institutional design outcomes of the PA but also in its prospects for future change. This eclectic framework represents an incremental contribution to institutionalist thought and its use in the context of international relations.

II CONCEPTUAL UNDERSTANDINGS

Many of the basic concepts used throughout this thesis have a variable meaning according to discipline and theoretical approach. Here I explain the intended content of central concepts used in this thesis: international cooperation, regionalism, regional and economic integration, institutions, regional institutions, and institutional frameworks. I identify broad definitions alongside more specific aspects, drawing insights from comparative regionalism and new institutionalisms.

A *Conceptual Pluralism: Cooperation, Regionalism and Associated Terms*

Conceptual pluralism highlights the need to define the scope of key concepts. An essential concept this thesis uses is international cooperation, which I understand as a process through which actors interact with others either to realise shared interests[186] or to solve problems that cannot be individually tackled.[187]

1 *Cooperation*

As Keohane states, cooperation takes place 'when actors adjust their behaviour to the actual or anticipated preferences of others, through a process of policy coordination.'[188] This thesis takes a top-down approach, focusing on cooperation amongst states. Moreover, the thesis is concerned with international cooperation that happens within the regional space.

This thesis uses 'international cooperation' in its broad sense in international relations. In taking Keohane's notion of 'international cooperation', the thesis distances itself from views that situate cooperation as a preliminary stage of regional integration,[189] with a clear distinction made based on the transfer of authority to the regional level (supranationalism).[190]

186 Robert Keohane, *After Hegemony* (Princeton University Press, 1984) [Kindle position 151].

187 Andrew Hurrell, 'Regionalism in Theoretical Perspective' in Louise Fawcett and Andrew Hurrell (eds) *Regionalism in World Politics* (Oxford University Press, 1995) 37, 42.

188 Keohane, above n 186, [Kindle position 1061-62]; Robert Keohane, 'International Institutions: Two Approaches' (1988) 32 *International Studies Quarterly* 379, 380-1. See also Helen Milner, 'International Theories of Cooperation Among Nations: Strengths and Weaknesses' (1992) 44 *World Politics* 466, 467.

189 See, eg, Bela Balassa, *The Theory of Economic Integration* (Richard D Irwin, 1961) 1-2.

190 See, eg, Tanja A Börzel and Thomas Risse, 'Introduction: Framework of the Handbook and Conceptual Clarifications' in Tanja A Börsel and Thomas Risse (eds) *The Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016) [Kindle position 367-8]; Søren Dosenrode, 'On Regional Integration' in Søren Dosenrode (ed) *Limits to Regional Integration*

Thus, I take the view that regional cooperation and regional integration do not operate at different ends of a continuum of regionalisation. However, I acknowledge that there are instances in which states cooperate to achieve shared interests or solve common problems (eg, drug trafficking, environmental pollution, illegal migration) without the aim of integrating. Regional integration is understood in this thesis as a subcategory of international cooperation,[191] notwithstanding other expressions of cooperation. At the same time, I also refer to cooperation as a means or instrument for achieving regionalism(s) projects.

2 *Regionalism and Associated Terms*

The thesis adopts the notion of region-building proposed by De Lombaerde and Van Langehove:

> A multidimensional process of social transformation whereby actors, associated with (sub) national governance levels and belonging to a limited numbers of different states, intensify their interactions through the reduction of obstacles, the implementation of coordinated or common actions and policies, and/or the creation of regional institutions, thereby creating a new relevant (regional) space for many aspects of human behaviour and activities.[192]

Two caveats apply about the use of this concept and the scope of the thesis. First, the thesis does not deal with issues regarding subnational governance levels, or what other authors call micro-regions.[193] Second, in examining the economic dimension of this process of region-building in connection with states' behaviour, I do not disregard the complexity of region-building in terms of the multiplicity of actors and dimensions.

I adopt a broad understanding of the need for geographic proximity or territorial continuity in the construction of regions, as ideas, identity and culture also play a role in defining them.[194] This latitude is crucial for understanding the regionalisation process (region-building) emerging from the PA, where geographic continuity is not the rule amongst the four members.[195] For instance, Breslin, Richard Higgot and Rosamond discuss geographic proximity in the characterisation of regions to state that although more often than not there is geographic proximity it is not axiomatic that it should always be the case.[196]

(Ashgate, 2015) 1, 4-5. See also Philippe C Schmitter, 'Los Conceptos de Cooperación e Integración Regional' (2011) IX (1) *Puente Europa* 8, 9-10 [Philippe C Schmitter, 'The Concepts of Cooperation and Regional Integration' (2011) IX (1) *Puente Europa* 8, 9-10].

191 See eg, Hurrell, above n 187, 37-73; Nolte, above n 3, 4.

192 De Lombaerde, above n 185, 32. De Lombaerde based on Philippe De Lombaerde and Luk Van Langenhove, 'Introduction' in Philippe De Lombaerde (ed), *Multilateralism, Regionalism and Bilateralism in Trade and Investment*, (Springer, 2007) 1, 1.

193 De Lombaerde, above n 185, 33.

194 Peter Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Cornell University Press, 2005) 9. See also Louise Fawcett and Helen Gandois, 'Regionalism in Africa and the Middle East' (2010) 32 (6) *Journal of European Integration* 617, 619.

195 But see Hurrell, above n 187, 38.

196 Shaun Breslin, Richard Higgot and Ben Rosamond, 'Regions in Comparative Perspective' in Shaun Breslin et al (eds), *New Regionalisms in the Global Political Economy: Theories and Cases* (Routledge, 2002) 1, 19.

A broad understanding of regionalism is necessary to be able to capture the pluralism of regionalisms around the world. As stated by Fawcett, the scope of the concept 'regionalism' is continually contested and subject to different interpretations.[197] This concept is also dynamic because it is subject to the evolving landscape in the empirical world. Fawcett understands regionalism as '[…] a policy and project whereby states and non-state actors cooperate and coordinate strategy within a given region. […] The aim of regionalism is to pursue and promote common goals in one or more issue areas.'[198]

The notions of regionalism and regionalisation are sometimes used interchangeably.[199] It is also the case that regionalisation is seen as a subcategory of the notion of regionalism.[200] More often, they are conceptualised as rather distinctive phenomena or facets of a world of regions.[201]

There are several labels used to characterise differences between regionalism and regionalisation according to the actors involved, the degree of formalisation or institution-building, the relation project-process, the relation process-outcome (result),[202] and the voluntary-intentional character of the regionalism phenomenon[203] vis à vis naturally occurring or undirected nature of the regionalisation phenomenon.

Moreover, overlapping labels talk about related, although not always identical, phenomena such as top-down vs bottom-up regionalism;[204] de jure state driven regionalism vs de facto regionalisation;[205] hard regionalism vs soft regionalism;[206] formal regionalism vs informal regionalism;[207] state-led regionalism vs market and societal induced regionalisation.[208]

197 Louise Fawcett, 'Regionalism in World Politics: Past and Present' in Ariane Kösler, and Martin Zimmek *Elements of Regional Integration: A Multidimensional Approach* (Nomos, 2008) 15, 17. See also Edward D Mansfield and Etel Solingen, 'Regionalism' (2010) The *Annual Review of Political Science* 145, 146.

198 Louise Fawcett, 'Regionalism from a Historical Perspective' in Mary Farrell, Björn Hettne, Luk Van Langenhove, *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2005) 21, 24.

199 See eg, *Monitoring Regionalisation Processes*, United Nations University <http://cris.unu.edu/monitoring-regionalisation-processes>.

200 But see Hurrell, above n 187, 38-5.

201 Peter Katzenstein, 'Regionalism and Asia' in Shaun Breslin et al (eds), *New Regionalisms in the Global Political Economy: Theories and Cases* (Routlege, 2002) 104, 105.

202 See also Andrew Wyatt-Walter, 'Regionalism, Globalization and World Economic Order' in Louise Fawcett and Andrew Hurrell (eds) *Regionalism in World Politics* (Oxford University Press, 1995) 74, 77.

203 See, eg, Amitav Acharya, 'Comparative Regionalism: A Field Whose Time Has Come?' in Amitav Acharya, *Rethinking Power, Institutions and Ideas in World Politics: Whose IR?* (Routledge, 2014) 74, 83 n 1.

204 Philippe De Lombaerde et al, 'Problems and Divides in Comparative Regionalism' in Finn Laursen (ed), *Comparative Regional Integration: Europe and Beyond* (Ashgate, 2010) 21, 24; See also Frederik Söderbaum, 'Formal and Informal Regionalism' in Timothy M Shaw, Andrew Grant and Scarlett Cornelissen (eds), *The Ashgate Research Companion to Regionalisms* (Taylor and Francis, 2011) 51, 55.

205 Shaun Breslin and Richard Higgot, 'New Regionalism(s) in the global political economy. Conceptual understanding in historical perspective' (2003) 1 (2) *Asia Europe Journal* 167, 167.

206 Fawcett, above n 198, 24.

207 Söderbaum, above n 204, 51-67.

208 Andrew Payne and Anthony Gamble, 'Introduction: the political economy of regionalism and world order in Andrew Payne and Anthony Gamble (eds), *Regionalism and World Order* (1996) 2. But see Mansfield and Solingen, above n 197, 146-7.

For instance, Payne and Gamble refer to regionalism as 'a state-led or states-led project designed to reorganise a particular regional space along defined economic and political lines.' [209] A common conceptual distinction exists between regionalism as a state-driven project and regionalisation as a bottom-up process through which non-state actors increase the levels of economic interdependence,[210] and other non-economic interactions.

Despite its common use, Söderbaum is particularly concerned about the tendency to refer to binary or dichotomised conceptualisation that could prevent the understanding of the links between the two.[211]

From an international political economy perspective, Katzenstein claims that a world of regions is shaped by economic and social processes of regionalisation and by the structures of regionalism. He asserts that they are two facets of a world of regions. Regionalism refers to the political structures that reflect and shape the strategies of governmental and non-governmental actors.[212]

Warleigh-Lack conceptualises regionalisation along these lines:

> [A]n explicit, but not necessarily formally institutionalised, process of adapting participant state norms, policy making processes, policy styles, policy content, political opportunity structures, economies and identity (potentially at both elite and popular level) to both align with a new collective set of priorities, norms and interests at regional level, which may itself then evolve, dissolve or reach stasis.[213]

Warleigh-Lack then refers to regionalisation in simpler terms as the 'process by which states work together on regional clusters.'[214]

Söderbaum distinguishes between both notions, emphasising the concept of regionalism as the policy and project in contrast to the regionalisation as the process.[215] Söderbaum assigns equal weight to the role of state and non-state actors as political actors. He characterises regionalism as representing the policy and the project 'whereby state and non-state actors cooperate and coordinate strategy within a particular region or as a type of world order'.[216] He suggests that regionalism is usually associated with

209 Payne and Gamble, above n 208, 2.

210 See, eg, Breslin, Higgot and Rosamond, above n 196, 13-4, 16. See also Mark Beeson, *Rethinking Regionalism: Europe and East Asia in Comparative and Historical Perspective* (2005) 12 (6) *Journal of European Public Policy* 969, 971. The latter sees regionalism as a state-led political process of cooperation, while regionalisation is a process resulting from the private sectors activities that may be influenced by state policies.

211 Söderbaum, above n 204, 55-6. He argues that the conceptualisation of regionalism vs regionalisation is inconsistent because it excludes non-state actors of political agency.

212 Katzenstein, above n 201, 105.

213 Alex Warleigh-Lack, 'Studying regionalisation comparatively' in Andrew F Cooper, Christopher W Hughes and Philippe De Lombaerde (eds), *Regionalisation and Global Governance: The taming of globalisation?* (Routledge Taylor & Francis Group, 2008) 43, 51.

214 Ibid 56.

215 Frederik Söderbaum, 'Comparative Regional Integration and Regionalism' in Todd Landman and Neil Robinson (eds), *The Sage Handbook of Comparative Politics* (SAGE, 2007) 477, 479. See also Söderbaum, above n 204, 56.

216 Söderbaum, 'Comparative Regional Integration and Regionalism' above n 215, 477.

a formal program and often leads to institution-building. 'Regionalisation refers to the process of cooperation, integration, cohesion and identity creating a regional space (issue-specific or general), and involves state as well as non-state actors'.[217]

This thesis adopts the distinction of Söderbaum between regionalism and regionalisation.[218] The thesis is particularly interested in the role of the state in reorganising a regional economic space, meaning the economic dimension of regionalism rather than security regionalism or other expressions of regionalism.[219] This interest in the role of the state in regionalism as the project and regionalisation as the process of region building derives from the empirical observation of LA, where states continue to be resilient drivers of regionalism and regionalisation.

The choice of studying the role of states may sound counterintuitive with the call made by Söderbaum to study the role of non-state actors and informal regionalism.[220] However, working from a broader conceptualisation of regionalism and regionalisation allows appreciation of the interactions among stakeholders (states, civil society actors and private actors in the market) and the emergence of soft forms of institutionalisation in the context of the PA.[221] This conceptualisation is also compatible with my empirical methodology and the eclectic framework of analysis, not limited to rationalist and problem-based accounts of regional institutions' design.[222]

B *Regional Integration and Economic Integration*

The European Union integration and theories of what has taken place within it have strongly shaped the current conceptualisations of regional integration.[223] Mainstream theories such as neofuntionalism define political integration in the words of Hass as a process 'whereby political actors shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states.'[224] Hass emphasises the voluntary character of the process as well as states' pooling or ceding of sovereignty.[225]

In the context of mainstream theories, Karl Deutsch's transactionalist approach and Donald Puchala propose alternative and more sociological understandings of regional integration. Deutsch understands regional integration as 'the attainment, within a territory, of a 'sense of community' and of institutions and practices strong enough and widespread enough to assure, for a 'long' time dependable expectations of 'peaceful

217 Ibid 479.

218 But see Philomena Murray and Alex Warleigh-Lack, 'Europe-Asia Studies: The Contribution of Comparative Regional Integration' in Thomas Christiansen, Emil Kirchner and Philomena Murray (eds), *The Palgrave Handbook of EU-Asia Relations* (Palgrave Macmillan, 2013) 108, 111.

219 See, eg, Wyatt-Walter, above n 202, 78.

220 Söderbaum, above n 204, 62-3.

221 See below Ch 5, Part III (B).

222 See below Part III (C) (1).

223 Acharya, 'Comparative Regionalism' above n 203, 77. See also Nolte, above n 3, 3, 5.

224 Ernest B Hass, *The Uniting of Europe: Political, Social and Economic Forces* 1950-1957 (University of Notre Dame, 2004) 16.

225 Oliver Dabène, *The Politics of Regional Integration in Latin America: Theoretical and Comparative Explorations* (Palgrave Macmillan, 2009) 6.

change' among its population.'[226] In turn, Puchala emphasises different characterising aspects of what he defines as (contemporary) international integration, which he describes as 'a set of processes that produce and sustain a Concordance System at the international level.'[227] A Concordance System is 'an international system wherein actors find it possible consistently to harmonise their interests, compromise their difference and reap mutual rewards from their interactions.'[228]

Ernest Hass refers to five aspects that define economic integration:[229] (1) agreement for gradual but complete elimination of tariffs, quotas and exchange controls of trade among members; abandonment of the right to restore trade restrictions unilaterally; (3) joint action to deal with the problems resulting from the removal of trade barriers and to promote efficient use of resources; (4) some degree of harmonisation of national policies that affect price structures and allocation of the resources and of monetary and fiscal policies, and (5) free, or at least freer, movement of capital and labour.[230] According to Hass, a linkage between economic and political integration is established when the removal of barriers is accompanied by new centrally made fiscal, labour, welfare and investment measures.[231] From here, a normative model for managing the economic integration process emerged where, as Hass outlined, the spillovers of the economic process in one sector would lead to economic integration in other sectors and ultimately to political integration.[232]

Balassa's economic theory on integration connects to Hass's neofunctionalist views. Balassa's economic theory develops beyond the static analysis of customs unions and considers optimum currency area theory. His dynamic theory on economic integration understands it as a process and a state of affairs.[233] Balassa asserts that economic integration is a process to abolish discrimination between national economies and a state of affairs in the sense that it can be viewed as the absence of various forms of discrimination between those national economies.[234] Although Balassa does not evaluate political considerations, he acknowledges not only that political factors play a role in economic integration but also the considerable degree of interdependence between economic and political factors.[235]

Balassa's economic typology of five degrees of integration refers to free trade areas when tariffs and quantitative restrictions between participating countries are abolished, but each country maintains them against non-participating parties.[236] A customs union includes, in addition to the removal of discrimination for commodity movements within

226 Karl Deutsch, Sidney A Burell and Robert A Kann, *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience* (Princeton University Press, 1957) 5.

227 Donald Puchala, 'Of Blind Men, Elephants and International Integration' (1971) 10 (3) *Journal of Common market Studies* 267-284.

228 Ibid.

229 Hass, above n 224, 11-2.

230 Ibid.

231 Hass, above n 224, 12-3.

232 Hass, above n 224, 283-317. See also Ben Rosamond, *Theories of European Integration* (Red Globe Press, 2000) 60.

233 Bela Balassa, above n 189, 1.

234 Ibid 2-3.

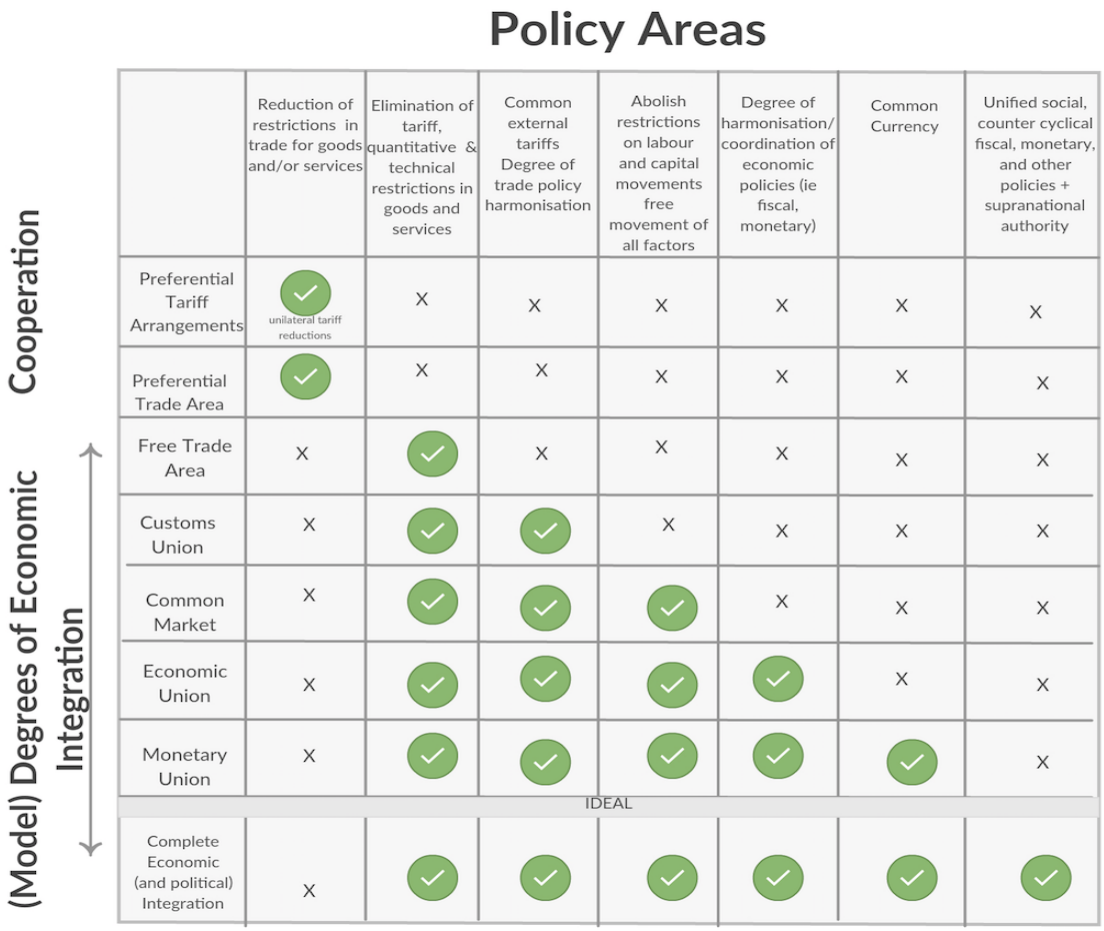
235 Ibid 6-7.

236 Ibid 2.

the union, common external tariffs with non-members.[237] A common market means a higher level of economic integration that abolishes not only trade restrictions but also restrictions on factor movements.[238] The economic union provides for some degree of harmonisation in economic policies to remove the discrimination resulting from disparities on commodities and factor policies at the national level.[239] Total economic integration will involve the unification of monetary, fiscal, social and countercyclical policies, requiring setting up supranational authorities with biding decision-making competence.[240] Contemporary debates on monetary unions amongst economists persist on the need that political integration accompanies monetary union.[241]

Table 2 explains the main features of each degree of integration conceptualised in Balassa's economic typology.

Table 2 Typology of Economic Integration



Source: Author's analysis based on Balassa, WTO and others

237 Ibid.
238 Ibid.
239 Ibid.
240 Ibid.
241 Bridgid Gavin and Philippe De Lombaerde, 'Economic Theories of Regional Integration' in Mary Farell et al (eds), *Global Politics of Regionalism: Theory and Practice* (Pluto Press, 2005) 69, 81-2.

Later conceptualisations of regional integration draw from classic integration theory definitions that highlight 'transfer of authority to the supranational level'.[242]

This definition of regional integration remains controversial, for two reasons. First, authors from different disciplines emphasise different factors (eg, sociological, economic, institutional-political) as definitional features. Causal relations between political and economic factors remain contested in the literature, to the extent that some authors refer to regional integration and regional economic integration interchangeably. Second, an EU-centric bias arguably exists in this definition and more broadly in the understanding of how regional integration operates (and should operate).[243] In my view some of these conceptualisations privilege a model of governance of regional integration (supranationality), implying that integration does not exist if this condition is not met. EU-centric conceptualisations also prioritise a pathway for (economic) integration that is trade based, or at least trade initiated.[244]

I do not pretend to solve here the deadlock of this inconclusive debate, which has lasted over 30 years. It is sufficient to say that, for the purpose of this thesis, I treat regional integration in a looser way than traditional definitions attached to the EU experience. Regional integration is an instance of international cooperation, [245] and in the words of Dabène, it represents 'a historical process of increased levels of interaction between political units (subnational, national or transnational), provided by actors sharing common ideas, setting objectives and defining methods to achieve them, and by doing so contributing to building a region.'[246] This notion fits closely with the concept of regionalisation delineated above.[247] I understand regional economic integration as one dimension of the integration process.

I also take the view that economic integration theory does not necessarily give an account of the universal pathway (process) for economic regionalism. These debates also highlight the inseverable relation between economic and political factors.

C *Institutions and Institutional Frameworks*

As this thesis is concerned with the institutional features of region-building and the methods to pursue the process of regional integration, particularly those of the PA, I need to define notions such as institutions, international institutions, regional institutions, and institutional frameworks.

Institutions in this thesis will be understood, as proposed by Keohane, as 'persistent and connected sets of rules (formal or informal) that prescribe behavioural roles,

242 See, eg, Börzel and Risse, 'Introduction' above n 190 [Kindle position 370]. See also Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press) 41.

243 See, eg, Philomena Murray, 'Comparative regional integration in the EU and East Asia: moving beyond integration snobbery' (2010) 47 3-4 *International Politics* 308, 318-19.

244 See, eg, Andrea Bonilla Bolaños, 'A step further in the theory of regional integration: A look at the Unasur's integration strategy' (Working Paper 1617, GATE Universitè Lyon, May 2016).

245 Dabène, above n 225, 7.

246 Dabène, above n 225, 215.

247 See above Part II (A) (2).

constrain activity, and shape expectations.'[248] Institutions will be understood as self-conscious or intentional creations, from a rationalist point of view.[249]

In the international sphere, Keohane's conceptualisation of institutions encompasses international regimes [250] such as the international shipping regime and also organisations such as the World Bank.[251] Keohane asserts that formal international organisations are distinguished from international regimes by their capacity for purposive action.[252] Keohane outlines the capacity of international organisations to engage in goal-directed activities, promulgate policies and make discretionary choices. Keohane refers to international regimes as 'specific institutions involving states and/or transnational actors which apply to particular issues in international relations.'[253]

The definition of international institutions that better suits this thesis is the one that Koremenos, Lipson and Snidal suggest:[254] explicit arrangements, negotiated among international actors, that prescribe, proscribe, and/or authorise behaviour. In defining the scope of international institutions, I have purposefully excluded implicit or tacit arrangements, due to the difficulties in grasping them at an empirical level. This conceptualisation of international institutions is relatively broad, to accommodate not only international institutions that have the structure of an organisation with bodies providing for some level of independence and legal personality, but also institutions that follow a less formalised path. Thus, I see international organisations (IOs) as a subgroup of international institutions (IIs).[255] International organisations will be a subset of international institutions based on the degree of formalisation and (legal) capacity.[256]

Regarding the distinction between formal and informal institutions in the organisational sense, the thesis relies on the characterisations offered in the work of Vabulas and Snidal.[257] This distinction points to a spectrum of formalisation of institutional arrangements according to criteria through which several combinations of institutional arrangements are possible rather than the simple binary between formal and informal institutions. These criteria include the type of institutional arrangement (ie, centralised or decentralised cooperation); the organising principle (ie, explicit shared expectations about purpose or formalised agreements); membership definition (ie, loosely, explicit

248 Keohane, 'International Institutions' above n 188, 382, 383.

249 Peter A Hall and Rosemary C R Taylor, 'Political Science and the Three New Institutionalisms' (1996) Political Studies XLIV, 936, 952. See also Robert Keohane and Lisa Martin, 'The Promise of Institutionalist Theory' (1995) 20 (1) *International Security* 39, 46.

250 See Keohane, 'International Institutions' above n 188, 384.

251 Ibid 383.

252 Ibid 384.

253 Ibid 384.

254 Barbara Koremenos, Charles Lipson and Duncan Snidal, 'The Rational Design of International Institutions' (2001) 55 (04) *International Organization* 761, 762.

255 Koremenos, Lipson and Snidal, above n 254, 762. But see Lisa Martin and Beth Simmons, 'International Organizations and Institutions' in Carlsnaes W, Risse T, Simmons BA, *Handbook of International Relations* (Sage, 2002) 327, 329.

256 See Ch 2, Part II (B).

257 Felicity Vabulas and Duncan Snidal, 'Organisation without Delegation: Informal intergovernmental organisations (IIGOs) and the spectrum of intergovernmental arrangements' (2013) 8 *Review of International Organizations* 193–220.

or formalised association); and the organisational structure for the institution (ie, regulatory of meetings or a Secretariat).[258]

Table 3 depicts the spectrum of different intergovernmental arrangements based on the criteria outlined by Vabulas and Snidal.[259]

Table 3 Spectrum of Formal-Informal Intergovernmental Arrangements

	Institutional Arrangement	Organising Principle	Members	Organisational Structure	Examples
More Informal	No institution	Self-help (anarchy)	All	Spontaneous interactions	Hobbesian world
	Decentralised Cooperation	Tacitly shared expectations	Loosely associated members	Spontaneous order	Customary International Law
	Explicit Agreement Consultations	Oral Agreement	Parties to the Conference	Limited Meetings and No Independent Secretariat	START negotiations
	Informal Intergovernmental Institution (IIGIs)	Explicitly shared expectations	Explicitly Associated Members	Regular Meetings and No Independent Secretariat	G8 G20 Concert of Europe
	IGIs within Formal Intergovernmental Institution (FIGIs)	Shared focus on a specialised issue area (non-codified rules)	Subgroup of FIGI members	Ad-Hoc Meetings and No Independent Secretariat, might report to formal secretariat	WHO Groups
	Formal IGIs (FIGIs)	Formalised expectations (international treaty)	Formal Members	Regular Meetings and Independent Secretariat	WTO NATO Arab League
More Formal	Supranational Institution	Institutionalised rules and centralised enforcement	Recognised Members	Regular Legislative Meetings and Independent Secretariat	European Union

Source: Vabulas and Snidal with modifications[260]

Regarding the distinction between formal and informal institutions in the sense of rules (and procedures), the thesis will rely on the work of Abbott, Snidal and others about the concept of legalisation.[261] These authors understand legalisation as a particular form of institutionalisation characterised by three dimensions: (i) obligation; (ii) precision; and (iii) delegation. [262] Thus, legalisation refers to a set of characteristics that

258 Ibid 201.

259 Ibid 202. Vabulas and Snidal confirm that these categories are useful for analytical purposes although no real world examples correspond perfectly to them.

260 Ibid 201. I refer to institutions rather than organisations, as originally proposed by Vabulas and Snidal, following the distinction and discussions in Chapter 2.

261 Kenneth Abbott et al, The Concept of Legalisation' (2000) 54 (3) *International Organization* 401-419; Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 53 (3) *International Organization* 421-456; Kenneth W Abbott and Duncan Snidal, 'Law, Legalization, and Politics' in Jeffey L Dunoff & Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations/ The State of the Art* (Cambridge University Press, 2013) 33–56.

262 Abbott et al, above n 261, 401.

institutions may or may not have. By obligation the authors mean that states or actors are legally bound by a rule or commitment that subjects them to scrutiny (internationally and or domestically) under these rules.[263] Having a binding instrument or agreement means that states (usually) may assert legal claims, 'engage in legal discourse', invoke legal procedures, and resort to legal remedies.[264] These mechanisms are not available in relation to non-binding instruments.

Precision means that the rules clearly and unambiguously define the conduct they require, authorise or proscribe by the state or other actors in a particular set of circumstances. [265] Abbott and others assert that precision and elaboration are particularly significant hallmarks of legalisation in the international context.[266] They help to reduce inappropriate and self-serving interpretations by the states or actors whose conduct the rules are meant to govern.[267] Koremenos provides additional tools to assess the precision by referring to the presence of specific language 'shall or shall not', and to the amount of detail accorded to the required, authorised or proscribed behaviour. [268] The latter relates to the notion of elaboration that Abbott and others employ.

Delegation refers to the extent to which states (and other actors) grant authority to third parties to implement, interpret, apply, resolve disputes, and possibly make additional rules.[269] Such authority could be delegated to administrative bodies, arbitrators, courts etc.

Legalisation takes place in several degrees, encompassing what Abbott and others call a 'multidimensional continuum' where no bright line divides legalised from non-legalised institutions.[270] Instead they assert an identifiable continuum from hard-law through various forms of soft-law.

These dimensions and the combination of attributes help to explain the legalisation of international norms, agreements and regimes.[271] The thesis aligns with the view that greater legalisation or any particular forms of legalisation are not inherently superior.[272]

Abbott and others conceptualised highly legalised institutions as:

> those in which rules are obligatory on parties through links to the established rules and principles of international law, in which rules are precise (or can be made precise through the exercise of delegate authority), and in which authority to interpret and apply the rules has been delegated to third parties acting under the constraint of rules.[273]

263 Ibid.
264 Ibid 401, 411.
265 Abbott et al, above n 261, 401; See also Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (Cambridge University Press, 2016) 159-60.
266 Abbott et al, above n 261, 414.
267 Ibid 412-14.
268 Koremenos, *The Continent of International* Law, above n 265, 159-60.
269 Abbott et al, above n 261, 401, 415.
270 Ibid 418.
271 But see, José E Alvarez, 'Institutionalised Legislation and the Asia-Pacific Region' (2007) 5 (9) NZJPIL 9, 26.
272 Abbott et al, above n 261, 408.
273 Ibid 418.

Abbott and Snidal conceptualise hard-law as legally binding obligations that are precise or can be made precise through adjudication or the issuance of detailed regulations and that delegate authority to interpret and implement them.[274] Soft-Law encompasses those legal arrangements where one or more of the dimensions are weakened.[275]

The thesis understands regional institutions as a subset of international institutions operating within a regional space and attending to a loose sense of geographic proximity.[276]

The notion of institutional framework refers to the set of rules, procedures, standard practices and organisational structures such as bodies, committees, and working groups that support the day-to-day operation and decision-making of a regional institution. I will examine primarily state-driven institutional frameworks while considering the influence of non-state actors in their establishment and operation.[277]

III THEORETICAL ORIENTATION AND ANALYTICAL TOOLS

The theoretical framework is interdisciplinary because the thesis uses insights from institutionalist theories and international institutional law bridging the fields of international relations and public international law.

This Part gives an account of the elements I draw from new institutionalisms — specifically, rational institutionalism, with insights from constructivist institutionalism. Complementarily the views provided by the expanding research program on comparative regionalism,[278] particularly comparative institutional design,[279] guide the understanding, in the thesis, of institutional variations across regional institutions and the underlying reasons.

I use international institutional law and the method of doctrinal legal analysis in Chapter 2 to examine the legal nature of the PA. The insights of the legal theory on international organisation-hood and the conceptual approaches to international legal personality are explained in detail in Chapter 2; therefore, the present Chapter does not cover them. Chapter 5, Chapter 6 and Chapter 7 also use the method of doctrinal legal analysis to examine the scope, relationship, and effects of the sources of law emerging as the legal regime of the PA.

This Part explains the choice for institutionalism approaches, over integration theories and new regionalism approaches, to examine the institutional framework of the PA. I describe and explain the particular approach followed within the rational institutionalism stream –The RDII and the COIL research program. I examine the shortcomings of this game-theoretic rational approach to address the questions of this thesis. I finally present the complementary explanations and analytical tools I draw

274 Abbot and Snidal, 'Hard and Soft Law in International Governance' above n 261, 421.
275 Ibid 421-22.
276 Louse Fawcett, 'Regionalism in World Politics: Past and Present' in Ariane Kösler, and Martin Zimmek *Elements of Regional Integration: A Multidimensional Approach* (Nomos, 2008) 15, 17.
277 See below Ch 5, Part III.
278 See above n 12.
279 See Acharya and Johnston above n 13. See also Closa and Casini, above n 3.

from constructivist institutionalism and comparative institutional design, particularly the work of Acharya and Johnson.

A *Why New Institutionalisms?*

The new institutionalisms are the theoretical approaches that better suit the thesis because they are concerned not with regionalism and the regionalisation process as such but with the emergence/creation (origins) of institutions, their operation and how institutions shape actors' behaviours (their effects). This aspect is essential since this thesis does not focus on explaining the economic regionalism project that the PA is undertaking; it centres on the institutional framework that supports this project.[280]

The questions on the institutional framework of the PA that this thesis addresses include: what comprises the PA's institutional framework?; what factors explain the design features of its institutional framework and how?; to what extent, does the institutional framework support the intended objectives of the PA, particularly deep integration towards the free movement of factors?; does the institutional framework require changes to better support these objectives, and what obstacles or challenges exist to implement such changes? [281] Thus, the detailed insights that new institutionalisms provide assist in addressing the research questions in ways that traditional integration theories (eg, neofunctionalist, intergovernmentalism) and new regionalism approaches are incapable of doing.

Although integration theories[282] and comparative regionalism[283] give some attention to the institutions in the integration process, institutions are not at the core of their theoretical proposals. More importantly, the actual institutional design, the reasons behind the choice of specific design features, and the relationship between institutional design and performance of regional institutions have been underexplored by traditional integration theories and new regionalism approaches.

In the case of intergovernmentalism, the limited attention given to institutions is a result of the theory's focus on explaining interstate treaty bargaining, prioritising the role of national governments over supranational institutions.[284] As Garret and Tsebelis state in the context of the EU, mainstream neofunctionalism and intergovernmentalism pay insufficient attention to institutional rules governing decision-making.[285] In the case of new regionalism approaches, the focus is on the participation of non-state actors and informal processes of regionalisation. Thus formal institutional design is not at the centre of its theoretical developments.[286]

280 See above Ch 1, Part II (C).
281 See above Ch 1, Part II (A).
282 See, eg, Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 (4) *Journal of Common Market Studies* 473, 496-517.
283 See, eg, Mattli, above n 242, 53, 64. See also 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 Publishing Group, 2010) 239-269.
284 Moravcsik, above n 282, 473-517.
285 Geoffrey Garrett and George Tsebelis, 'An institutional critique of intergovernmentalism' (1996) 50 (2) *International Organization* 269, 270.
286 Acharya and Johnston, above n 5, 1, 10, 30.

The new institutionalisms are a development from political science to study the dynamics of domestic political institutions such as The United States Congress, political parties, and electoral systems.[287] Institutions are also the concern of other fields such as economics,[288] anthropology and sociology nurturing the development of not one but several new institutionalisms such as rational institutionalism — which draws from the insights of microeconomics — historical institutionalism, sociological institutionalism and more recently constructivist institutionalism.[289] Academics employ the insights of its different streams to examine domestic institutions, international institutions, [290] and even regional institutions. [291] Institutionalism theories in the international relations context help to understand how international cooperation could be achieved, the forms that it could take,[292] how international institutions operate and what kind of effects they have. [293]

In contrast to integration theories, institutional insights are better equipped to examine institutions as independent variables when investigating their effects. The analytical tools from new institutionalisms are also able to provide explanations about institutions as dependent variables when studying how they come into being, how they operate and how they evolve.[294]

This focus of the new institutionalisms explains why various streams of institutionalism such as historical institutionalism, [295] rational institutionalism, [296] and sociological

287 Hall and Rosemary, above n 249, 942; Cf James G March and Johan P Olsen, The New Institutionalism: Organisational Factors in Political Life' (1984) 78 (3) *The American Political Science Review* 734-749.

288 See, eg, North, above n 5.

289 B Guy Peters, *Institutional Theory in Political Science: The "New Institutionalism"* (Continuum, 3rd, 2012).

290 See, eg, Koremenos, Lipson and Snidal, above n 254, 761-99; Barbara Koremenos, Charles Lipson and Duncan Snidal, 'Rational Design: Looking Back to Move Forward' (2001) 55 (04) *International Organization* 1051-82; Barbara Koremenos and Duncan Snidal, 'Moving Forward, One Step at a Time' (2003) 57 (2) *International Organization* 431-444; Barbara Koremenos, 'Institutionalism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 59.

291 See, eg, Mark Pollack, 'The New Institutionalism and European Integration' in Atnje Wiener and Thomas Diez (eds), *European Integration Theory* (Oxford University Press, 2nd ed, 2009) 125-143.

292 Kenneth W Abbot, 'Enriching Rational Choice Institutionalism for the Study of International Law' (2008) 1 *University of Illinois Law Review* 5, 6.

293 Robert Keohane and Lisa Martin, 'Institutional Theory as a Research Program' in Colin Elman and Miriam Fendius Elman (eds), Progress in International Relations Theory/ Appraising the Field, (MIT Press, 2003) 71, 104.

294 George Tsebelis, 'Institutional Analysis of European Union' (Newsletter, European Community Studies Association, 1999) < http://sites.lsa.umich.edu/tsebelis/wp-content/uploads/sites/246/2015/03/ecsa.pdf>.

295 See, eg, Simon Bulmer, The Governance of the European Union: A New Institutionalist Approach' (1993) 13 *Journal of Public Policy* 351-380. See also Paul Pierson, 'The Path to European Integration: A historical Institutionalist Analysis' (1996) 29 (2) *Comparative Political Studies* 123-63.

296 See, eg, Mark A Pollack, 'The New Institutionalism and EC Governance: The Promise and Limits of Institutional Analysis' (1996) 9 (4) *Governance: An International Journal of Policy and Administration* 429-458; Tsebelis, above n 294. See also Geoffrey Garrett and Barry R Weingast, 'Ideas, Interests and Institutions: Constructing the European Community's Internal Market' in Judith Goldstein and Robert O Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Cornell University Press, 1993) 173-206; Garrett and Tsebelis, above n 285, 269-299.

institutionalism[297] are employed to examine EU institutions in EU studies. Analytical tools from new institutionalisms are used to tackle a variety of questions regarding decision-making, institutional development, institutional change, causal influences of EU bodies in EU policy outcomes, and identity, among others.[298] These theories have also served to explain how EU institutions shape the policy process and the policy outcomes in predictable ways. Institutionalist theories are employed to explain regional institutions, although these efforts are primarily focused on the EU.[299]

Briefly reviewing the use of institutionalist theories in EU studies does not mean I rely on this literature as the basis of the theoretical analysis of this thesis. This reference only stresses the suitability of institutionalist theories (new institutionalisms) to explain regional institutions. These writings also confirm that toolkits from several streams of the new institutionalisms can be used in complementary and supplementary ways because in many cases they address different sets of questions rather than being mutually excluding.

I intend to engage with new institutionalisms in the broader field of political science and institutionalism in international relations.[300] I also employ institutionalism analytical tools beyond what has been presented in the context of the EU. Moreover, I highlight that this thesis does not attempt to encapsulate the PA within a prescribed model of integration by a priori affiliating the process that the PA members follow to traditional integration theories.[301] This intentional departure from traditional integration theories and the choice for a broader understanding of interstate cooperation and regional integration allows grasping, in greater detail, the design features of the PA as of today.

By understanding the process of the PA in the broader context of interstate cooperation in international relations, I can explore the conditions in which this cooperation takes place and how not only underlying cooperation problems but also the shared ideas of its members shape institutional design.[302] I follow this approach because I claim that being able to comprehend the conditions in which institutions come to being, and the reasons why they are designed in a specific way helps to anticipate the shape that future changes could take, and the constraints for these changes. Institutionalist insights also offer a more detailed account of the design features through which institutions function and shape state behaviour.[303]

297 Johan P Olsen, 'European Challenges to the Nation State' in Bernard Steunenberg and Frans van Vught (eds), *Political Institutions and Public Policy: Perspectives on European Decision Making* (Kluwer Academic Publishers, 1993) 157-188.

298 See, eg, Mark Aspinwall and Gerald Schneider, 'Institutional Research on the European Union: mapping the field' in Gerald Schneider and Mark Aspinwall (eds) *The rules of integration: Institutionalist approaches to the study of Europe* (Manchester University Press, 2001) 1, 6. See also Briceño Ruiz, above n 20, 158-72.

299 See, eg, Pollack, above n 296, 429-458. See also Pollack, above n 291, 125-43.

300 Keohane, above n 186, 39-51; Robert O Keohane, 'Institutional Theory in International Relations' (2002) in Michael Brecher, Frank P. Harvey (eds), *Realism and Institutionalism in International Studies* 153-159; Keohane and Martin, above n 293, 71-109.

301 See above Ch 1, Part II (B).

302 See below Ch 7 and Ch 8, Part II.

303 Koremenos, 'Institutionalism and International Law' above n 290, 73.

B *Rational Institutionalism Tools: 'A' Rational Design Project (RDII) and the COIL Research Program*

This Part elucidates the explanatory variables the thesis uses to shed light on the institutional features (of the PA), according to Koremenos. Section One identifies the strategic and non-strategic problems that could potentially be present in interstate cooperation. Section Two presents the characteristics in the aggregate of states that could be of relevance as explanatory factors in institutional design. Section Three addresses the four institutional features that Koremenos studies in her program to define their scope. I claim in this Part that underlying cooperation problems and the characteristics in the aggregate of states are suitable to explain institutional design as it presents in international agreements, despite some theoretical limitations.

This thesis views institutional design as a purposeful process from which intended and unintended consequences, and effects arise. The theoretical orientation of the thesis has as a starting point the consideration that institutions are designed to respond to cooperation problems as suggested in the work of Koremenos, Lipson and Snidal, through the RDII Project.[304] Koremenos refines this approach later through the COIL Project.[305] However, her contribution in the COIL project goes beyond refinement, as she also tests empirically a group of hypotheses (conjectures) in a dataset of 234 international agreements to enhance the robustness and generalisability of the findings in her research program.[306]

1 *Cooperation Problems*

These cooperation problems are basically of two categories: interest-based problems and constraints-based problems. The first category includes: (i) enforcement problems; (ii) distribution problems; (iii) coordination problems; (iv) commitment problems; and (v) norm exportation. The second category encompasses different types of uncertainty problems on behaviour, preferences, and the state of the world.[307] All these problems are strategic cooperation problems under game theory.[308]

Enforcement problems refer to its traditional sense in cooperation theory, where there are individual incentives to cheat or defeat an agreement or a set of rules while others cooperate.[309] These problems convey a situation in which free riding makes a state better off while its partners continue to cooperate.[310] There are enforcement problems when actors see present unilateral noncooperation so appealing that they sacrifice long-term cooperation.[311] Enforcement problems emerge when incentives to defect are

304 Koremenos, Lipson and Snidal, above n 254, 761-99.
305 Koremenos, *The Continent of International Law*, above n 265.
306 See below Appendix D.
307 Koremenos, *The Continent of International Law*, above n 265, 32-40.
308 Barbara Koremenos, *The Continent of International Law/ Files/Cooperation Problems: Definitions and Examples*, University of Michigan, 6 < http://www.isr.umich.edu/cps/coil/COIL-cooperation-110613.pdf>.
309 Koremenos, *The Continent of International Law*, above n 265, 32; Koremenos, Lipson and Snidal, above n 254, 776.
310 Koremenos, *The Continent of International Law*, above n 265, 32.
311 Koremenos, *The Continent of International Law/ Files*, above n 308, 2.

greater or interactions less frequent. Incentives to defect can be smaller if the expectations of benefits from future interactions are high and also their value.

Distribution problems relate to the potential that more than one cooperation outcome would be efficient but with differences in the distribution of costs and benefits for the actors (eg, states).[312] Actors would prefer those cooperation outcomes that better suit their (expected) payoff. This problem will ultimately represent divergent preferences among the actors (eg, states) as to what alternative to implement.[313] The degree of the problem depends on the intensity with which an actor prefers an alternative and how the actor compares it with the preferred alternatives of other actors.[314] For example, agreements on international quotas (eg, fisheries) or agreements on compensation for the international wrong doing of a state have underlying distribution problems.

The commitment problem refers to a domestic situation or a time-inconsistency situation explained by Koremenos as the problem when 'an actor's best plan for some future period may not be optimal when that future period arrives.'[315] For instance, the compliance with an agreement may be in the best interest of a state today, but that situation may change in the future making noncompliance a better option for the state. Koremenos mentions a common situation that takes place when what might be in the best long-term interest of a state may not be beneficial in the medium-term or at a point in the future. Thus, current preferences may not be consistent with future preferences, which creates time-inconsistency and ultimately domestic commitment problems. In Koremenos framework a commitment problem is present even if only one of the members and not the others have the domestic commitment problem.[316]

I complement Koremenos' analytical framework proposing that for the case study methodology that I employ here, it is relevant to assess domestic governance levels as they relate to commitment problems in the area of analysis: economic regionalism. I use the WGI from the World Bank that estimates country governance in six indicators: (i) voice and accountability;[317] (ii) political stability and absence of terrorism;[318] (iii)

312 Koremenos, *The Continent of International Law*, above n 265, 33; Koremenos, Lipson and Snidal, above n 254, 775.

313 Koremenos, *The Continent of International Law/ Files*, above n 308, 2-3.

314 Ibid 3.

315 Koremenos, *The Continent of International Law*, above n 265, 33.

316 Ibid 73.

317 'Reflects perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media.' WGI, The World Bank < http://info.worldbank.org/governance/wgi/>.

318 'Measures perceptions of the likelihood of political instability and/or politically motivated violence, including terrorism.' WGI, above n 317.

government effectiveness;[319] (iv) regulatory quality;[320] (v) rule of law;[321] and (vi) control of corruption.[322]

WGI understands governance as:[323]

> …the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.

Because the yardstick on domestic regime-type that Koremenos proposes to assess commitment problems is low, I need a supplementary measure to identify institutional nuances among PA members. My presumption here is that institutional weaknesses, measured through governance levels, have negative implications on international cooperation. Thus, when ranks on governance levels, particularly political instability are low in at least one of the PA members I assess the cooperation situation as underlying a commitment problem.

Coordination problems in the COIL research program refer to situations where 'actors must coordinate on exactly one outcome to be better off cooperating.'[324] 'The worse it is to 'miss' some specific solution, the more severe the cooperation problem.'[325] For instance, when states are better off at matching policies, there would be coordination problems. The problem will be agreeing on an outcome that makes policies as close as possible to result in cooperation that makes them better off. Koremenos asserts that coordination problems can take place without the presence of distribution problems and vice versa.[326] However, they can and often take place together.

Norm exportation problems or reinforcement of norms problems refer to cooperation issues arising from the interest of an actor (eg, state) to spread its norms into another state or states. [327]The addition of this type of problem to the analytical framework constitutes Koremenos' effort to link rationalist views and constructivist scholarship.[328] Norm exportation could also be linked to the interest that adoption of certain norms

319 'Reflects perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.' WGI, above n 317.

320 'Reflects perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.' WGI, above n 317.

321 'Reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.' WGI, above n 317.

322 'Reflects perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests.' WGI, above n 317.

323 WGI, above n 317.

324 Koremenos, *The Continent of International Law*, above n 265, 34.

325 Koremenos, *The Continent of International Law/ Files*, above n 308, 5.

326 Koremenos, *The Continent of International Law*, above n 265, 35-6.

327 Ibid 36.

328 Ibid; Koremenos, 'Institutionalism and International Law' above n 290, 64.

through international treaties (eg, 'standards') may lead to behavioural changes at the national level.[329]

Following Koremenos, Lipson, and Snidal's conceptualisation, I define the uncertainty problem as the inability to anticipate outcomes because of lack of certainty about other actors' (eg, states) preferences and behaviour, and more generally about the state of the world.[330] It relates to the difficulty of knowing whether another state is cheating or cooperating. The uncertainty problem about preferences is not knowing what other parties would truly want out of a deal.[331] Koremenos claims that states may have incentives to misrepresent their preferences, contributing to this problem.

The uncertainty problem about the state of the world refers to uncertainty regarding the consequences of economic, political, scientific or technological actions. The uncertainty could be related to consequences of their actions, the actions of others or the actions of international institutions.[332] The uncertainty about the state of the world could be either present or future. For instance, when parties are not certain about the effects of an agreement or consequences in practice, there is uncertainty over the present state of the world, according to Koremenos framework. Uncertainty about the state of the world frequently could have repercussions over the distribution of benefits and costs that can only be determined in the future. It is possible that the future distribution of benefits from cooperation are dependent upon whether political developments could change the desirability of the terms of cooperation.[333] There could be uncertainty about effects of cooperation and consequences of political, economic, and technological actions in the absence of shocks.[334]

Finally, Koremenos refers to a residual type of cooperation problem — non-strategic cooperation problem. These are problems that are not strategic in a game-theoretic sense.[335] Examples of this non-strategic problem include foreign aid, disaster aid, or military aid.[336] The aims set for a cooperation endeavour will determine the presence of strategic cooperation problems. These categories do not exclude one another. It is possible for an agreement to have strategic and non-strategic cooperation problems.

From a rational design institutional perspective, the presence, combination, and degree of these problems explain differences in institutional design features and outcomes.[337] These cooperation problems are explanatory elements of the institutional design choices in the PA as I argue subsequently in Chapter 7,[338] although not the exclusive factors that influence such institutional design choices.

329 Koremenos, *The Continent of International Law*, above n 265, 37.
330 Koremenos, Lipson and Snidal, above n 254, 778-80.
331 Koremenos, *The Continent of International Law*, above n 265, 36.
332 Ibid 39.
333 Koremenos, *The Continent of International Law/ Files*, above n 308, 2.
334 Koremenos, *The Continent of International Law*, above n 265, 39.
335 Koremenos, *The Continent of International Law/ Files*, above n 308.
336 Ibid.
337 Koremenos, *The Continent of International Law*, above n 265, 56.
338 See below Ch 7, Part IV.

2 *Characteristics of the States in the Aggregate*

In the COIL research program, Koremenos introduces an additional category of analysis that carries explanatory power for institutional design/agreement design. 'Characteristics of the states in the aggregate' refers to properties that describe the group of actors in the aggregate.[339] The characteristics are: (i) the number of members; (ii) the degree of domestic regime-type asymmetries;[340] (iii) the degree of heterogeneity in preferences, and (iv) the level of (economic) power asymmetries. Koremenos asserts that conditions/characteristics of the states in the aggregate are important variables although not of the same relevance as the cooperation problems.

First, for the number of states involved, Koremenos' analytical framework suggests that higher numbers pose more challenges than bilateral cooperation. Bilateral cooperation operates in a different way to multilateral cooperation and this factor ultimately impacts international cooperation.[341]

Second, the degree of domestic regime-type asymmetries refers to differences in the system and types of government (eg, authoritarian vs democratic) of the states that could also impact international cooperation. The analytical framework suggests that cooperation could solve challenges more easily when participation states are like-minded regarding how democratic they are.[342]

Third, the degree of heterogeneity in preferences points to the effect that differences in the interests of the states involved have on cooperative efforts. Koremenos asserts that unanticipated changes in gains could raise greater distributional concerns over cooperation when preferences are more heterogeneous among participating parties. In contrast, it could be more 'safely' assumed by a cooperating party that another party with more homogeneous preferences, gaining more than the former, would use such gains for shared priorities.[343]

Fourth, the level of power asymmetries point to the differences in the quality of cooperation that stem from divergences in the actors' power. These differences could include economic, political or military power.[344] Koremenos asserts that power disparities can manifest in the design of institutions. I focus on assessing economic power asymmetries.

3 *Institutional Features/Dimensions*

Based on the work of Koremenos, Lipson and Snidal in the rational design project, Koremenos considers four design features (dimensions) — dependent variables — in the COIL project. Cooperation problems and characteristics of actors in the aggregate — as independent variables — ought to explain these design dimensions/features of

339 Koremenos, *The Continent of International Law*, above n 265, 26, 31.

340 The inclusion of aggregate characteristics of the actors partially addresses some of Duffield's critics to the Rational Design Project. See John S Duffield, 'The Limits of "Rational Design"' (2003) 57 *International Organization* 411, 417.

341 Koremenos, *The Continent of International Law*, above n 265, 40.

342 Ibid 41.

343 Ibid.

344 Ibid.

international institutions. These dimensions are:[345] (i) the scope of issues and areas covered; (ii) the level of centralisation of tasks; (iii) rules providing for control of the institution; and (iv) adjustability of arrangements.[346] I refer to the adjustability of arrangements rather than the flexibility of arrangements as proposed in Koremenos' original framework to avoid confusing this feature with the idea of flexibility that I explain in detail in Chapter 8.[347] The feature of the flexibility of arrangements has a limited scope in Koremenos' framework, and the notion of adjustability of arrangements encompasses this scope well. Flexibility as an idea has a broader reach and its contours are less delimited. The idea of flexibility is strongly grounded in the narrative used by several stakeholders of the PA, and its selection has an empirical basis. These reasons justify the departure from the denomination in Koremenos' original framework.

The scope feature refers to the range of issues covered or dealt with by the institution.[348] It also points to the presence of inducements for compliance — rewards or punishments — tied to prescribed or proscribed behaviours.[349]

The centralisation dimension examines the extent to which key tasks are managed or performed through a single focal entity. This dimension deals with the degree of delegation to this single focal point.[350] Centralised activities could include dealing with collection and dissemination of information, monitoring, dispute resolution or enforcement.[351]

The rules providing for control points to the rules affecting directly or indirectly the decision-making of the institution.[352] Rules on simple or qualified majorities in decision-making, qualified voting rights, veto rights, need for consensus are rules determining the levels of control exerted by members in the institution.[353] This dimension deals with how control in the institution is allocated and whether it varies from one task to another.

The last feature is adjustability of arrangements. This dimension encompasses how easy it is to modify rules, procedures, and obligations. This feature refers to the extent to which institutional rules accommodate to changes in circumstances with two ways to deal with them. Koremenos' framework examines six legal devices that provide for adjustability of institutional rules: (i) finite duration rules; (ii) escape clauses; (iii) degree of precision; (iv) reservations (v) renegotiation clauses;[354] and (vi) withdrawal clauses. Considering the case study nature of the thesis, I introduce to the analysis additional adjustability devices. They are: (vii) 'bundle' withdrawal clauses; (viii)

345 Koremenos, Lipson and Snidal, above n 254, 761; Koremenos, Lipson and Snidal 'Rational Design: Looking Back to Move Forward' above n 290, 1051-82; Koremenos and Snidal, above n 290, 431-44; Koremenos, 'Institutionalism and International Law' above n 290, 59-82.

346 Koremenos, *The Continent of International Law*, above n 265, 41-44.

347 See below Ch 8, Part II (C) 2.

348 Koremenos, *The Continent of International Law*, above n 265, 761, 770.

349 Ibid 44, 228.

350 Ibid 43.

351 Koremenos, *The Continent of International Law*, above n 265; Koremenos, Lipson and Snidal, above n 254, 771.

352 Koremenos, *The Continent of International Law*, above n 265, 44.

353 Koremenos, Lipson and Snidal, above n 254, 772.

354 Koremenos, *The Continent of International Law*, above n 265, 42-3.

exception clauses; (ix) carve-outs; (x) NCMs; and (xi) 'customised' commitments. Because of their presence in PA's international agreements it is necessary to explore the reasons underlying these additional mechanisms. The analysis of these additional adjustability devices constitutions and incremental development of Koremenos' research program with the limitations of a case study.

I consider the questions of the COIL project and its coding instrument[355] to characterise the institutional features of the PA in Chapter 5 and Chapter 6.

All cooperation problems could be present to some degree in all institutional arrangements. The thesis takes into consideration the coding rules that Koremenos employs in COIL to solve this issue.[356] Following Koremenos, I only consider the substantive goals of the PA to assess the presence of a specific cooperation problem.[357] I identify the incidence of the cooperation problem as meeting or not meeting the threshold. This assessment does not mean the absence of the problem, it denotes that the agreement fails to meet the criteria.[358]

Table 4 below describes the factors considered to assess the presence of a cooperation problem. It also explains how I gauge the characteristics of the states in the aggregate in the PA by using the tools and sources that the COIL project relies on. For the assessment of the characteristics of the PA states in the aggregate, I take into account the databases used in the COIL project although due to the qualitative nature of this thesis and its case study methodology I do not engage in the quantitative calculations that the COIL project undertakes to assess preference heterogeneity, economic power asymmetries and domestic regime heterogeneity.

Table 4 Criteria to Assess the Presence of Cooperation Problems and Characteristics of States

Cooperation Problem	Factors Considered for the Presence of Cooperation Problems
Enforcement problem	Free-Riding on another's cooperation. It is present if a state's choice to defeat while another cooperates would make at least some subset of states better off than mutual cooperation.[359] It is present if one state's decision to defeat would make the other state to defeat.
Distribution problem	The subject area at stake has to be almost zero-sum in nature. There is a lack of focal points to facilitate a bargaining solution, and/or refers to subject areas where high domestic distributional conflict exists or which are close to the basic identity of the state.[360]
Commitment problem	Domestic regime instability in at least one of the members in the decade before the signature.[361]

355 Barbara Koremenos, *Project: The Continent of International Law (COIL)*, University of Michigan < https://cps.isr.umich.edu/project/the-continent-of-international-law-coil/>.
356 Koremenos, *The Continent of International Law*, above n 265, Apprendix 2.
357 Ibid 70.
358 Ibid 371.
359 Ibid.
360 Ibid 372.
361 Ibid.

Cooperation Problem	Factors Considered for the Presence of Cooperation Problems
	I propose to consider supplementarily institutional weaknesses estimated through the levels of governance in the WGI.[362] If the governance levels in at least one of the members in the decade before the signature are ranked as weak, I treat it as an instance of commitment problems and test Koremenos' hypotheses based on this sub-problem.
Coordination problem	Policy matching should be almost exact if states are to be better off cooperating. (Eg, no coordination problem exists if 'it is better to clean up the park with friends even if one is not sure if others are cleaning up as efficiently as you are')[363]
Uncertainty about behaviour	It responds to a question: how easily is compliance observed in the absence of any institutional design tools that allow intrusive monitoring?[364]
Uncertainty about preferences	If there is great uncertainty regarding at least one member's true motives for participating in the agreement.
Uncertainty about the state of the world	If great uncertainty exists on how the agreement would work in practice or if a change in the environment or a shock could cause a substantive variation in the distribution of gains from the agreement.[365]
Number	The states considered are the ones at the negotiation stage, not those that accede later.
Domestic regime-type heterogeneity	I include two measures:[366] (i) the level of democracy scores (Polity)[367] and the Freedom House Index.[368] I make estimations for every member and assess qualitatively members in the aggregate. Supplementarily I assess domestic institutional strength through WGI in the aggregate.[369]
(Foreign Policy) Preference heterogeneity	I use ideal point data calculated based on the states' voting positions in the UN General Assembly and[370] membership to regional fora/institutions in LA and to fora engaging with the Asia-Pacific.
(Economic) Power Asymmetry	I use the World Bank data on GDP (PPP) among participants rather than the data from the Penn World Table that the COIL project uses. I examine qualitatively the differences in GDP (PPP) rather than calculating standard deviation among the

362 WGI, above n 317.
363 Koremenos, *The Continent of International Law*, above n 265, 373.
364 Ibid.
365 Ibid 374.
366 Ibid 375.
367 Center for Systemic Peace, *Polity IV Project Country Reports 2010* <http://www.systemicpeace.org/p4creports.html>; See also Center for Systemic Peace, *Data Page: Polity IV Regime Authority Characteristics and Transitions Dataset 1820 - 2018* < http://www.systemicpeace.org/inscrdata.html >.
368 Norris Pipa, *Democracy Cross National Data, release 4.0* (August 2015) < https://sites.google.com/site/pippanorris3/research/data#TOC-Democracy-Cross-national-Data-Release-4.0-Fall-2015-New->.
369 WGI, above n 317.
370 Erik Voeten, Anton Strezhnev and Michael Bailey, 'United Nations General Assembly Voting Data' (Harvard Dataverse, V21, 2019) < https://doi.org/10.7910/DVN/LEJUQZ, Harvard Dataverse, V21, UNF:6:pewd/JMymJQo6lXfbeBmCA== [fileUNF] >.

Cooperation Problem	Factors Considered for the Presence of Cooperation Problems
	participants to the agreements.[371] Although Koremenos calculates military power in the COIL project through a standard deviation, the thesis does not deal with military power.

Source: Author's analysis based on Koremenos proposed criteria

The thesis works under the following premises. First, states continue to be the primary drivers of international cooperation despite the growing relevance of non-state actors.[372] Second, although acknowledging the growing debates around it and the growing two-level game studies, the thesis premise is of states as unitary actors.[373] Third, states pursue Pareto improving institutions with minimum cost.[374] Thus institutional outcomes are pursued to make at least one actor better off without making any of the others worse off. Fourth, states base their actions on self-interests.[375] As I mentioned before, I approach these assumptions with some leeway to reach a compromise between theoretical parsimony and empirical foundation for the thesis.

I complete this framework by outlining specific tasks that international institutions perform. I propose to examine the design features through the lenses of six tasks: (i) decision-making; (ii) administration; (iii) monitoring; (iv) information production and management; (v) dispute resolution; (v) enforcement/punishment. I examine these tasks in relation to the notion of delegation and the relation between formal and informal design elements.[376]

It is an intentional choice to maintain the original reference made by Koremenos to institutions rather than international law or international law provisions that she refers to in the COIL research project. The justification for this selection is twofold. First, it fits better with the interest of the thesis on the institutional framework of the PA which encompasses not only the legal regime and the rules comprising it but also the organisational structures in place.[377] Second, maintaining a broader conceptualisation of the institutional framework allows me to test Koremenos analytical contribution in the context not only of international law provisions but also for the broader institutional framework.

C *Limitations of the RDII and the COIL's Approach*

The adjustments that Koremenos makes to the RDII in the COIL research program address some of the critics that Dunoff,[378] Acharya and Johnston,[379] and, to a much less

371 Robert C Feenstra, Robert Inklaar and Marcel P. Timmer, 'The Next Generation of the Penn World Table' (2015) 105 (10) *American Economic Review* 3150-3182 <https://www.rug.nl/ggdc/productivity/pwt/>.
372 Koremenos, *The Continent of International Law*, above n 265, 29.
373 Ibid.
374 Ibid 28.
375 Ibid 325.
376 Ibid 325.
377 See above Ch 1, Part II (C).
378 Duffield, above n 340, 411-430. See Koremenos, *The Continent of International Law*, above n 265, 67-8. See also Koremenos, 'Institutionalism and International Law' above n 290, 65.
379 Acharya and Johnston, above n 5, 13-15.

extent, Wendt made to RDII.[380] She does it primarily by incorporating new variables in examining institutional design — characteristics of the states in the aggregate — and additional cooperation problems — norms exportation, commitment problems and coordination problems.

Despite its contribution in explaining the institutional design features of the PA in Chapter 7, this rational institutionalist approach does not consider relevant issues that are significant for the questions I ask in this thesis. This Part explains the limitations of the COIL program and outlines the complementary and supplementary analytical tools that I take from constructivist institutionalism. Section One examines the role of ideas as explanatory variables of institutional design which Koremenos does not incorporate in her analysis. Section Two explains the sources of institutional change and the endogenous and exogenous factors that influence institutional change. Koremenos does not address inquiries of institutional change and how it is most probable to occur. Thus, I draw from constructivist institutionalism to tackle questions on institutional change in this thesis. Section Three addresses the shortcomings of Koremenos' framework regarding informal institutions. Her insights in this area are limited and do not include informal institutions in the form of standard practices and routines.

I claim that analytical tools regarding the role of ideas in institutional design and explanatory factors of institutional change complement and supplement the analysis of PA's institutional framework and solve some of the pitfalls of Koremenos' rational framework.

1 *The Role of Ideas and Constructivist Institutionalism*

Koremenos' framework in particular falls short in capturing the effect that ideational factors and beliefs have on the design of institutions.[381] Rational institutional design is not concerned with how ideas influence institutional outcomes, an issue of interest in this thesis, which attempts to address the multiple factors that impact on the institutional design in the PA.

In this Part I outline several roles that ideas could play in shaping institutional design, based on constructivist institutionalism and Goldstein and Keohane's rational insights.[382] I test and discuss several of these roles in Chapter 8 in the context of the PA and in relation to four specific ideas that I gathered that underpin the institutional framework of the PA. These ideas are: (i) open regionalism; (ii) deep integration; (iii) flexibility; and (iv) pragmatism.

380 Alexander Wendt, 'Driving with the Rearview Mirror: On the Rational Science of Institutional Design' (2001) 55 (4) *International Organization* 1019-1049.

381 See Duffield, above n 340, 418.

382 Judith Goldstein and Robert O Keohane, 'Ideas and Foreign Policy: An Analytical Framework' in Judith Goldstein and Robert O Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Cornell University Press, 1993) 3-30.

I eclectically turn to constructivist institutionalism[383] — also named ideational,[384] or discursive institutionalism[385] — to explain the concept of ideas for this thesis, their types and their implications for institutional design (and institutional change). The seminal work of Hall and Taylor on new institutionalisms refers to three approaches: (i) historical institutionalism; [386] (ii) rational institutionalism; and (iii) sociological institutionalism. However, writings from the last decade refer to constructivist institutionalism as a research program in progress that presents ontological, analytical and methodological distinctiveness.[387] I acknowledge the intellectual debates on the nature of constructivist institutionalism and whether it is a 'new' branch of institutionalism.[388]

The concerns of the research program on constructivist institutionalism over how ideas shape institutions and their subsequent development are of particular interest for this thesis.[389] The role it places on ideas makes constructivist institutionalism's views relevant to shed light on the design of the PA and its prospects of change. Constructivist institutionalism's emphasis on ideas, particularly ideas about institutions, is also significant for this thesis. The reason being is that it asserts explanatory power on the role of notions such as 'open regionalism', 'pragmatism', 'flexibility', and 'deep integration' for institutional design outcomes particularly in the context of the PA, [390] as I explain in Chapter 8.[391]

Constructivist institutionalism's research program centres on the influence that ideas have for policy-making,[392] which also aligns with the recent interest of rationalist accounts on ideas. [393] I draw lessons and test constructivist institutionalism insights to explain institutional design despite three pitfalls of this literature. First, constructivist institutionalism does not address the relationship between ideas and institutional design directly. This approach is concerned with explaining the relationship between ideas and political outcomes. Second, it focuses on the domestic or national policy outcomes rather than international contexts or interstate relationships. Third, the literature focuses on economic ideas and has not yet engaged with other types of ideas. I use constructivist institutionalism insights because, contrasting to other institutionalist theories, it

383 Colin Hay, 'Constructivist Institutionalism' in Sarah A. Binder, R A W Rhodes, and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2009) 56-74.

384 See eg, Colin Hay 'The "Crisis of Keynesianism and the Rise of Neoliberal Britain: An ideational Institutionalist Approach' in John L Campbell and Ove K Pedersen (eds), *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press, 2001) 193-218. See also Mark Blyth, *Great Transformations, Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge University Press, 2002) [Google version].

385 See eg, Peters, above n 289, 112-126; Vivian A Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse' (2008) 11 *Annual Review of Political Science* 303-326.

386 See, eg, Hall and Rosemary, above n 249, 936-957. See also Alex Warleigh, 'Introduction: institutions, institutionalism, and decision making in the EU' in Alex Warleigh (ed), *Understanding European Institutions* (Routledge, 2002) 6, 6-12; Pollack, above n 291, 125.

387 Hay, above n 383, 57. See also Peters, above n 289, 112-26.

388 Peters, above n 289, 124-5.

389 Hay, above n 383, 66-8.

390 Ibid.

391 See below Ch 8, Part II.

392 Hay, above n 383, 56-73; John L Campbell, *Institutional Change and Globalization* (Princeton University Press, 2004) 90, 91.

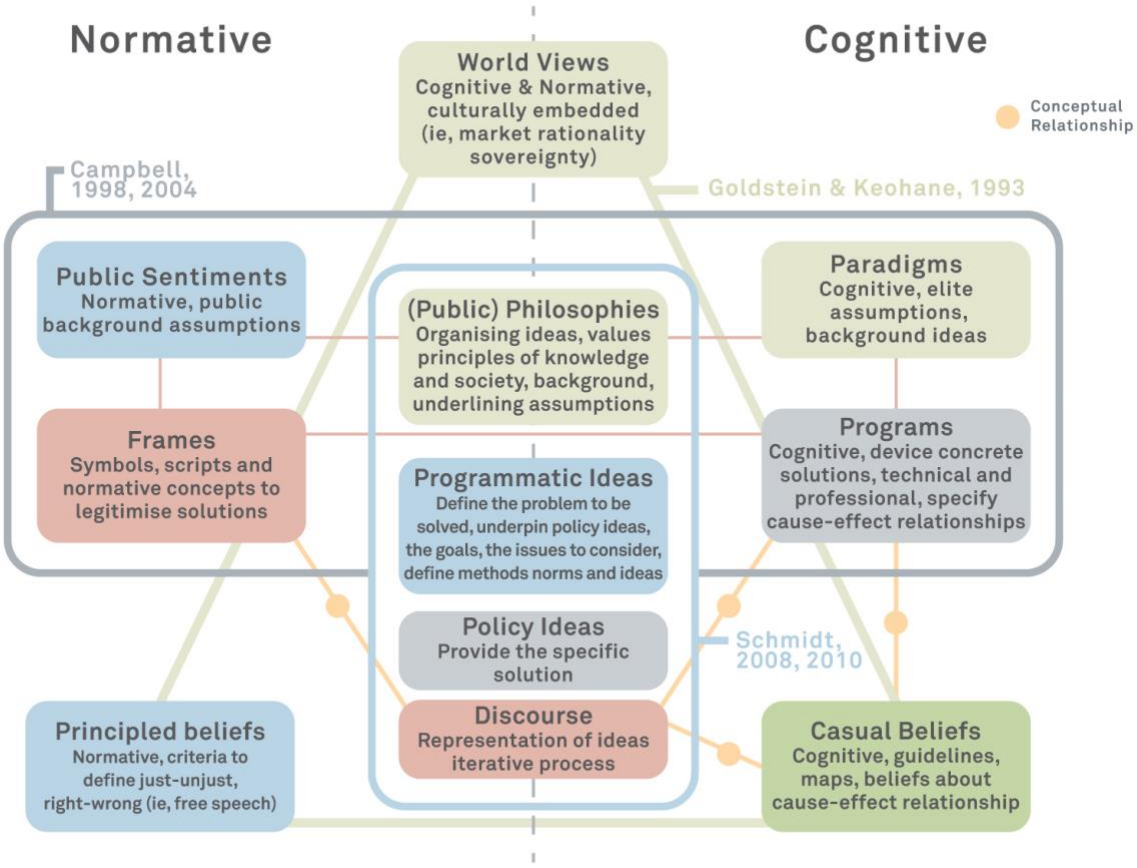
393 Goldstein and Keohane, above n 382, 11-26. But see Mark M Blyth, 'Review: "Any More Bright Ideas?" The Ideational Turn of Comparative Political Economy' (1997) 29 (2) *Comparative Politics* 229-250.

provides key conceptualisations on what ideas are, the types of ideas actors engage with and also their potential roles. Constructivist institutionalism also contributes fruitfully to the understanding of institutional change, how it happens and how ideas constrain and facilitate these changes.

I understand the concept of ideas as shared beliefs of different kinds. Authors conceptualise ideas in several ways depending on the weight each type carries, how culturally embedded they are, how susceptible to change they are, their technical character or abstract content and their cognitive or normative nature.

Figure 1 illustrates conceptualisations and typologies to explain ideas, based on the differences in nature and scope. It also draws some relationships between the types of ideas proposed by several authors that although not identical point to similar characteristics.

Figure 1 Conceptualisations about Ideas



Source: Author's analysis based on materials in Part II (D) (1)

I closely follow the taxonomy of ideas that Campbell provides [394] because, in constructivist institutionalism, it seems to me the most comprehensive covering most of the defining features outlined by other authors. Campbell asserts that ideas could be of two types. First, background ideas that are usually taken for granted as assumptions

394 John Campbell, 'Institutional analysis and the role of ideas in political economy' (1998) 27 *Theory and Society* 377, 389-94; Campbell, *Institutional Change* above n 392, 90, 93-100.

that are rarely contested because they remain largely accepted.[395] Second, foreground ideas are concepts and theories articulated by elite decision-makers and more commonly contested.[396] Ideas are either cognitive or normative. Cognitive ideas are outcome oriented;[397] they refer to theoretical analysis and descriptions defining cause-effect relationships.[398] Normative ideas are identities, values and attitudes.[399]

Following these overarching distinctions, Campbell proposes a typology of four ideas: (i) paradigms; (ii) public sentiments; (iii) programs; and (iv) frames. Paradigms are cognitive background assumptions that constrain the options that decision-making elites perceive useful and worth considering.[400] Public sentiments refer to public opinions, values, norms, identities and other shared expectations.[401] They are background normative assumptions constraining the range of programs that decision-making elites perceive acceptable and legitimate to their constituents and themselves.[402] Programs or policy prescriptions are cognitive foreground concepts and theories that facilitate elites' actions by identifying ways to solve specific (policy) problems. These ideas have a technical and professional nature helping actors to plan concrete solutions and specify cause-effect relationships.[403] Frames are normative concepts used to legitimise programs to the public. They are the 'means' to channel a program to make it fit not only with cognitive paradigms, but also public sentiments.[404] Frames are ways to package substantive ideas through discourse[405] and framing processes. Campbell claims that framing is conducted by 'creatively blending different ideas through the process of bricolage.'[406]

I test analogically how ideas could play a similar role for institutional design as theoretical developments suggest in relation to policy outcomes and decision-making. I explore four non-exclusive roles that ideas could play for institutional design: (i) anchor points or coordination mechanisms to choose from multiple potential equilibrium paths;[407] (ii) roadmaps[408] (iii) filters of available options that policymakers believe to be normatively acceptable based on frames and their own cognitive assumptions;[409](iv) as legitimising tools.[410] These four roles are based on the insights that Goldstein and Keohane provide, which follow a functional role for ideas,[411] and

395 Campbell, *Institutional Change* above n 392, 90, 93.
396 Ibid 90, 93.
397 Ibid.
398 Ibid.
399 Campbell, above n 394, 384; Campbell, *Institutional Change* above n 392, 90, 93.
400 Campbell, above n 394, 385.
401 Campbell, *Institutional Change* above n 392, 96.
402 Ibid.
403 Campbell, above n 394, 386-89.
404 Campbell, *Institutional Change* above n 392, 102.
405 See Schmidt, above n 385, 303-326.
406 Campbell, above n 394, 394; Campbell, *Institutional Change* above n 392, 103.
407 Goldstein and Keohane, above n 382, 17-20. I use the notion of anchor point rather than focal point that Goldstein and Keohane use in their original conceptualisation of the role of ideas to avoid any confusing with the conceptualisation that Koremenos uses for characterising the feature of centralisation. Koremenos employs the notion of focal point in an organisational sense denoting that there is centralisation when there is a focal point to whom tasks are delegated. See above Part III (B) (3).
408 Goldstein and Keohane, above n 382, 13-17.
409 Campbell, above n 394, 394.
410 Campbell, *Institutional Change* above n 392, 90-100.
411 Goldstein and Keohane, above n 382, 3-30.

Campbell's detailed examination of the effects that each type of ideas has on decision-making and institutional change.[412]

I test these four potential roles for ideas in shaping institutional design in Chapter 8 in the context of the PA and in relation to four specific ideas: (i) open regionalism, (ii) deep integration, (iii) flexibility, and (iv) pragmatism. Why these ideas and not others?

The selection of these four ideas is the result of an empirical enquiry of stakeholders and secondary sources that extensively point to these four ideas as foundations of the PA. These ideas are regularly referred to as distinctive aspects in the configuration of the PA. This selection does not attempt to disregard the relevance of other ideas such as autonomy and national sovereignty in the establishment of the PA. Table 5 represents a simple terminology search for the frequency of the four concepts within the sample of interviews, secondary, and primary sources.

Table 5 Empirical Searches about Prevalent Ideas

Source Type	Open Regionalism	Deep Integration	Flexibility/ - Flexible	Pragmatism/ Pragmatic
Interviews (38)	4	121[413]	49	57
Secondary sources (193)	334	316	86	90
Presidential and Parliamentary Declarations (22)	3	17	0	0
Explanatory Statements Framework Agreement (4)	7	32	3	2
2030 PA Vision (1)	0	3	1	1
Treaty Documents (6)	1	13	0	0

Source: Author's analysis on MaxQDA based on multiple sources

Chapter 8 disentangles the meaning that PA actors give to these ideas to understand the way in which they influence institutional features and other institutional aspects. [414]

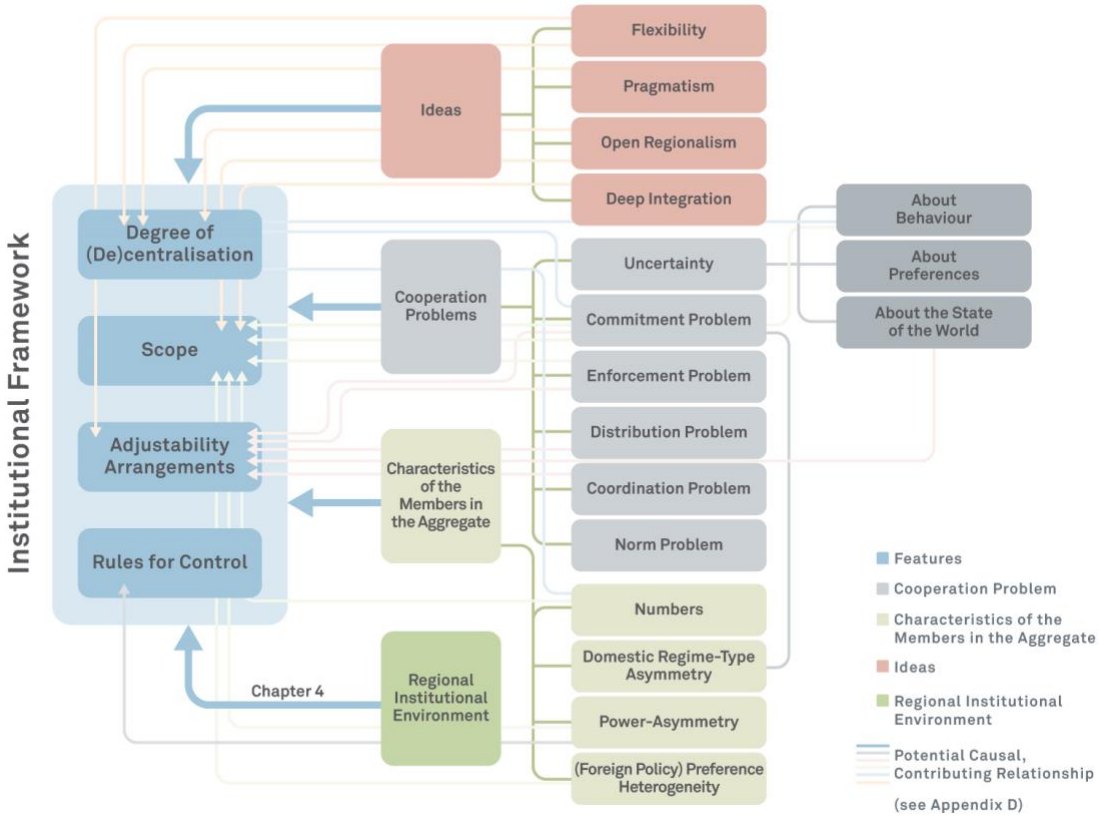
Figure 2 illustrates the proposed multifactorial analytical framework of the thesis to explain the institutional arrangements in place in the PA and to address the normative concerns of the thesis.

412 Campbell, *Institutional Change* above n 392, 90, 93.

413 The interview protocol includes a question on the meaning of deep integration that could have affected the incidence of it in the interview data.

414 See below Ch 8, Part II.

Figure 2 Analytical Framework (Based on RDII and COIL Approach)



Source: Authors' analysis

2 *Changes over Time*

It is not the aim of the COIL research project to provide insights on how institutions change and what the determinants of institutional change are. It would probably be too much to ask from a research program, which is already committed on a demanding task, concerned with why international institutions are designed the way they are. However, this limitation is a critique that rational choice institutionalism often receives,[415] and the COIL research program is no exception as it studies cooperation problems and characteristics of the states at the negotiating point when institutions are established. Rational institutionalism theories traditionally presumed states' interests and preferences to be fixed, ignoring the potential for changes in interests and preferences or the associated institutions. This presumption also makes it difficult for rational approaches to examine the factors that explain these changes.

As suggested by Pierson[416] Koremenos,[417] and Peters[418] institutional change continues to be an underexplored sub-field in institutionalist literature. From a theoretical view, this situation makes it difficult to establish what variables/factors influence institutional change. A sound theoretical understanding of institutional change and the factors that

415 Peters, above n 289, 47, 62-3.
416 Paul Pierson, The Limits of Design: Explaining Institutional Origins and Change' (2000) 13 (4) *Governance: An International Journal of Policy and Administration* 475, 475.
417 Koremenos, 'Institutionalism and International Law' above n 290, 76-77.
418 Peters, above n 289, 119.

constrain and facilitate it is necessary to address questions on institutional reforms in the case of the PA. Thus, this Part explains the potential sources of institutional change that new institutionalism approaches examine and the endogenous and exogenous factors that influence change to cast light on the factors that I consider for institutional adjustments in the PA in Chapter 9.

(a)Sources of Institutional Change and Institutional Continuity

Several streams of institutionalism point to two possible sources of institutional change. The first source is shocks or crisis,[419] which is what historical institutionalism calls critical junctures and has also been described through the theory of punctuated equilibrium.[420] Change in this case would be disruptive because crisis would lead to setting new paths for institutional development.[421] Change produced by crisis or critical events is mostly explained through exogenous factors to the institution that would result in wholesale institutional replacement/revolution.[422]

Incremental adaptation or evolution, which uninterrupted modification characterises, is the second source of change. [423] In this case, change is the result of gradual accumulation. Pierson's analysis suggests that when institutions have been in place for a long time or are highly institutionalised most changes will be incremental.[424] Pierson prefers to refer to institutional development rather than change and focuses on it as a long-term process,[425] although this approach does not deny the tendency towards incremental adjustments. [426]

New institutionalism approaches and authors differ as to the weight they give to pre-existing institutional structures and actors' ability and opportunity to influence institutional change. A detailed examination of these variants exceeds the scope of this Chapter.[427] My aim here is to map the two sources and provide a framework of factors that could potentially influence change and the mechanisms/modes through which institutional change is to happen. [428]

419 Blyth, above n 384, [Google version, 40]. But see Campbell, *Institutional Change* above n 392, 115-6.

420 See eg, Kathleen Thelen and James Conran, 'Institutional Change' in Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2016) 54-5; Vivien Lowndes and Mark Roberts, *Why Institutions Matter: The New Institutionalism in Political Science* (Red Globe, 2013) 113-15.

421 Thelen and Conran, above n 420, 54; Lowndes and Roberts, above n 420, 115.

422 Lowndes and Roberts, above n 420, 115. See also Siobhán Harty, 'Theorising Institutional Change' in André Lecours (ed), *New Institutionalism: Theory and Analysis* (University of Toronto Press, 2005) 51, 59.

423 See eg, Kathleen Thelen, 'How Institutions Evolve? Insights from Comparative Historical Analysis' in James Mahoney and Dietrich Rueschemeyer (eds), *Comparative Historical Analysis in the Social Sciences* (Cambridge University Press, 2003) 208-240; North, above n 5, 89-94. See also Acharya and Johnston, above n 20, 264-5.

424 Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton University Press, 2004) 144, 153.

425 Ibid 133-166.

426 Ibid 133, 147.

427 See, eg Lowndes and Roberts, above n 420, 111-143.

428 See eg, Thelen, 'How Institutions Evolve? above n 423, 222-240; Thelen and Conran, above n 420, 64-65.

As part of their incremental understanding of institutional change, Streeck and Thelen propose four modes of institutional change that I consider in this thesis to examine how potential changes would unfold in the PA: displacement, layering, drift and conversion. [429] Displacement represents the removal of existing rules by the introduction of new rules. Displacement could result from the sudden breakdown of institutions, although it can operate in a slow-moving process. [430]Layering takes place when new rules are added to old rules or alongside existing rules changing the way in which the old rules influence behaviour. This mode involves additions, amendments or revisions of current rules.[431] Drift results when there are changes in the surrounding political or economic environment or the external conditions that make institutional recalibration necessary. In this case, formal rules stay the same, but the environmental changes impact the institution and its operation.[432] There is a failure to update and adapt rules with institutional consequences of their inaction. For instance, situations where institutional structures provide for veto powers facilitate institutional drift. A final mechanism of institutional change is conversion. This mode takes place when formal rules stay the same but are interpreted or 'enacted' in new ways.[433] This mechanism is an active strategy to benefit from inherent ambiguities of the institution. Conversion allows redirecting the institution towards new goals, functions and purposes.[434]

Along with the sources of institutional change, it is relevant to consider new institutionalisms accounts of institutional inertia or stability because it acts as a potential constraint for change.[435] Thus institutional continuity or stability is the flip side of the coin, to understand the factors that produce reform requires understanding the factors that inhibit it.[436] Acharya and Johnston, [437] Pollack[438] and many others argue that institutional design is relevant because once in place it tends to be resilient and creates path dependency, shaping future institutional changes. Pollack asserts institutional reforms take place within the context of existing institutions. This circumstance not only constrains but also channels the choices available to the members of those institutions.[439] Even when institutions could be framed as flexible, specific institutional choices rigidify as they become stable over time, preventing future adjustments.

Historical institutionalism is particularly concerned with path dependency, [440] institutional inertia and continuity. Historical institutionalism tends to explain institutional change in terms of exogenous shocks and moments of critical juncture that

429 Wolfgang Streeck and Kathleen Thelen, 'Introduction: Institutional Change in Advanced Political Economies' in Wolfgang Streeck and Kathleen Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, 2005) 1, 20-29.

430 Ibid. I do not include the exhaustion mode because it leads to institutional breakdown rather than change.

431 James Mahoney and Kathleen Thelen, *Explaining Institutional Change: Ambiguity, Agency and Power* (Cambridge University Press, 2009) 32.

432 Ibid 34.

433 Ibid. See also John L Campbell, 'Institutional Reproduction and Change' in Glenn Morgan et al, *The Oxford Handbook of Comparative Institutional Analysis* (Oxford University Press, 2010) 87, 106.

434 Mahoney and Thelen, above n 431, 34.

435 Lowndes and Roberts, above n 420, 131.

436 Thelen and Conran, above n 420, 63.

437 Acharya and Johnston, above n 20, 264-5.

438 Pollack, above n 296, 439.

439 Ibid 432.

440 Pierson, above n 424, 17-53.

have the potential to alter the path.[441] Except for North, who defends that institutional change is overwhelmingly incremental and path dependent,[442] rational institutionalism is more akin to explanations of change based on punctuated equilibrium and external shocks.[443]

The different streams of new institutionalism assert multiple reasons for institutional stability. From a rational perspective, Shepsle points to the transaction costs associated with institutional change once actors establish an institution and how these costs could create some 'cushion' or stability to it. [444]These transaction costs include the ones connected with the decision-making, the ones needed to enforce the new regime, and the ones for individuals to adapt to the new rules and procedures.[445] Keohane claims that because of transaction costs and uncertainty, institutions are easier to maintain than to create.[446] In turn, Pollack asserts the inertia that transaction costs, uncertainty, and institutional barriers to change give to institutions.[447]

Pierson also examines institutional stability in terms of institutional resilience and the rising costs of deviating from the established institutional configurations.[448] One of Pierson's main claims is that 'early steps in a process fundamentally restrict the range of options available at later ones.'[449]Thus, institutional arrangements in place condition their own revision. Additionally, Pierson claims that coordination problems, veto points, asset specificity and positive feedback make revision difficult, or at least condition the revising of institutional arrangements.[450]

He argues that asset specificity is a source of institutional resilience because once an institution is adopted it produces effects that change actors' calculations of the cost and benefits of alternative institutional arrangements. Since the value of assets is attached to a particular (institutional) setting, actors are likely to be more committed to the continuation of an arrangement where those assets are applied (eg, institutional arrangements that encourage investing on specific physical assets).

Positive feedbacks point to the inter-linkages among institutional arrangements over time and how the value of one component could be enhanced by the presence of another complementary component. This connection means that the presence of complementary institution 'B' may reinforce institution 'A' raising the costs for revising institution 'A'.[451]

441 Ibid 135.
442 North, above n 5, 89-94.
443 But see Kenneth A Shepsle, 'The Rules of the Game: What Rules? Which Game?' (Paper presented at The Legacy and Work of Douglass C. North: Understanding Institutions and Development Economics, Center for New Institutional Social Science, Washington University, November 4-5 2010) 7 < http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.644.5248&rep=rep1&type=pdf>.
444 Kenneth A Shepsle, 'Studying Institutions: Some Lessons from the Rational Choice Approach' (1989) 1 (2) *Journal of Theoretical Politics* 131, 144.
445 Ibid 144.
446 Keohane, above n 186 [Kindle position 2165-67].
447 Pollack, above n 296, 438. See also Harty, above n 422, 58-59.
448 Pierson, above n 424, 142, 150.
449 Ibid 134.
450 Ibid 142-153.
451 Pierson, above n 424, 149-150. But see Thelen, 'How Institutions Evolve? above n 423, 224-225.

Constructivist institutionalism highlights not only path dependence but also ideational path dependence.[452] The ideas on which institutions are based inform the institutional development and constrain their autonomy. Different types of ideas such as paradigms and public sentiments could also reinforce institutional stability due to their constraining effect on institutional change.

According to Campbell, different types of ideas play different roles in institutional change. He argues that paradigms and public sentiments constrain institutional change. In the case of paradigms it is because they limit the range of options on new programs that decision-makers can imagine and articulate through discourse. [453] For instance, neoclassic economic paradigms affect the policy options perceived available when trying to solve political, economic or organisational problems. [454] Blyth refers to this constraining effect of paradigms as 'cognitive locking.'[455] According to Campbell, public sentiments have a similar effect for institutional change although they act as 'normative locks'.[456] Public sentiments constrain the range of options that decision makers perceive publicly acceptable. They also affect how collective actors perceive and interpret their interests. [457]

Although programs and frames, generally enable change they could also constrain it and reinforce institutional stability. According to Campbell, frames could serve to block change because actors (eg, business associations, labour unions, and elites) can manipulate frames to their advantage to avoid the adoption of programs.[458] At the same time, the adoption of programs often leads to their institutionalisation in ways that reinforce their influence over time.[459] Once adopted, programs gain constituents that benefit from them and may resist alternative options. [460] Programs also demand implementation capacities such as planning and financing. Once executed those capacities reinforce the influence of programs over time.[461]

Institutional stability and path dependence, including ideational path dependence, do not render institutional change impossible although they influence institutional changes and need to be considered. I examine them within the endogenous institutional and ideational factors explained in Part (b) below.

(b)Exogenous and Endogenous Factors Influencing Institutional Change

Institutional change derived from critical ruptures or moments of crisis are often explained through exogenous factors. Exogenous (non-institutional) factors to the institution include defeat in war, serious economic stagnation, energy crisis, technological innovations, and (political) regime change, which open the door to institutional transformation/revolution.

452 Hay, above n 383, 65.
453 Campbell, *Institutional Change* above n 392, 108.
454 Ibid 100.
455 Blyth, above n 384, [Google version, 188-9, 253-4].
456 Campbell, *Institutional Change* above n 392, 110.
457 Ibid 109.
458 Ibid 104.
459 Ibid 108.
460 Ibid.
461 Ibid 107-8.

One of the recent contributions of new institutionalisms is also to ascertain the influence of endogenous institutional factors on institutional change. Constructivist institutionalism provides a more suitable framework than rational institutionalism to understand endogenous factors in the institutional change even if limited to ideational factors. These factors play a main role in explaining change within constructivist institutionalism. Constructivist institutionalism posits that institutional change would take place in two different ways: (i) through shifts in paradigms resulting from moments of crisis,[462] (ii) through evolution on policy paradigms arising from gradual variations in ideas different to underlying paradigms (eg, programs or instruments). The second type is consistent with the concept of path dependency and ideational path dependency.[463] Under this strand of institutionalism, the change in ideas generates the change in institutions.

Programs and frames are subject to constant test and revision because decision makers try to fit them into the constraints imposed by present paradigms and public sentiments.[464] Campbell notes that generally programs and frames enable change.

Institutional entrepreneurship and advocacy, the role that different types of actors (eg, decision-makers, elites, the public, constituents, intellectuals) play and their bargaining relationships are also essential for institutional change.[465] Some of these actors may resist change (eg, beneficiaries of the status quo) while other may either propose or demand it. These interactions along with the coalitions and conflicts arising from it are underpinning factors to explain how institutional change takes place.[466]

I mean by institutional entrepreneurs those actors that design or have the initial idea of how an institution should be. Institutional entrepreneurs (also institutional innovators) are not always the creators or founders of institutions. Decision-Makers (eg, politicians or government officials) are usually helped by institutional entrepreneurs that mobilise resources for an institution to be created or change.[467] Institutional entrepreneurs need to have the skills to be able to transfer their institutional ideas in a simple way so decision-makers can implement them.

Finally, exogenous political and economic environments that represent other surrounding institutions are factors that impact institutional change.[468] This factor provides a relational aspect to the analysis because institutions do not develop in isolation but in the context of other institutions. Institutional developments and performance and the establishment of different forms of international rules could also impact and trigger accommodating institutional changes within a specific institution (eg, the PA). Moreover, changes in national environments (institutions) could also influence change in regional institutions (eg, the PA).

462 Hay, 'The "Crisis" of Keynesianism and the Rise of Neoliberalism in Britain', above n 384, 202.
463 See above Part III (C) (2) (a).
464 Campbell, *Institutional Change* above n 392, 100, 108-9.
465 See eg, Campbell, *Institutional Change* above n 392, 116-117; Pierson, above n 424, 136-7; Lowndes and Roberts, above n 420, 136. See also Mahoney and Thelen, above n 431, 39.
466 But see Pierson, above n 424, 141.
467 Paul Dimaggio, 'Interest and Agency in Institutional Theory' in Lynne Zucker (ed), *Institutional Patterns and organizations: Culture and the Environment* (Ballinger, 1998) 3, 14.
468 Lowndes and Roberts, above n 420, 140.

(c) Implications for the Analysis of the PA

Explanations from new institutionalism approaches on institutional change are important for this thesis because they allow understanding that institutional change does not happen in a vacuum. In the absence of serious shocks or critical junctures, changes are prone to occur through incremental adjustments. Gradual changes take place through several mechanisms such as displacement, layering upon already existing institutions, drifting, and conversion.

Path dependency and institutional endurance suggest that future modifications to the original institutional design of the PA 'would have to be a gradual process rather than radical break.'[469] As Thelen claims, significant changes can also derive from gradual cumulation of incremental adjustments and are not only the result of critical moments. I apply an evolutionary/incremental approach to examine and propose future institutional changes to the PA in Chapter 9.

Moreover, new institutionalisms make it clear that exogenous and endogenous factors to the institution could influence institutional change.[470] Thus, the proposals for adjustments to the institutional structure that I develop in Chapter 9 should consider these factors to be meaningful. From an eclectic view, I consider four factors in my examination of institutional change/evolution in the PA.

First, (endogenous) institutions within the PA as pre-existing structures that could constrain/promote change. This examination involves studying the potential effects that the current institutional features — centralisation, scope, control, and adjustability of arrangements — could have for future changes in the PA.

Second, I investigate the role of actors such as institutional reformers, government officials, decision-makers, elites, and civil society to facilitate and constrain change. Third, I consider contextual environments where those changes could potentially develop and how the surrounding institutions at the national and international level could trigger or constrain such changes.

Fourth I consider the role of institutional ideas. I examine the role that different types of ideas and particularly the four ideas examined in Chapter 8 — open regionalism, deep integration, flexibility, and pragmatism— could play to constrain or channel institutional change in the PA. I will examine how new ideas and frames to mobilise institutional changes will need to operate into already existing paradigms and public sentiments.

3 *Informal Institutions*

The COIL units of analysis are international agreements (ie, treaties) as individualised institutions. Thus, the informal institutions it is concerned with have already met a threshold of formalisation to be part of an international agreement. Therefore, COIL

469 Acharya and Johnston, above n 20, 267-8.

470 Vivien Lowndes, 'The Institutional Approach' in David Marsh, and Gerry Stoker (eds), *Theory and Methods in Political Science* (Palgrave Macmillan, 3rd ed, 2010) 60, 76.

has limitations to explain systematically other informal institutions such as the trans-governmental agreements that populate the PA current framework.[471]

Despite its limitations in the treatment of informal institutions, the insights of Koremenos' framework are still significant to understand institutional outcomes on the different types of rules (ie, hard-law and soft-law) as a result of underlying cooperation problems in their negotiation. I use these distinctions and Koremenos'rational explanations to elucidate institutional rules of the PA in Chapters 5, 6 and 7.

In contrast to the COIL project, this thesis is concerned not only with institutions as prescriptive or proscriptive rules of behaviour but also more broadly with what I call the institutional framework.[472] It includes what I refer to as standard practices or regular patterns of behaviour that in the institutionalisation process have not or may not need to reach additional levels of formalisation. The ambition of the thesis regarding informal institutional practices is modest and limits its scope to map some of them through the empirical qualitative method.[473]

IV CONCLUSIONS: TOWARDS AN ECLECTIC FRAMEWORK TO EXPLAIN PA'S INSTITUTIONAL DESIGN

In this Chapter, I take rational institutionalism as the starting point and enrich its analytical tools with those of constructivist institutionalism. The latter, at the same time, takes aspects from historical[474] and sociological institutionalism.[475] This eclectic theoretical approach is an effort to bridge the insights of several streams of institutionalism to explain the current institutional design of the PA. This approach also takes into account the empirical situation of the PA in a more suitable way than addressing it through the lens of only one stream of new institutionalisms.

The analytical framework presented here to explain institutional design relies on three overarching factors: (i) interstate cooperation problems; (ii) characteristics of the states that attempt to cooperate in the aggregate; and (iii) the ideas underpinning the process of interstate cooperation. These three factors help to explain four design features of the PA: (i) the scope of the issues and areas covered; (ii) the level of centralisation of tasks; (iii) the rules providing for control of the institution; and (iv) the adjustability of arrangements. I examine the particular case of the institutional design of the PA in Chapters 5, 6, 7 and 8.

I claim in the present Chapter that the insights from several streams of institutionalism can be complementary and supplementary. The factors outlined in these approaches operate symbiotically to explain institutional design outcomes and the institutional framework of the PA. My view is that, to some extent, these approaches are complementary and supplementary rather than competing because they provide

471 See below Ch 7, Part II (E).
472 See above Ch 1, Part II (C).
473 See above Ch 1, Part IV (B).
474 Hay, above n 383, 60.
475 Anne van Aaken, 'Towards Behavioural International Law and Economics: A Comment on Enriching Rational Choice Institutionalism for the Study of International Law' (2008) 1 *University of Illinois Law Review* 47, 50.

concepts and tools that help to explain different aspects of institutional creation and design by emphasising diverse factors and forces. Therefore, I assert that multifactorial frameworks such as the one I propose offer better tools than mono-theoretical approaches to explain the institutional outcomes of the PA.

To address the concerns over the factors that influence institutional change in the PA and its potential enablers or constraints, I supplement the theoretical framework in this Chapter by proposing to examine four potential endogenous and exogenous factors that the institutionalist literature on institutional change highlights. First, I propose to study endogenous institutional factors in the PA, particularly its institutional features, to disentangle how the current features limit or promote change. Second, I aim to review the effect of underpinning institutional ideas (ie, flexibility and pragmatism) to drive or constrain institutional changes in the PA. I complement the analysis by examining two exogenous factors: the role of different types of actors and their interactions in preventing or promoting institutional changes, and the political and economic environment at two levels (international and national).

I delimit the analysis to incremental institutional changes, albeit recognising that institutional change could also be the result of critical junctures or more systemic crisis that could trigger changes in the PA's institutional framework. In taking a gradualist approach to institutional change I examine the mechanisms through which those changes are expected to occur as a result of adaptation or evolution rather than wholesale revolution. Based on the factors and modes for institutional change, I examine potential changes to the institutional framework of the PA in Chapter 9.

Van Aaken states that 'political scientists as well as international lawyers have long struggled between different paradigms of either functional analysis using mainly game theory based on rational choice on the one hand or an analysis of how ideas and beliefs " construct" realities and policies on the other.'[476] The proposed theoretical framework — functional analysis derived from rational institutionalism and constructivism institutionalism — evidences this struggle.

However, this puzzle also presents international lawyers and political scientists with an opportunity to enrich their understanding of the empirical world by bridging explanations rather than having to choose between them. I undertake this task by combining and complementing the insights that each paradigm has to offer to explain the PA institutional design and change. The eclectic framework that I develop here is an effort to grasp the institutional outcomes and features of the PA on the ground and explain them in a theoretically sound way. I combine rational institutionalism and constructivist institutionalism insights also to account for the relevance of material interests and ideas for the PA rather than examining its institutional design as a result of one or the other. [477]

Finally, Chapter 4 explores the evolution of regional institutions in Latin America and their current context and examines how the three overarching factors, particularly ideas, have played a role in their development. I study the development of regional institutions in LA and the perceptions about their performance. This is a necessary step because, as

476 Anne van Aaken, 'Behavioural International Law and Economics' (2014) *Harvard International Law Journal* 421, 438.

477 Campbell, *Institutional Change* above n 392, 123.

I argue in Chapter 4, the different types of ideas that underpin other regional institutions in Latin America are significant to understand the prevailing ideas that play a role in the current institutional design (and eventual institutional change) in the PA. Overall history and context of other regional institutions in LA represent external institutional environments that also constitute a relevant factor in explaining PA's institutional design.

4 EVOLUTION OF REGIONAL INSTITUTIONS IN LA: IMPLICATIONS FOR INSTITUTIONAL DESIGN IN THE PA: AN ECLECTIC APPROACH

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I INTRODUCTION

This Chapter traces the evolution of regional institutions and the regionalism projects in LA and places them into the conceptualisation of 'waves of regionalism'. Explanations about regionalism and the emergence, decline, re-engineering, and change in regional institutions in LA complement the analysis of the PA institutional framework in three ways. First, this analysis is instrumental in understanding the role that cooperation problems and particularly ideas play in the establishment of the PA. Second, it assists in identifying the economic and political drivers behind the establishment of the PA. Third, these explanations reveal the (perceived) poor performance of other regional institutions in LA with ramifications for the design of the institutional framework of the PA and the ideas underpinning this institutional design.

Part II of this Chapter examines the creation of regional institutions in LA from the attempts of the early 19th century. Then I move to explain the first wave of regionalism and the regional institutions established since the end of World War II. I delve into the economic and political ideas surrounding the emergence of regional institutions during this wave of regionalism and review the limitations and challenges that this approach to regionalism faced. I follow a similar method to address the second and third waves of regionalism and the establishment of regional institutions in the subsequent sections. Part III refers to ARCO — the preceding institution to the PA— to understand what elements the PA borrows from this early attempt to build a Pacific Latin American forum to engage with the Asia Pacific. Part IV describes the regional context in which the PA emerged, characterised by the coexistence of regional institutions that take divergent approaches to regionalism. This Part finalises by assessing the (perceived) performance of regional institutions in LA and what these perceptions mean for the creation of the PA.

Part V presents the conclusion on the evolution of regional institutions in LA and the implications of this institutional environment not only for the original institutional design of the PA but also for its prospects of institutional change. Thus, the present Chapter partially addresses the question of what factors explain the design features of the institutional framework of the PA, which I discuss in greater detail in Chapter 6.

I claim here that cooperation problems such as distribution problems, commitment problems and enforcement problems have been present throughout the lifespan of regional institutions in LA. Collectively, these problems have also posed challenges to the consolidation of several of these regional institutions, although, in most instances, these problems have not led to their extinction. Regional institutions in LA have proved to be resilient over time as an expression of regionalism.

I maintain that economic ideas and ideas on economic development have played a vital role in the emergence and change of regional institutions in LA. Political ideas on regional autonomy from the regional hegemon have also inspired regional institutions in LA. Ideas have shaped the models followed by regional institutions throughout the years in LA, and the PA is no exception. The ideas that underpin other regional institutions in LA are significant to understand the prevailing ideas that play a role in the current institutional design (and potential institutional change) in the PA.

I also maintain that perceptions of the ineffectiveness and institutional inflation of other regional institutions in LA represent an external institutional environment that prevented their institutional designs from acting as models in the establishment of the institutional framework of the PA. In contrast, these negative perceptions prompted a reactive institutional design in the PA, where institutional entrepreneurs and decision-makers attempt to distance from the typical structures implemented by other regional institutions in LA. Thus, these perceptions limited the options that PA decision-makers saw available at cognitive and normative levels:[478] at the cognitive level, because these views helped to disregard institutional structures implemented by other regional institutions, for instance, on the basis that their costs outweighed their benefits; at the normative level, because these views contributed to placing a hierarchy or a priority on the values and principles to be promoted by the new institutional framework (eg, needs-based, results-based).

II WAVES OF REGIONALISM IN LA: INSTITUTIONS AND IDEAS

This Part examines the evolution of regional institutions and the regionalism projects in LA for three reasons. First, this study helps me to comprehend the ideas underlying the establishment of the PA and how these ideas contribute to shaping the institutional choices in place today. Second, it helps me to identify the material and non-material drivers behind the establishment of the PA by placing the PA in its broader institutional context. Third, it helps me to understand the extent to which the perceptions about the performance of other regional institutions in LA have influenced the institutional choices within the PA. I claim that these perceptions create an institutional environment that serves as a complementary explanatory factor for the institutional design of the PA.

Section A examines the early attempts at regional integration in the Americas since the early 19th century. Section B maps the several regional institutions that emerged in LA during the first wave of regionalism, since the 1950s. An inward-looking model of economic integration characterises these institutions. Section C examines the grounds of the second wave of regionalism and the context in which it emerged in the early 1990s. Section D surveys the third wave of regionalism in LA its characteristics and focus towards developmental and social programs.

I maintain that the conceptual distinction of waves of regionalism in LA refers to differences in the economic and or political models followed through regional institutions and the ideas that support not only their emergence but also their changes (re-engineering and relaunching) across time. Authors characterise three waves in the progression of regional institutions in LA.[479]

A *The Early Attempts*

Attempts to build regional institutions in LA can be traced back to the times of independence in the early 19th century, to the Bolivarian ideal to have LA united as a

478 See above Ch 3, Part III (C) (1).

479 But see Oliver Dabène, 'Explaining Latin America's Fourth Wave of Regionalism: Integration of a Third Kind (Paper presented at the 2012 Congress of the Latin American Studies Association (LASA), San Francisco, 25 May 2012) 11-2.

region with a shared history, language and culture.[480] From this first call, the United States, Brazil and Haiti were excluded.[481] The efforts proved fruitless, with only a handful of newly independent states attending the First Congress of Latin American Plenipotentiaries in 1826.[482] Thus, the idea of nationalism rather than regionalism guided the process for nearly fifty decades. A movement towards boundary definition and a Westphalian sense of state strengthened a process of disintegration rather than integration in LA.[483]

The United States led initiatives to integrate the Americas during the 1880s and early 1900s, with the First International Conference of American States held in Washington in 1890 and later International American Conferences.[484] The United States advanced the first project for an institutionalised setting to pursue common political, economic and security objectives, through the so-called Pan Americanism.[485] The United States' efforts through the Washington Conference and later via the creation of the Pan American Union in 1910 laid the groundwork, although at a languid pace, for the consolidation of the Inter-American System in the late 1940s.[486]

The end of World War II provided the United States with the opportunity to strengthen its leadership in the Inter-American System, with the adoption in 1948, during the Ninth International American Conference, of the Charter of the OAS.[487] This historic moment also marked the beginning of contemporary regionalism in the international arena. However,[488] it took the LA countries more than a decade to start aligning with the

480 Gian Luca Gardini, 'Unity and Diversity in Latin American Visions of Regional Integration' Gian Luca Gardini and Peter Lambert, *Latin American Foreign Policies: Between Ideology and Pragmatism* (Palgrave Macmillan, 2011) 235, 236; Florabel Quispe-Remón, 'Problemas y Perspectivas de Procesos de Integración en América Latina' (2010) 16 *International Law: Revista Colombiana de Derecho Internacional*, 259, 262 [Florabel Quispe-Remón, 'Problems and Prospects of Integration Processes in Latin America' 16 *International Law: Colombian Journal of International Law* 259, 262]; Oliver Dabéne, *The Politics of Regional Integration in Latin America: Theoretical and Comparative Explorations*, (Palgrave Macmillan, 2009) 11-23.

481 But see Dabéne, *The Politics of Regional Integration in Latin America'*, above n 480, 12.

482 Diana Tussie, 'Latin America: Contrasting Motivations for Regional Projects' (2009) 35 *Review of International Studies* 169, 171; Dabéne, *The Politics of Regional Integration in Latin America'*, above n 480, 13. See also Jorge I Domínguez, 'International cooperation in Latin America: the design of regional institutions by slow accretion' in Amitav Acharya and Alastair Iain Johnston (ed*), Crafting Cooperation: Regional International Institutions in Comparative Perspective* (Cambridge University Press, 2007) 83, 83-6.

483 Luís Claudio Villafañe Santos*,* 'Las Relaciones Interamericanas' en Enrique Ayala Mora y Eduardo Posada Carbó (eds), *Historia General de América Latina: Los Proyectos Nacionales Latinoamericanos: Sus Instrumentos y Articulación 1870-1930* (Unesco y Trotta, 2008) 311, 311-314 [Luís Claudio Villafañe Santos*,* 'Interamerican Relations' in Enrique Ayala Mora and Eduardo Posada Carbó (eds), *General History of Latin America: The Latin American National Projects: Their Instruments and Articulation 1870-1930* (Unesco and Trotta, 2008) 311, 311-314]; Dabéne, *The Politics of Regional Integration in Latin America'*, above n 480, 14.

484 Villafañe Santos, above n 483, 316.

485 Tussie, above n 482, 172; Ibid 315-316.

486 Dabéne, *The Politics of Regional Integration in Latin America'*, above n 480, 14-16.

487 *Charter of the Organization of American States*, signed in 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951); *Our History* Organization of American States < http://www.oas.org/en/about/our_history.asp >.

488 Louise Fawcett, 'The History and Concept of Regionalism' (Working Paper W-2013/5, United Nations University Institute on Comparative Regional Integration Studies, May 2013) 9.

international trend because dictatorial regimes in different countries did not provide an appropriate environment for these ideas to flourish.[489]

B *The First Wave: Closed Regionalism*

At the end of the 1950s, countries started to associate under a common economic policy of import substitution industrialisation.[490] The model for regional economic growth pursued industrialisation through the removal of internal barriers among countries in the region while preserving high barriers to external trade. The region followed this approach to regionalism using the interpretations and ideas on industrialisation that the newly created ECLAC promoted for LA.[491]

Integration was seen at the time of closed regionalism as an economic process: a form of defensive regionalism concerned with intraregional trade as a way to enhance extra-regional competition.[492] The economic policy behind this approach was to promote industrial complementarity along with an industrial focus on country specialisation.[493]

The liberalisation of trade among the countries in the region would help to overcome the limitations of small domestic markets, to enhance economies of scale and to broaden the scope of import substitutions to the regional level.[494] During this period, ECLAC followed a structuralist approach in its recommendations towards development and the construction of a LA common market planting the seeds for a program that would last

489 José del Pozo, *Historia de América Latina y del Caribe 1825-2001* (LOM Ediciones, 2da Edición, 2009) 173-74 [José del Pozo, *History of Latin America and the Caribbean 1825-2001* (LOM Editors, 2nd ed, 2009) 173-74]; Pablo Urrutía Nájera, 'La Integración Económica Centroamericana' (2011) 1 *Revista ASIES* 3, 9 [Pablo Urrutía Nájera, 'The Central American Economic Integration' (2011) 1 *Revista ASIES* 3, 9]. But see Dabéne, *The Politics of Regional Integration in Latin America'*, above n 480, 19.

490 Banco Interamericano de Desarrollo, 'Más Allá de las Fronteras: El Nuevo Regionalismo en America Latina' (Progreso Económico y Social en América Latina, Informe, 2002) 3-4. [IDB, 'Beyond Borders: New Regionalism in Latin America' Economic and Social Progress in Latin America, Report, 2002, 3-4]; Carlos Espinosa, 'The Origins of the Union of South American Nations: A Multicausal Account of South American Regionalism' in Ernesto Vivares (ed), *Exploring the New South American Regionalism (NSAR)* (Ashgate Publishing, 2014) 29, 34; Edgar Moncayo, Philippe de Lombaerde and Oscar Guinea Ibañez, 'Latin American Regionalism and the Role of the UN-ECLAC 1948-2010' in Claude Auroi and Aline Helg (eds), *Latin America 1810-2010: Dreams and Legacies* (Imperial College Press, 2012) 359, 363-367, 375; Mario A Forero Rodríguez, 'Orígenes, Problemas y Paradojas de la Integración Latinoamericana' (2010) 2 *Revista Análisis Internacional* 155, 166-68 [Mario A Forero Rodríguez, 'Origens, Problems and Paradoxes for Integration in Latin America' (2010) 2 *Revista Análisis Internacional* 155, 166-68].

491 Moncayo, de Lombaerde and Guinea Ibañez, above n 490, 360-63; Gert Rosenthal, 'Un informe crítico a los 30 años de la integración en América Latina' (1991) 113 *Nueva Sociedad* 60-65 [Gert Rosenthal, 'Critical Report after 30 years of integration in Latin America'' (1991) 113 *Nueva Sociedad* 60-65].

492 Rosenthal, above n 491, 60-65. See also Pia Riggirozzi y Diana Tussie, 'Claves para leer al regionalismo sudamericano: fortaleciendo el estado, regulando el mercado, gestionando autonomía' (2018) 3(5) *Perspectivas Revista de Ciencias Sociales*, 6-7 [Pia Riggirozzi and Diana Tussie, 'Clues to read South American regionalism: strengthening the state, regulating the market and managing autonomy' (2018) 3 (5) *Perspectivas Revista de Ciencias Sociales* 6-7].

493 Dabène, above n 225, 18; Rosenthal, above n 491, 61.

494 Moncayo, de Lombaerde and Guinea Ibañez, above n 490, 362; Victor Bulmer-Thomas, 'Debate: Regional Integration in Latin America and the Caribbean' (2001) 20 (3) *Bulleting of Latin American Research* 360, 360.

from the late 1950s to the early 1970s.[495] Some authors also refer to this wave as 'old regionalism' in LA.[496]

Three different regional institutions emerged after the 1950s pursuant to the ECLAC economic ideas and model. The first was CACM in 1958,[497] followed by LAFTA in 1960.[498] In 1965 an agreement to establish CARIFTA was signed,[499] but its implementation was delayed, and the regional institution was transformed into a more ambitious project named CARICOM in 1973.[500] All these subregional institutions had the purpose of liberalising trade among their respective members, with different levels of ambition.[501] In contrast to the LAFTA, which provided for trade liberalisation and the creation of a free trade area, the CACM pursued a common market in line with other aims concerning development, infrastructure and cooperation.[502]

However, the slow pace of liberalisation at the LAFTA and the unsolved asymmetries in larger subregional projects created discontent amongst smaller countries.[503] Six of

495 ECLAC, *The Latin American Common Market* (United Nations Publication, 1959) 39-43; Moncayo, de Lombaerde and Guinea Ibañez, above n 490, 361. See also Dabène, 'Explaining Latin America's fourth wave of regionalism', above n 479, 7-10.

496 Bulmer-Thomas, above n 494, 360-369. But see Dabène, 'Explaining Latin America's fourth wave of regionalism' above n 479, 28.

497 *Multilateral Treaty on Free Trade and Central American Economic Integration*, signed 10 June 1958, 454 UNTS 47 (entered into force 2 June 1959) and The *General Treaty on Central American Economic Integration*, signed 13 December 1960, 455 UNTS 3 (entered into force 3 June 1961). However, an agreement to enhance cooperation and integration in the Central American region preceded these two agreements. It was the *Charter of the Organization of Central American States*, signed 14 October 1951, 122 UNTS 3 (entered into force 18 August 1955). The Charter of the Organization of Central American States (ODECA by its acronym in Spanish) was later amended by a Second Charter signed in 1962.

498 *Treaty of Montevideo*, signed 18 February 1960, 1484 UNTS 223 (entered into force 1 June 1961). This agreement was succeeded in 1980 by a new treaty creating The Latin American Integration Association (LAIA).

499 *Trade and Commerce Agreement Establishing the Caribbean Free Trade Association*, signed 15 December 1965, 772 UNTS (entered into force 1 May 1968). See Victor Bulmer-Thomas, *The Economic History of the Caribbean since the Napoleonic War* (Cambridge University Press, 2012) 379.

500 *Treaty Establishing the Caribbean Community*, signed 4 July 1973, 12 ILM 1033 (entered into force 1 August 1973). See Francesco Seatzu, 'The Caribbean Community' in Marco Odello and Francesco Seatzu (eds), *Latin American and Caribbean International Institutional Law* (TMC Asser Press, 2015) 219, 221.

501 Dabéne, *The Politics of Regional Integration in Latin America'*, above n 480, 18; Manuel Rodríguez Cuadros, 'El Nuevo Regionalismo Latinoamericano y la Comunidad Andina: Convergencias y Espacios de Acción Conjunta' (Documentos Informativos No SG/di 996 E, Secretaría General de la Comunidad Andina, 16 de abril de 2013) 1 [Manuel Rodríguez Cuadros, 'The New Latin American Regionalism and the Andean Community: Convergence and Spaces for Common Action' (Informative Documents No SG/di 996 E, Andean Community General Secretariat, 16 April 2013) 1]; Seatzu, The Caribbean Community' above n 500, 221.

502 *Multilateral Treaty on Free Trade and Central American Economic Integration*, signed 10 June 1958, 454 UNTS 47 (entered into force 2 June 1959) and the *General Treaty on Central American Economic Integration*, signed 13 December 1960, 455 UNTS 3 (entered into force 3 June 1961) art 1, 4. See Urrutía Nájera, above n 489, 12-5.

503 Tussie, above n 482, 174; Dabéne, *The Politics of Regional Integration in Latin America',* above n 480, 18; Rodríguez Cuadros, above n 501, 1; See Miguel S Wionczek, 'The Rise and the Decline of Latin American Economic Integration' (1970) 9 (1) *Journal of Common Market Studies* 49, 64. See Ruben Antonio Barbosa, 'Diez Años de ALADI; Lecciones y Perspectivas' (1990) (Septiembre) *Integración Latinoamericana* 24 [Ruben Antonio Barbosa, 'Ten Years of LAIA: Lessons and Prospects' (1990) (September) *Integración Latinoamericana* 24].

the LAFTA members joined forces to create the Andean Pact in 1969,[504] with the aspiration of advancing a LA common market in the long run, but mainly reacting to give a voice to smaller players of the LAFTA agreement, which perceived that only big players were benefitting from trade liberalisation.[505] Compared to other attempts, the model envisaged was highly institutionalised and resembled the basic institutional architecture of the ECC. In its origins, the subregional group followed the ECLAC model of import substitution and intra-regional liberalisation, coupled with high extra-regional protections and regional industrialisation planning.[506]

CACM was the only regional institution relatively successful in helping to boost economic growth, industrialisation and intraregional exports of the Central American countries.[507] Despite bilateral conflicts between members that led to the withdrawal of Honduras in the 1970s,[508] the CACM made significant progress.[509] By 1967, 90 per cent of the traded goods in the region was subjected to the Common External Tariff, while 95 per cent were traded free of duties.[510] The region was also able to implement other taxation measures and incentives to promote investment in the industry. The region raised the levels of intraregional trade to a level of 25 per cent by 1980.[511] However, the implementation of the ECLAC's views on industrialisation planning was incomplete as the sub-region faced external pressures by the US to implement a competing model based on exports and free trade.[512]

504 *Agreement on Andean Subregional Integration (Cartagena Agreement)*, signed 26 May 1969, 8 ILM 910 (entered into force 16 October 1969). Bolivia, Chile Colombia, Ecuador and Peru created the Andean Pact, Venezuela joined the agreement in 1973 and Chile withdrew from it in 1976 under Augusto Pinochet's regime.

505 Ibid. Espinosa, above n 490, 35; Dabéne, *The Politics of Regional Integration in Latin America',* above n 480, 18. But see Oliver Dabéne, 'Consistency and Resilience through Cycles of Repoliticization' in Pia Riggirozzi and Diana Tussie, *The Rise of Post-Hegemonic Regionalism*, (Springer Science & Business Media, 2012) 41, 49.

506 ECLAC, above n 495, 13-22; Moncayo, de Lombaerde and Guinea Ibañez, above n 490, 362-63; Germánico Salgado Peñaherrera, *El Grupo Andino de Hoy; Eslabón hacia la Integración Suramericana* (Universidad Simón Bolivar del Ecuador, 1995) 3-5 < http://www.comunidadandina.org/bda/docs/EC-INT-0001.pdf> [Salgado Peñaherrera, Germánico, The Andean Group Today: Link towards South American Integration (University Simón Bolivar of Ecuador, 1995) 3-5 < http://www.comunidadandina.org/bda/docs/EC-INT-0001.pdf>.

507 Jose Antonio Sanahuja, 'Regionalismo post-liberal y multilateralismo en Sudamérica: El caso de UNASUR' en Andres Serbin, Laneydi Martínez y Harold Ramanzini (eds), 'El regionalismo "Post-liberal" en América Latina y el Caribe: Nuevos actores, nuevos temas, nuevos desafíos' (2012) 9 *Anuario de Integración* 19, 24 [Jose Antonio Sanahuja, '"Post-Liberal Regionalism" and Multilateralism in South America: The Case of UNASUR' in Andres Serbin, Laneydi Martínez y Harold Ramanzini (eds), '"Post-liberal" Regionalism in Latin America and the Caribbean: New Actors, New Topics, New Challenges" (2012) 9 *Anuario de Integración* 19, 24].

508 Gerardo López Servantes, 'El Mercado Común Centroamericano' (2012) 22 *Mediterráneo Económico,* 261, 265 [Gerardo López Servantes, 'Central American Common Market' (2012) 22 *Mediterráneo Económico* 261, 265]; Victor Bulmer-Thomas, 'El Mercado Común Centroamericano: del Regionalismo Cerrado al Regionalismo Abierto' en Victor Bulmer-Thomas (ed), '*Integración Regional en Centroamerica*' (FLACSO, 1998) 21, 27 [Victor Bulmer-Thomas, 'Central American Common Market: From Closed Regionalism to Open Regionalism in Victor Bulmer-Thomas (ed), '*Regional Integration in Central America'* (FLACSO, 1998) 21, 27].

509 Sanahuja, above n 507, 23-4.

510 Bulmer-Thomas, 'Central American Common Market', above n 508, 24.

511 Moncayo, de Lombaerde and Guinea Ibañez, above n 490, 367.

512 Dabène, 'Explaining Latin America's fourth wave of regionalism', above n 479, 10; See also Dabéne, 'Consistency and Resilience' above n 505, 46-7.

This model on closed regionalism started to lose momentum at the end of the 1960s. The import substitution strategy proved to be ineffective as a general scheme to foster endogenous country development, export diversification, economic growth and technological capabilities over 20 years.[513] Many structural economic issues of the countries such as complex tariff patterns for consumer goods and heterogeneity in development levels did not allow for the ECLAC approach to be fully implemented.[514]

SELA was created during the 1970s to promote the process of regional integration and to develop common vies and economic strategies, with a modest approach on commitments regarding free trade.[515] This regional intergovernmental body subsists today as a forum for consultation among Caribbean, Central, and South American states.

The weakening of the closed regionalism model was soon paired with a deadlock in the integration process attributed to multiple domestic, regional and international factors. From the early 1970s, LA countries experience domestic political changes such as in the case of Chile and also Bolivia, Colombia and Peru. These changes lead governments to shift their preferences towards trade liberalisation and export promotion. Changes in the international context also included the end of the Bretton Woods system and the oils shocks from 1973 and 1979.[516] The debt crisis for LA countries in 1982 served as the critical juncture, marking the end of a paradigm on national development.

The literature identifies a transitional stage in regional integration in LA. Some authors refer to it as the revisionist phase of the regionalism projects where the unfulfilled timelines and goals of the regional institutions came into question.[517] During this time, LAFTA loosened its objectives and approach and substituted with LAIA in 1980.

The Andean Pact encountered a predicament between 1983 and 1988. Disagreements on the negotiations over the common external tariff and the slow pace of other negotiations motivated this crisis.[518] Later, border hostilities between Ecuador and Peru and the coup in Bolivia affected intraregional trade, contributing to the stagnation of the Andean Pact during the 1980s. In 1987, the organisation also underwent readjustments through the Quito Protocol to introduce flexibilities on policy harmonisation and other areas.[519]

C *The Second Wave: Open Regionalism*

The early 1990s saw the birth of a new program for regionalism. This shift was the result of multiple factors. At the international level, the end of the Cold War allowed for the US hegemony and the dissemination of the neoliberal program instrumentalised through the Washington Consensus. At the domestic level, governments identified open

513 Moncayo, de Lombaerde and Guinea Ibañez, above n 490, 367.
514 Ibid 365.
515 *Panama Convention Establishing the Latin American Economic System*, signed 17 October 1975, 15 ILM 1976 (entered into force 7 June 1976).
516 Dabène, 'Explaining Latin America's fourth wave of regionalism', above n 479, 11.
517 Rosenthal, above n 491, 60-2. See also Dabène, 'Explaining Latin America's fourth wave of regionalism', above n 479, 23.
518 Salgado Peñaherrera, above n 506, 6-7.
519 Dabéne, 'Consistency and Resilience' above n 505, 51.

markets, deregulation, privatisation of publicly owned companies and fiscal austerity as the mandatory formula for LA countries in facing the debt crisis.[520] Thus, the changes in regional plans and strategies also arose from a series of internal structural reforms within LA states.[521]

The new outward economic model of national development also nurtured the second wave of regionalism, named open regionalism. This second wave of regionalism modified intra-regional and inter-regional relations, emphasising the need to develop strategies to compete in global markets. The model represented an effort to reconcile preferential trade agreements and multilateral trade liberalisation.[522] Under this renewed approach integration was instrumental for the insertion of LA countries in the global economy.[523]

Open regionalism was an economic-oriented approach with a primary focus on trade and investment relations. This approach to regionalism reinforced the need for export growth, trade liberalisation and foreign investment promotion to pursue economic development.[524] Economic and market integration continued to be the driving force from which social equity was expected to emanate. Under its umbrella, non-state actors, principally private firms, had an important role to play.[525]

At the international level, the consolidation of the EU with the signing of the Treaty of Maastricht provided a fresh stage to develop new projects of regionalism and to revive the projects that stagnated during the debt crisis. In 1991, the CACM made significant adjustments in its formal institutional architecture giving birth to SICA.[526] In the Andean Pact measures to reduce trade barriers and promote trade liberalisation date back to 1989. In 1991, the Caracas Declaration of the Andean Pact provided for the free repatriation of profits by foreign investors. A more systemic readjustment of the Andean Pact took place in 1996 when it was renamed CAN with an amending protocol.[527] The organisation was framed as the Andean Integration System, and

520 Briceño Ruiz, above n 20, 68; Gian Luca Gardini, *Latin America in the 21st Century: Nations, Regionalism, Globalization* (Gemma Brown, Zed Books, 2012) [trans of: *L'America Latina del XXI Secolo* (first published 2009)] 57; Lincoln Bizzozero, 'América Latina a Inicios de la Segunda Década del Siglo XXI: Entre Regionalismo Estratégico y la Regionalización Fragmentada' (2011) *Revista Brasilera de Política Internacional* 29 [Lincoln Bizzozero, 'Latin America at the Beginning of the Second Decade of the 21st Century: Between the Strategic Regionalism and the Fragmented Regionalisation' (2011) *Brazilian Journal of International Politics* 29].

521 IDB, above n 490, 1; Mikio Kuwayama, 'Open Regionalism in Asia Pacific and Latin America: A Survey of the Literature' (CEPAL, Serie Comercio Internacional N 4, ECLAC, December 1999) 18.

522 Andrés Malamud, 'Theories of Regional Integration and the Origins of MERCOSUR' in Marcílio Toscano Franca Filho, Lucas Lixinski and Maria Belén Olmos Giupponi (eds), *The Law of MERCOSUR* (Oxford Hart Publishing, 2010) 9, 9.

523 IDB, above n 521, 1.

524 Ibid 376-77. See also Riggirozzi and Tussie, above n 492, 6, 8.

525 ECLAC, 'Open Regionalism in Latin America and the Caribbean: Economic Integration as a Contribution to Changing Production Patterns with Social Equality' (LC/G.1801/Rev.1-P, United Nations, 1994) 9-10 < http://repositorio.cepal.org/bitstream/handle/11362/2140/S9260981_en.pdf?sequence=2 >.

526 See *Tegucigalpa Protocol to the Charter of the Organization of Central American States*, signed 13 December 1991, 1695 UNTS 382 (entered into force 23 July 1992) (*'Tegucigalpa Protocol'*).

527 *Protocolo Modificatorio del Acuerdo de Integración Subregional Andino*, firmado el 10 de Marzo de 1996, (entró en vigencia el 30 de diciembre de 1997) art 6 < http://www.sice.oas.org/trade/junac/carta_ag/Trujillo.asp > [*Amending Protocol to the Andean*

members made institutional modifications. This path was also followed by SICA, which also made further institutional adjustments in 1997. In 1989, the CARICOM adopted the Grand Anse Declaration confirming the aim of establishing a single market and economy and defining, for the first time, deadlines and a work program to be completed by 1993.[528]

Equally important was the establishment of MERCOSUR,[529] under the premises and principles of the neoliberalism and the open regionalism programs. At the domestic level Argentina, Brazil and Uruguay elected presidents with a trade-centred view on integration, translating these views into the new project. In 1991, Brazil, Argentina, Uruguay and Paraguay established MERCOSUR. Despite having strong economic foundations, some authors also point to political factors as contributing conditions for the surge of MERCOSUR,[530] such as the recovery of democratic regimes in Argentina and Brazil.[531]

ECLAC endorsed the new model of regionalism and made important contributions to the conceptualisation of open regionalism in LA.[532] ECLAC conceptualised two types of integration: one taking place under formal agreements and one building upon de facto, market-driven economic interdependence, enhanced by firms. Openness was meant to draw upon two different meanings: liberalisation and deregulation, and non-exclusive membership.[533]

Another important feature marking the landing of open regionalism was NAFTA,[534] signed between Mexico, Canada and the US. This PTA epitomises the idea of trade liberalisation.[535] NAFTA would later play an important role in setting the standard on issues covered in preferential trade agreements in the region,[536]along with marking the beginning of North-South PTAs.[537] In addition, Colombia, Venezuela and Mexico embarked on a PTA known as the G3. By 1999, LA countries had signed 41 ECAs among them; most of them were bilateral.[538]

In the meantime, the US enhanced its efforts to achieve trade liberalisation by launching FTAA in 1994, which was preceded by the 1990 Enterprise of the Americas. In the

Subregional Integration Agreement, signed 10 March 1996, (entered into force 30 December 1997) art 6 < http://www.sice.oas.org/trade/junac/carta_ag/Trujillo.asp >].

528 Anthony Payne, *The Political History of CARICOM* (Ian Randle, 2008) 265.

529 *Treaty Establishing a Common Market between the Republic of Argentina, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay* , signed 26 March 1991, 30 ILM1041 (entered into force in 29 November 1991); Espinosa, above n 490, 36.

530 Malamud, 'Theories of Regional Integration', above n 522, 24.

531 Briceño Ruiz, above n 20, 75; Dabéne, 'Consistency and Resilience' above n 505, 52. But see Malamud, 'Theories of Regional Integration', above n 522, 23.

532 ECLAC, 'Open Regionalism in Latin America and the Caribbean' above n 525; Kuwayama, above n 521, 9. See below Ch 8, Part (II) (A) 1.

533 Kuwayama, above n 521, 8. See below Ch 8, Part II (A) (1).

534 *Contra* Ross Garnaut, 'Open Regionalism: Its Analytic Basis and Relevance to the International System' (1994) 5(2) *Journal of Asian Economics* 273, 273, 290.

535 See Philippe De Lombaerde and Luis Jorge Garay, 'The New Regionalism in Latin America and the Role of the United States' (Background Paper 2006, OBREAL/EULARO, April 2006) 12; Gardini, *Latin America in the 21st Century*', above n 520, 71; Fawcett, above n 488, 9. See also Susanne Gratius, above n 49, 174-76.

536 Dabène, 'Explaining Latin America's fourth wave of regionalism', above n 479, 14.

537 De Lombaerde and Garay, above n 535, 16.

538 Kuwayama, above n 521, 11.

political climate of this period, the heads of state of most LA countries received the idea well and committed to finalising negotiation of the FTAA by 2005.[539] Although economic in character, Espinosa stresses the context in which FTAA negotiations took place, characterised by the US attempts to impose its hegemony on security and political governance in the entire region. [540]

Attempts to reach an agreement towards liberalisation lasted almost a decade. During this time, the political environment in the region shifted towards less pro-market governments and a developmental role for the state, dampening trade liberalisation initiatives. The death of the FTAA was a major upset for the model of open regionalism. However, the US decided to change its strategy in the region by negotiating bilateral PTAs and entering negotiations with other subregional groups such as the Andean Community and the Central American countries. LA states in the meantime started a race to be part of those deals.[541]

The EU followed a similar path, starting bilateral negotiations of PTAs with Mexico and Chile during the late 1990s, which entered into force in July 2000 and February 2003, respectively. Negotiations with the subregional groups including MERCOSUR,[542] CAN,[543] and Central American countries[544] were also launched but proved very difficult to succeed during the late 1990s and early 2000s.

D *The Third Wave: Post-Liberal Regionalism*

By the end of the 1990s, the poor results of the neoliberal program in terms of social distribution and welfare led to its crisis at the national level. This outcome force governments to resort to new models of national governance, reoriented towards social development. The scenario harvested the resurrection of nationalist ideologies and the rejection of the US interference in the region.[545] In the aforementioned context, new regional institutions started to emerge in response to the social, political and the

539 De Lombaerde and Garay, above n 535, 7-8.

540 Espinosa, above n 490, 37.

541 See Richard Baldwin, 'The Causes of Regionalism' (1997) 20 (7) *The World Economy* 867, 880-81, 884.

542 European Comission, *Countries and Regions: MERCOSUR* (30 October 2014) European Comission <http://ec.europa.eu/trade/policy/countries-and-regions/regions/mercosur/>; Organización de Estados Americanos, *MERCOSUR-Unión Europea: Antecedentes y Negociaciones*, Sistema de Información Sobre Comercio Exterior <http://www.sice.oas.org/TPD/MER_EU/MER_EU_s.asp> [Organization of American States, *MERCOSUR-European Union/ Background and Negociations*, <http://www.sice.oas.org/TPD/MER_EU/MER_EU_s.asp>].

543 European Comission, *Countries and Regions: Andean Community* (4 March 2015) European Comission <http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/>; Organización de Estados Americanos, *Países Andinos-Unión Europea/Antecedentes y Negociaciones* Sistema de Información de Comercio Exterior < http://www.sice.oas.org/TPD/AND_EU/AND_EU_s.ASP > [Organization of American States, *Andean Countries-European Union: Background and Negotiations* Foreign Trade Information System < http://www.sice.oas.org/TPD/AND_EU/AND_EU_s.ASP >].

544 Organization of American States, *Central America-European Union: Background and Negotiations* Foreign Trade Information System < http://www.sice.oas.org/TPD/CACM_EU/CACM_EU_e.ASP >.

545 Pia Riggirozzi, 'Region, Regionness and Regionalism in Latin America: Towards a New Synthesis' (Working Paper No 130, Latin American Trade Network, April 2010) 6; Riggirozzi and Tussie, above n 492, 11.

(perceived) ideational limitations of open regionalism marking the beginning of an ideational shift.[546] This new wave of regionalism is framed as post-liberal,[547] or post-hegemonic regionalism.[548] These different conceptualisations refer to the reactionary nature and opposition of these regional institutions to the neoliberal model of regionalism and development in place at the time.

The move of the early 2000s towards left wing, centre-left governments shifted temporarily, not only for the priorities of national governments but also for the regional agendas.[549] Post-liberal regionalism represents an attempt to move away from the traditional focus of open regionalism by putting the social agenda at the centre of the regionalism project, including social justice, inequality and poverty; reduction of asymmetries in regional development; and social legitimation of regionalism with the more active participation of non-state actors and civil society.[550]

The regional institutions that epitomise this new wave are UNASUR founded in 2008,[551] and the ALBA created in 2004. These projects claimed for more autonomous forms of regionalism in the region with new forms of leadership by Brazil and Venezuela, respectively. They presented themselves as alternative projects of regionalism, with political and ideological approaches that differ from each other in degrees.

UNASUR is a Brazilian-Led integration initiative commenced in the early 2000s that called for a new form of regionalism involving only South America, as a new geopolitical zone.[552] UNASUR pursues regionalism in far-reaching fields, focusing not only on economic integration but also welfarism and developmentalism.[553] UNASUR intends to achieve cultural, social and political integration with a focus on political dialogue, social policies, education, energy, infrastructure, finance and the environment while acknowledging political differences between the members.[554] Concerns about subregional security have been present from the start of the organisation. An important backbone of UNASUR is IIRSA that encompasses a public-private venture to develop projects related to physical infrastructure in the logistics and transport, telecommunications, and aerial sectors.

ALBA's approach to regionalism presents a more radical separation into traditional and new forms of regionalism, with a frontal attack on the US hegemony in the region.

546 Tussie, above n 482, 186.

547 Jose Antonio Sanahuja 'Del "regionalismo abierto" al "regionalism post-liberal". Crisis y cambio en la intergración regional en América Latina' (2008-2009) *7 Anuario de Integración,* 11, 24 [Jose Antonio Sanahuja, 'From "open regionalism" to "post-liberal regionalism". Crisis and change in the Latin American integration' (2008-2009) *7 Anuario de Integración,* 11, 24]. See also Sanahuja, above n 507, 22-3; Pennetta, above n 87, 80-88.

548 Pia Riggirozzi and Diana Tussie (eds), *The Rise of Post-Hegemonic Regionalism: The Case of Latin America* (Springer, 2009).

549 Bizzozero, above n 520, 29; Riggirozzi and Tussie, above n 492, 11.

550 Sanahuja, above n 507, 32-3.

551 *Union of South American Nations Constitutive Treaty*, signed 23 May 2008, I UNTS 48456 (entered into force 11 March 2011). See Sanahuja, 'From "open regionalism" to "post-liberal regionalism", above n 547, 11, 31.

552 Espinosa, above n 490, 40.

553 Ibid 47.

554 *Union of South American Nations Constitutive Treaty*, signed 23 May 2008, I UNTS 48456 (entered into force 11 March 2011), art 2.

ALBA centres around the idea of the LA and Caribbean nations rather than the states, promoting social initiatives that involve cooperation in the cultural, educational, health, financial, energy, commercial and communications fields to reduce poverty and social exclusion. ALBA focuses on the Caribbean nations as its 'influence zone'.[555] Following the conceptual separation between the two processes, some scholars consider ALBA an expression of South-South cooperation, rather than regional integration. [556]

The new political context and the dissatisfaction about the social accomplishments of neoliberal policies in the region also nurtured reforms in the 'traditional' (and open) regionalism model of MERCOSUR. The concerns over the equitable distribution of the benefits of integration and demands for the social legitimacy of the regional organisation and more representation of citizens' interests led to institutional reforms between 2002 and 2005.[557]

UNASUR has weakened in recent years as a regional actor. This decline is partly attributed to Brazil's domestic political and economic crisis that has hindered its position as leader of the organisation. Furthermore, UNASUR's role has come into question during the ongoing crisis in Venezuela where the institution has failed to agree on what measures to take on a regional level. The failure triggered the withdrawal of one of its members and the voluntary membership suspension by five of its twelve members. This critical internal juncture has left the organisation de facto inactive.

The progress of ALBA's agenda is seriously endangered. ALBA's dependency on the leadership of the late president Hugo Chavez and Venezuelan oil resources render its future uncertain, given the economic conditions and internal governance crisis that Venezuela faces. The assessment of the mechanism gives it little prospects for achieving support in the region to position itself as more than an ideological concept, the '21st Century Socialism'.[558]

CELAC complements the instances of cooperation and promotion of regionalism. CELAC comprises all 33 countries from Central and South America and the Caribbean, coming together to combine the agendas of the Rio Group and the LA and the Caribbean Summit. CELAC is an intergovernmental organisation established in 2011 to enhance regionalism and the development of the LA countries. It is another avenue for political dialogue and consensus, working on issues of social development, education, nuclear disarmament, culture, finances, environment and energy. The literature describes CELAC as an expression of multilateral or diplomatic regionalism in LA.[559]

555 Espinosa, above n 490, 40.

556 Gardini, 'Unity and Diversity', above n 480, 246; See Sanahuja, 'From "open regionalism" to "post-liberal regionalism", above n 547, 29. See also Sanahuja, above n 507, 31.

557 *Protocol on the Establishment of the MERCOSUR Parliament*, signed 9 December 2005, 2444 UNTS 172 (entered into force 24 February 2003) ('*Protocol on the MERCOSUR Parliament*').

558 Gian Luca Gardini, 'South American Regional Integration Projects: Towards a Regional Convergence Theory' (2010) 15 *International Relations* 11, 18.

559 Cintia Quiliconi and Raúl Salgado Espinoza, 'Latin American Integration: Regionalism à la Carte in a Multipolar World?' (2017) 92 *Colombia Internacional* 15-41.

III BACKGROUND FOR THE EMERGENCE OF THE PA: BALANCING THE POST-LIBERAL WAVE

During the boom of post-liberal regionalism in LA some countries undertook efforts to enhance economic relations with the Asia Pacific on a regional scale giving birth to ARCO in 2007. ARCO was an effort for a broader LA coordinated action, with a view to fostering economic relations with the Asia Pacific, under the leadership of Peruvian President Alan Garcia.[560]

The concerns of the ARCO agenda were regional political dialogue, cooperation, and convergence on economic issues. Eleven LA countries, including the current members of the PA, established the initiative.[561] In contrast to the debates and changes in regionalism approaches that were taking place in the region at the time, ARCO focused on economic and commercial issues. ARCO undertook this approach within the framework of open regionalism,[562] with a view towards the convergence of existing PTAs. Some authors argue that ARCO was motivated by the situation of the Andean Community at the time, with the withdrawal from Venezuela and the sense among its members of significant ideological divisions.[563] Despite its economic focus, ARCO advanced towards some degree of political coordination in later ministerial meetings, referring also to a commitment to democracy and the rule of law.

The presidents of the members participating in ARCO met only once in 2008. The ministers held several ministerial meetings between 2007 and 2010,[564] but it proved difficult to reach an agreement amongst the broad asymmetrical membership. There were important differences in interests and commercial policies as well as in levels of development between the members.[565] ARCO lost relevance before it could deliver positive results and consolidate any institutional architecture, [566] but its main contribution was distilling in a regionalism project those LA states that were truly committed to the development of a regionalism approach based on the ideas of open regionalism, economic openness, free markets, and democracy. [567] PA also inherited ARCO's interest to enhance relations with the Asia Pacific Region.

560 Adriana Roldán, Camilo Alberto Pérez y Maria del Mar Garza, 'Arco del Pacífico Latinomaericano y ASEAN: Oportunidades de Cooperación Birregional' (artículo presentado en el XIII Congreso Internacional de la Asociación Latinoamericana de Estudios de Asia y Africa, Bogota, 2011) 7 < http://ceaa.colmex.mx/aladaa/memoria_xiii_congreso_internacional/images/garza_roldan_perez.pdf > [Adriana Roldán, Camilo Alberto Pérez and Maria del Mar Garza, 'Pacific Rim Latinomaericano and ASEAN: Opportunities for inter-regional Cooperation (paper presented at XIII International Congress of the Latin American Association for the Studies of Asia and Africa, Bogota, 2011) 7 < http://ceaa.colmex.mx/aladaa/memoria_xiii_congreso_internacional/images/garza_roldan_perez.pdf].

561 Dade and Meacham above n 9, 2.

562 Briceño Ruiz, 'The Initiative of the Latin American Pacific Rim', above n 9, 45, 58.

563 Ibid, 50.

564 Roldán, Pérez and Garza, above n 560, 6.

565 Dorotea López y Felipe Muñoz, *El Inicio Formal de la Alianza del Pacífico* (12 Agosto 2012) ICST <http://www.ictsd.org/bridges-news/puentes/news/el-inicio-formal-de-la-alianza-del-pac%C3%ADfico> [Dorotea López y Felipe Muñoz, *Formal Beginning of the Pacific Alliance* (12 August 2012) ICST http://www.ictsd.org/bridges-news/puentes/news/el-inicio-formal-de-la-alianza-del-pac%C3%ADfico]; Abusada-Salah et al, above n 7, 11.

566 Dade and Meacham, above n 9, 3. See also Briceño Ruiz, 'The Initiative of the Latin American Pacific Rim', above n 9, 54.

567 Dade and Meacham, above n 9, 3; Briceño Ruiz, 'The Initiative of the Latin American Pacific Rim', above n 9, 52-3.

Following the tradition in LA regionalism of active presidential leadership, the Presidents of Chile, Colombia, Mexico and Peru met on 28 April 2011, upon Peru's initiative, and agreed to create the PA.[568]

IV Institutional Environment of Regional Institutions in LA

This Part explores the institutional patterns that I identify for regional institutions in LA. Section A explores the context of subregional fragmentation and cohabitation of regional institutions in LA and what it entails. Section B examines the historical, functional, and ideational aspects that regional institutions in LA have in common. Section C discusses the general pattern of resilience that characterises regional institutional in LA and the factors underpinning institutional changes in these regional institutions. Section D discusses the assessments of scholars of LA regionalism and decision-makers, about the institutional performance of these regional institutions to understand their implications for the original institutional design of the PA.

From these assessments, I maintain that negative perceptions about the performance of other regional institutions in LA triggered institutional entrepreneurs and decision-making elites to see institutional design options that are problem-based or demand-based credible at the time the PA was set up. This external institutional environment contributes to explain the institutional structures developed originally by the PA. Demand-Based institutional structures refer to a process of institution-building that responds to the day-to-day needs or the demands of specific stakeholders (eg, business or political elites) to tackle issues on a regional scale and less to long-term institutional planning. Problem-Based approaches to institution-building relates to the creation of working groups or committees to address specific problems and deliver solutions in particular areas (eg, organised crime) that may or may not align or contribute to an overarching goal of the regionalism project.

Negative perceptions about the performance of other regional institutions in LA and their central bodies also promoted the development of informal structures in the institutional design of the PA. Intergovernmentalism and presidential leadership are characteristics of LA regionalism also imprinted in the PA model.

A *Fragmentation and Cohabitation*

Regional institutions present formal characteristics from both types of regionalism: open and post-liberal regionalism. Regional institutions with different political, social, and economic perspectives coexist in LA. Post-liberal projects such as UNASUR live

568 I Presidential Summit, *Presidential Declaration on the Pacific Alliance* (28 April 2011) The Pacific Alliance, 2 < http://alianzapacifico.net/documentos/>; Ministerio de Relaciones Exteriores de Colombia, *Línea de Tiempo de la Alianza del Pacífico* < http://www.cancilleria.gov.co/sites/default/files/fotos/FEB-1/linea-de-tiempo-alianza_pacifico.pdf> [Ministry of Foreign Affairs of Colombia, Timeline of the Pacific Alliance < http://www.cancilleria.gov.co/sites/default/files/fotos/FEB-1/linea-de-tiempo-alianza_pacifico.pdf>].

in an environment crowded with North-South PTAs that still provide long-lasting policies on neoliberalism and trade liberalisation.[569]

The current landscape suggests a context of fragmentation marked by differences in ideological underpinnings and models of regionalism. In attempting to conceptualise the scenario of LA's regionalism(s) and its fragmentation, Briceño-Ruiz identifies three axes:[570] an open integration axis represented by the PA, a revisionist axis represented by MERCOSUR, and an anti-systemic axis represented by ALBA. The open integration axis follows a model that promotes free trade and PTAs as a means to integrate into the global economy.[571] The revisionist axis represents MERCOSUR's effort to go beyond the emphasis on open markets and trade issues, being the focus of its first phase, to move towards the productive and the social agenda of integration.[572] The anti-systemic axis of ALBA proposes an anti-capitalist model and distinguishes itself from the commercial view of regionalism supported by the strategy of free trade.[573]

Briceño-Ruiz's conceptualisation of the axes lies in their distinction according to the economic integration models followed within the axes. Thus, he characterises three models of economic integration. A first model is strategic regionalism, where the driver is the welfare and economic gains, and the focus is primarily on trade liberalisation and the governance of trade-related issues.[574] A second model is a productive integration, driven by an interest in economic development and a robust agenda on productive diversification and industrialisation.[575] Briceño-Ruiz characterises a third model as social integration, where the main driver is social equality, emphasising redistribution, regulatory activity to take account of social aims and impacts, and social rights.[576]

Briceño-Ruiz argues that regional institutions in LA conceptually follow one of these models of economic integration but in practice, implement hybrid models. MERCOSUR, in the revisionist axis, represents a combination of the productive and the social models. Briceño-Ruiz states that ALBA in the anti-systemic axis offers an alternative model sharing the premises of the productive and socio-economic integration models that he conceptualises.[577] Briceño-Ruiz argues that the PA currently stands on the axis of open regionalism following traits of the strategic model of

569 See, eg, *Free Trade Agreements*, Office of the United States Trade Representative, *Free Trade Agreements* < http://www.ustr.gov/trade-agreements/free-trade-agreements>. See also European Commission, *The EU's Free Trade Agreements — Where are We?* (18 June 2013) European Commission < http://europa.eu/rapid/press-release_MEMO-13-576_en.htm >.

570 Jose Briceño-Ruiz, 'Axes and models in the current scenario of regional economic integration in Latin America" (2013) 175 *Estudios Internacionales* 9-39. See also Jose Briceño-Ruiz, 'Regional dynamics and external influences in the discussions about the model of economic integration in Latin America' (RSCAS 2014/11, EUI Working Papers, European University Institute/Robert Schuman Centre for Advanced Studies, November 2014).

571 Briceño-Ruiz, 'Regional dynamics and external influences', above n 570, 3.

572 Briceño-Ruiz, 'Axes and models in the current scenario' above n 570, 16. See also Briceño-Ruiz, 'Regional dynamics and external influences', above n 570, 2.

573 Briceño-Ruiz, 'Axes and models in the current scenario' above n 570, 18, 32-3.

574 Ibid 23.

575 Briceño-Ruiz, 'Regional dynamics and external influences', above n 570, 6-7.

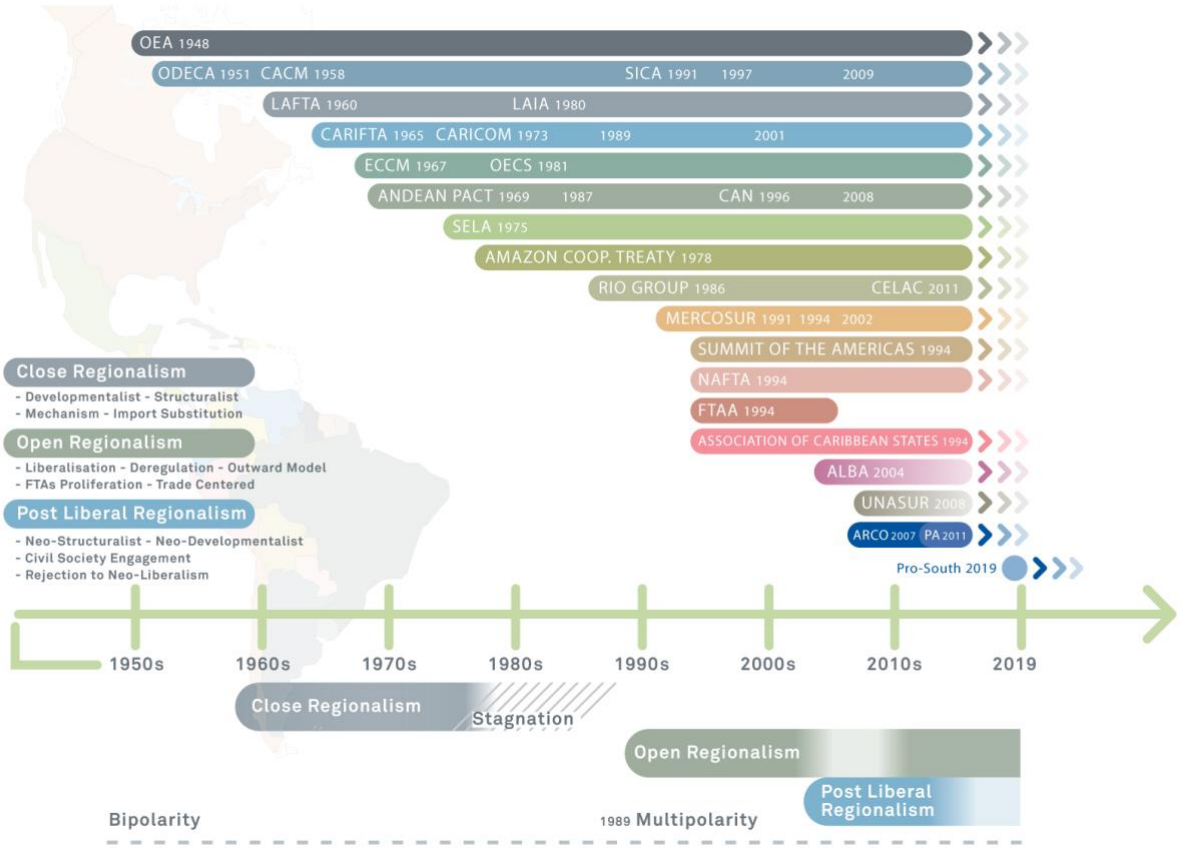
576 Ibid 5-6.

577 Briceño-Ruiz, 'Axes and models in the current scenario' above n 570, 34.

economic integration.[578] As I examine in Chapter 8,[579] the PA goes beyond traditional conceptualisations of the open regionalism from the 1990s.[580]

Figure 3 below summarises the regional institutions emerging in LA since the 1950s and the ideological underpinnings of their regionalism models. It outlines the chronology for the establishment and main reforms of regional institutions pursuing not only economic integration but also regional political dialogue and cooperation.

Figure 3 Regional Institutions in LA (1948-2019)



Source: Author's analysis based on materials in Part II

B *Commonalities*

Despite differences in the approaches and foundational ideas of the regional institutions in LA, they also have significant commonalities. First, historically LA countries share colonial heritage and battles for independence that contribute to entrenched sovereignty. Second, they share the instrumental use of regionalism as a tool to build and reaffirm national sovereignty.[581] Third, regardless of the differences in paradigms

578 Briceño-Ruiz, 'Regional dynamics and external influences', above n 570, 7.
579 See below Ch 8, Part II (A).
580 Jorge Garzón and Detlef Nolte, 'The New Minimalism in Regional Economic Governance: Cross-regionalism and the Pacific Alliance' in Pia Riggirozzi and Christopher Wylde (eds), *Handbook of South American Governance* (Routledge, 2018) 331-355.
581 Briceño Ruiz, above n 20, 147-8; Riggirozzi and Tussie, above n 492, 7-8.

and programmatic ideas, regionalism has been functional and instrumental in the pursuit of development and industrialisation by LA states.[582] Fourth, a search for economic and/or political autonomy from the regional hegemon — the US — has defined the regionalism project through either frontal confrontation or more subtle strategies of market diversification and international economic insertion..[583]

Firth, the evolution of regional institutions in LA shows a trait towards broadening the scope of the issues tackled through regionalism. Some of these institutions emerge with an economic focus and with time, expand toward multidimensional scopes. However, normative economic drivers have been and continue to be a pivotal reason for states to pursue regionalism.

Sixth, regional institutions in LA have performed a facilitating role towards the transition and consolidation of democratic regimes by ensuring that democracy is a condition for membership of the subregional institutions.[584] Regional institutions also contribute to more formalised channels of communication, regularly preventing unilateral action against other states. At the same time, heterogeneity of domestic regimes of the members has also served as a hurdle for regional institutions with dictatorial regimes, preventing progress in the pursuit of regionalism.

Seventh, two features are prevalent in the regional institutions in LA: intergovernmentalism and presidentialism. Although in the early days, there were efforts to establish supranational institutions that mimic EU institutional settings, the most prevalent model of governance maintains intergovernmental negotiations as the core mechanism to progress in the regionalism goals. Presidents of members continue to be the primary political drivers of the regionalisation process, despite multiple efforts towards the professionalisation of their operation. This outcome means that regionalism projects in LA continue to be highly politicised and replicate a prevalent feature of national governance in LA countries.

C *Institutional Resilience and Incremental Change*

Shifts in paradigms of political and economic governance have inspired the emergence of regional institutions in LA. At times paradigm shifts pushing for new models of regional institution-building have arisen from the work of regional institutional entrepreneurs such as ECLAC officials, for instance with their 1960s model of regional development and their industrialisation program based on import substitution and planning. At other times these shifts have stemmed from ideational changes at the international level, such as the surge and spread of neoliberalism that inspired MERCOSUR in the early 1990s. More recently, regional institution-building has come from the decline in the neoliberal paradigm, prompting shifts in ideas in the national/domestic sphere. During the post-hegemonic wave, national stakeholders mobilised changes in paradigms and public sentiments about social and economic development, and the role of the state from the national to the regional level.

582 Briceño Ruiz, above n 20, 149.

583 Riggirozzi and Tussie, above n 492, 9-12. See also Detlef Nolte, 'The Good, the Bad, the Ugly and the Necessary: Past, Present and Future of Latin American Regionalism' (2019) 28 (1) *Revista Uruguaya de Ciencia Política* 131, 139.

584 Acharya and Johnston, above n 20, 252.

In the case of the Andean Pact, cooperation problems, particularly distribution problems arising from LAFTA, are also explanatory variables contributing greatly to its formation.[585] External institutional environments — particularly the establishment of the EEC — sponsored the emergence of regional institutions such as the Andean Pact, CACM and LAFTA. The EEC evolution also influenced the establishment of MERCOSUR, coinciding with the negotiations of the European Maastricht Treaty.[586]

The distinction between waves of regionalism offers a practical tool to understand the ideological underpinnings behind the establishment of new regional institutions in LA over the last 60 years. This differentiation, and the paradigm shifts that underscore it, partially explains some of the institutional reforms of existing regional institutions throughout the years. However, waves of regionalism are not the only explanatory factor for institutional change and incremental adjustments within existing regional institutions over time.

Regional institutions in LA have shown their resilience despite discontent with their performance and a broad sense of stagnation,[587] confirming Pierson's claim that institutions once established tend to be resilient and stable.[588] Throughout their life, regional institutions such as CAN, LAIA, SICA and MERCOSUR have experienced progressive and incremental institutional changes. A complex web of factors explains those changes at the micro-level.

Factors such as the perception of internal institutional crisis have also motivated these progressive changes. The perception of institutional crisis has arisen from the members' behaviour or the institutions' performance. Unilateral action by state members, and more generally coordination problems, distribution problems,[589] enforcement problems, and commitment problems among members are a familiar source for internal crisis and stagnation for regional institutions in LA.[590] Changes in domestic regime-types have also caused asymmetries among members and subsequent changes in national preferences that hinder the search for a common interest at the regional level. Lack of compliance with deadlines to achieve the goals,[591] and public perception of lack of legitimacy, have contributed to the prevailing sentiment of institutional crisis.

Regional institutions in LA have also experienced substantive growth in the areas and topics of their agendas, putting pressure on existing institutional structures and demanding additional institutional arrangements to deliver results.[592] This expanding work agenda is thus another factor contributing to incremental changes in regional institutions in LA. For instance, even during the phase of closed regionalism, regional organisations such as the Andean Pact were subjected to incremental adjustments addressing areas related to industrial planning,[593] education, health, and labour. During

585 Dabéne, 'Consistency and Resilience' above n 505, 49.
586 Ibid 43.
587 Dabène, above n 225, 85.
588 See above Ch 3, Part III C (2) (a).
589 Dabéne, 'Consistency and Resilience' above n 505, 50.
590 See above Ch 3, Part III C (2) (a).
591 Nolte, above n 583, 141.
592 Dabéne, *The Politics of Regional Integration in Latin America',* above n 480, 101.
593 *Cartagena Agreement*, Ch IV.

the 1970s, several agreements (*Convenios*) were signed with the intention of expanding the scope of integration.[594]

Another example of the expansion in work agendas is the formal changes that the Andean Pact (later CAN) went through the 1987 Quito Protocol reflecting social, cultural and democratic dimensions of integration. These changes occurred at a time when the Andean Pact was following a model of open regionalism that was trade centred, although it was not an obstacle to extend its work to new areas not focused on trade. The regional institution added a series of 'complementary' mechanisms, programs and cooperation initiatives that included broader issues, such as the use and preservation of natural resources and the environment, tourism, science and technology, social development programs, and social communication programs. In 1996, during the flourishing of the neoliberal program, the Andean Pact became the Andean Community (CAN), via an amending protocol,[595] while it established further institutional structures. These changes could be characterised as a layering mechanism of institutional change in Streeck and Thelen's typology for institutional change because new disciplines, goals and areas of work are added while the existing ones remain.[596] As part of these incremental changes, many of the regional institutions have transitioned to hybrid models of regionalism,[597] with multidimensional rather than one-dimensional approaches over time.

This incremental approach to change is also true for MERCOSUR, which only three years after its launch agreed on an additional protocol establishing new bodies including an administrative Secretariat followed by a subsequent growth in the number of working groups.[598] Further adjustments in 2002[599] incorporated a mechanism for the resolution of disputes and the strengthening of the role of the Secretariat. In 2006, the MERCOSUR members created a regional parliament as a watchdog institution that tries to maintain connections with other regional bodies of MERCOSUR and civil society rather than to regulate as a lawmaking body.[600] In contrast, SICA faced a different situation with the expansion of the scope of the political goals that the organisations did not pair with changes to the institutional structure.[601]

Incremental changes in institutional design in regional institutions in LA not only confirms new institutionalisms views on institutional evolution,[602] but also contributes to forecasting that institutional changes in the long-term in the PA would take place in a similar way. Understanding the relevance of gradual changes and their several modes

594 See, eg, Andres Bello Accord from 1970, Hipólito Unanue Accord from 1971, and Simón Rodríguez Agreement from 1973.

595 *Protocolo Modificatorio del Acuerdo de Integración Subregional Andino*, firmado el 10 de Marzo de 1996, (entró en vigencia el 30 de diciembre de 1997) art 6 [*Amending Protocol to the Andean Subregional Integration Agreement*, signed 10 March 1996, (entered into force 30 December 1997) art 6].

596 See above Ch 3, Part III (C) (2) (b).

597 Tussie, above n 482, 186.

598 *Ouro Preto Protocol*.

599 *Olivos Protocol for the Resolution of Disputes in MERCOSUR*, signed 18 February 2002, 2252 UNTS 243 (entered into force 1 January 2004 < http://www.mercosur.int/msweb/portal%20intermediario/es/arquivos/destacado5_es.doc. >

600 *Protocol on the MERCOSUR Parliament*.

601 Dabéne, 'Consistency and Resilience' above n 505, 47-8.

602 See above Ch 3, Part III (C) (2) (c).

(displacement, layering upon already existing institutions, drifting, and conversion) helps me in proposing more feasible changes to its institutional structure in Chapter 9.

An account of the incremental changes in LA regional institutions also needs to consider the institutional rationalisation process that these regional institutions began in recent years. CAN,[603] SICA[604] and MERCOSUR[605] have attempted institutional adjustments framed as re-engineering in response to the perception of internal crisis/stagnation induced by endogenous institutional factors and exogenous ones. I maintain that these attempts show that regional institutions in LA have experienced incremental changes that represent not only institutional expansion and increase in the number of bodies and auxiliary structures but also contraction, institutional mergers and thematic prioritisation in search of effectiveness. These adjustments include, for instance, in the case of the CAN the plan to suppress the Andean Parliament by 2021 and the removal of several ad hoc groups and committees.[606]

The PA emerged in this context of institutional rationalisation of other regional institutions in LA initiated from 2008 onwards. This is an (external) institutional environment where the relevance of some institutional structures such as parliaments, and regional tribunals is questioned. The effectiveness of Secretariats in supporting the regionalism project is scrutinised vis a vis the budgetary costs that their operation represent for their members. There are calls from external consultancy experts to suppress ad hoc working groups, committees and subcommittees without clear aims and work agendas that subsist in the institutional structures despite poor or no results. I claim that this context of institutional rationalisation influenced the way institutional entrepreneurs and decision-makers design the PA. In particular, the environment prevented them from seeing some of these structures necessary to pursue the aims of

603 See Comunidad Andina, Decisión 792 de 2013, *Implementación de la Reingeniería del Sistema Andino de Integración* < http://www.sice.oas.org/Trade/Junac/Decisiones/DEC792s.pdf> [Andean Community, Decision 792 from 2013, *Implementation of the Reengineering in the Andean Integration System* < http://www.sice.oas.org/Trade/Junac/Decisiones/DEC792s.pdf>.

604 See *Cumbre Extraordinaria de Jefes de Estado y de Gobierno de los Países de la Integración Centroamericana para el Relanzamiento del Proceso de Integración Centroamericana: Declaración Conjunta* (20 de julio de 2010) < https://www.sica.int/integracion/index.aspx?Idm=1> [*Extraordinary Summit of the Heads of State and Government from the Countries of the Central American Integration System for the Relaunching of the Central American Integration Process: Joint Declaration* (20 July 2010) < https://www.sica.int/integracion/index.aspx?Idm=1>]. See also Carlos Ernesto Salazar Grande, *El Protocolo de Tegucigalpa: Tratado Marco del Sistema de la Integración Centroamericana* (Editorial Orbi.iure, 2015) 184 [Carlos Ernesto Salazar Grande, *The Tegicigalpa Protocol: Framework Treaty for the Central American Integration System* (Editorial Orbi.iure, 2015) 184].

605 MERCOSUR, CMC/DEC No 12/12, *Programa de Trabajo* < https://www.mercosur.int/documentos-y-normativa/normativa/ >[MERCOSUR, CMC/DEC No 36/10, *Working Program* < https://www.mercosur.int/documentos-y-normativa/normativa/ >] and MERCOSUR, CMC/DEC No 36/10, *Estructura del Grupo del Mercado Común y Tipología de sus Órganos Independientes* < https://www.mercosur.int/documentos-y-normativa/normativa/ > [Mercosur, CMC/DEC No 12/12, *Structure of the Common Market Group and Independent Bodies Typology* < https://www.mercosur.int/documentos-y-normativa/normativa/ >]. See, eg, Gerardo Caetano (coord), *La reforma institutional del Mercosur: Del diagnóstico a las propuestas* (Ediciones Trilce, 2009) [Gerardo Caetano (coord), *The institutional reform of Mercosur: From the diagnosis to the proposals* (Ediciones Trilce, 2009)].

606 See, eg, Cancillería de Colombia y Ministerio de Comercio, Industria y Turismo, (Abril 2017) 7-8 <http://www.tlc.gov.co/loader.php?lServicio=Documentos&lFuncion=verPdf&id=81198&name=INFORME_DE_GESTION_PPT_CAN_COLOMBIA_2016-2017.pdf&prefijo=file>.n13>.

this regionalism project and excluded gran-design approaches to institutional development.

D *(Perceived) Performance of Regional Institutions: Implications for the PA*

This Part surveys the academic and non-academic literature on LA regionalism regarding the performance of regional institutions in LA. I claim that the perceived poor performance has had an impact on the options that policymakers and institutional entrepreneurs of the PA perceive available for institutional design, even when I disagree with the reductionist binary assessments of success and failure. [607]

I argue that these appraisals contribute to shaping the framing of ideas that underscore institutional design outcomes in the PA. Following the study of these negative perceptions about the performance of other regional institutions in LA, I maintain that these perceptions ultimately promoted an institutional design for the PA that is problem-based or demand-based. Institutional entrepreneurs leaned towards this design as a starting point for a new regionalism project because it was more credible than the previous models attempted through other regional institutions in LA.

Current assessments for regional institutional performance in LA follow three approaches. First, some assessments take the EU as a yardstick for institutional development. Second, some appraisals consider the gap between the formal objectives of creating common markets against their achievements on the ground, [608] from the perspective of traditional conceptualisations of economic integration in Balassa's typology.[609] Third, some authors examine the levels of economic interdependence and intra-regional trade among the members of particular institutions concluding that these levels are significantly lower than in regional institutions in other parts of the world.[610] Assessments based on these three benchmarks present a pervasive negative perception about the performance of regional institutions in LA.

At the institutional level, one of the main concerns regarding regional institutions in LA centres on the strong dependency on presidential leadership for decision-making.[611]

607 Riggirozzi and Tussie, above n 492, 20.

608 Diana Tussie, 'Requiem, or a New Pathway for Integration?' in Josette Altmann y Francisco Rojas Aravena (eds), *Paradoxes of the Integration in Latin America and the Caribbean* (Fundación Carolina and Siglo XXI, 2008) 273; Jorge Heine, 'Regional Integration and Political Cooperation in Latin America' (2012) 47 (3) *Latin American Research Review* 209; Quispe-Remón, above n 480, 259]; Gian Luca Gardini, 'Sur-realismo o 'Surrealismo?' 20 años del MERCOSUR' en Jose Briceño Ruiz, El MERCOSUR y las Complejidades de la Integración Regional (Teseo, 2011) 63 [Gian Luca Gardini, 'Sur-realism or "Surrealismo"? 20 year of MERCOSUR' in Jose Briceño Ruiz, MERCOSUR and the Complexities of Regional Integration (Teseo, 2011) 63]; Luz María De la Mora and Dora Rodríguez, 'Why is it Worth Rethinking Latin American Integration? (2011) 33 (15) *Integration and Trade Journal* 7.

609 See above Ch 3, Part II (B).

610 See, eg, Nolte, above n 583, 138.

611 Silvana Insignares Cela, 'Particularidades del proceso de integración Latinoamericano: un camino inacabado? en Eric Tremolada (ed), *Repensando la Integración y las Integraciones* (Universidad Externado de Colombia, 2013) 425 [Silvana Insignares Cela, 'Distintive Features of the Latin American Integration Process: An Unfinished Process? in Eric Tremolada Álvarez (ed) *Rethinking Integration and the Integrations* (Universidad Externado de Colombia, 2013) 425, 440]. See also Andrés Malamud, 'Presidentialism and MERCOSUR: A Hidden Cause for a Successful Experience'

The role of the presidents is either a formalised institutional rule or informal practice of regional institutions that leads to assess them as the main axis deciding the progress and often the ideological foundations guiding these regional institutions.[612] At the same time, this factor is linked to the claim of a lack of strong leadership to explain the slow progress of subregional institutions in LA.[613] The focus of the critique then seems to be the widespread presence of personalised leadership in the presidents that contrast with the lack of sustained country leadership.

The literature considers regional parliaments[614] as representing a marginal role within the regional institutions due to their lack of lawmaking powers, the absence of powers to propose legislation and lack of decision-making power over regional budgets, and limited or no monitoring capacity over regional bodies, among other factors. The academic literature, national decision-makers, some political elites, and civil society perceive regional parliaments as highly ineffective in tackling the democratic deficit of regional institutions in LA, despite this aim being the main reason for their establishment.[615] Because people do not perceive them as having a direct impact on their daily lives regional parliaments have managed to achieve reduced legitimacy among national constituents.[616]

Epistemic communities and elites perceive institutional weakness as hampering several of the regional institutions in LA. Those sharing the view that supranational institutions are preconditions for regionalism usually connect the lack of progress towards integration goals to the intergovernmental nature of many of the projects.[617] They suggest that supranational institutions are required to protect the interest of the integration project itself.[618] When regional integration develops through intergovernmental governance, the views and interests of members tend to prevail over those of the regionalism project as a whole.[619]

The literature and various stakeholders outline four institutional flaws regarding regional institutions' performance in LA: (i) difficulties in achieving policy

in Finn Laursen (ed), *Comparative Regional Integration: Theoretical Perspectives* (Ashgate Publishing Company, 2003) 53, 63-6. Cf Malamud, above n 46, 153-7.

612 Cf Closa and Casini, above n 3, 79-1.

613 Forero Rodríguez, above n 490, 174. See also Mattli, above n 242, 146,149, 160.

614 Nolte, above n 583, 142.

615 Bruno Theodoro Luciano, Karina Lilia Pasquariello Mariano y Regiane Nitsch Bressan, 'Los Parlamentos Regionales en la Integración de América del Sur: Análisis de la Percepción Popular' (2014) 17 *Revista Trimestral de Estudios Economía Latinoamericanos* 17, 1-15 [Bruno Theodoro Luciano, Karina Lilia Pasquariello Mariano and Regiane Nitsch Bressan, 'Regional Parliaments in the South American Integration: analysis from the popular perception' (2014) 17 *Revista Trimestral de Estudios Economía Latinoamericanos* 1-15].

616 Ibid. See also, Latinobarómetro Corporation, *Latinobarómetro 2013*, 5< http://www.latinobarometro.org/latContents.jsp >.

617 Fernando Rueda-Junquera, 'What can be Learnt from the European Integration Process?: Economic Integration in Europe and Latin America in Comparative Perspective' (2009) 219 *Nueva Sociedad* 60, 66; Kuwayama, above n 521, 32.

618 See, eg, Josette Altmann Borbón, 'Integration in Latin America: Crisis of the Regional Models and Absence of Certainties' in Luis Guillermo Solis y Francisco Rojas Aravena (eds*), Latin American Integration: Regional and Subregional Views* (Editorial Juricentro, 2006) 322.

619 See Malamud, 'Presidentialism and MERCOSUR' above n 611, 66-7; Gian Luca Gardini, 'Latin American Trading Blocs: between Reality and Utopia' (2011) 33 (15) *Integration and Trade Journal* 106, 107.

coordination; [620] (ii) low levels of implementation of regional rules; [621] (iii) noncompliance with the regional rules and policies, along with unilateral action by the members of subregional institutions, contrary to their legal commitments;[622] and (iv) deficiency or absence of dispute settlement mechanisms.[623] Epistemic communities (eg academics) claim that the institutional design of dispute settlement bodies in most regional organisations in terms of autonomy, attributes, procedures and sanctions gives them limited scope to provide effective solutions to the disputes arising between members.[624]

Thus, negative perceptions of key stakeholders about the performance of other regional institutions in LA have established an external environment for the institutional entrepreneurs of the PA in proposing its institutional architecture. Decision-Makers are thus inclined to adopt an institutional model that differs from regional institutions in LA that stakeholders perceived as low achievers.

Negative perceptions about the performance of other regional institutions have constrained and limited the options these actors see acceptable, credible, feasible and legitimate in designing the PA institutional framework.[625] Perceived poor results from regional parliaments in legitimising the integration projects, the inability of regional tribunals to enforce regional regulations and solve disputes among members through judicial channels, and the limited capacity of Secretariats to ensure implementation of regulations and development of the integration agenda contributes to dismiss these structures as credible or necessary in the success of a new regionalism project such as the PA. Negative perceptions about the performance of these formalised structures created an environment where more informal institutional structures are seen financially more appealing than formal structures that require stable dedicated budgets to operate. This is particularly the case when previous experiences of regional institution-building have created the perception among members that the costs of those formal structures outweigh their benefits and outcomes. Based on this background, institutional entrepreneurs and decision-makers in the PA members took a cautious approach to institution-building based on informal structures.[626]

620 Mattli, above n 242, 159-1.

621 See MERCOSUR, CMC/DEC No 20/02, *Perfeccionamiento del Sistema de Incorporación de la Normativa Mercosur al Ordenamiento Jurídico de los Estados Partes* < https://www.mercosur.int/documentos-y-normativa/normativa/ > [MERCOSUR, CMC/DEC No 20/02, *Improvements to the System for Incorporating MERCOSUR Regulations into the Legal Order of the State Parties* < https://www.mercosur.int/documentos-y-normativa/normativa/ >] Preamble. See also Gratius above n 49, 174-76.

622 Francisco Rojas Aravena, Josette Altmann Borbón y Tatiana Beirute Brealey, 'Integración Política; un Cambio hacia la Integración Latinoamericana' en Josette Altmann Borbón (ed), *América Latina; Caminos de la Integración Regional* (FLACSO, 2012) 11, 16-7 [Francisco Rojas Aravena, Josette Altmann Borbón and Tatiana Beirute Brealey, 'Political Integration; a Change Towards Latin American Integration' in Josette Altmann Borbón (ed), *Latin America; Roads to Regional Integration* (FLACSO, 2012) 11, 16-7]. See also Nolte, above n 583, 141.

623 Sanahuja, above n 507, 28.

624 Francisco Rojas Aravena y Josette Altmann, 'Multilateralismo e Integración en América Latin y el Caribe' en Josette Altmann and Francisco Rojas Aravena (eds), *Multilateralismo e Integracion en América Latina: Paradojas de la Integración* (FLACSO, 2006) 7, 29 [Francisco Rojas Aravena and Josette Altmann, 'Multilateralism and Integration in Latin America and the Caribbean' in Josette Altmann and Francisco Rojas Aravena (eds), *Multilateralism and Integration in Latin America: Paradoxes of the Integration* (FLACSO, 2006) 7, 29].

625 Campbell, *Institutional Change*, above n 392, 94-6. See also Gallego Zuñiga, above n 149, 77-0.

626 See Ch 7, Part II (A).

Informal structures represent less sunk costs in their establishment and could be dismantled with less economic and political costs than in cases where formal structures are established from the start. The option towards informal structures also makes less feasible the development of supranational structures that by default are formal, while privileging intergovernmental approaches.

The mentioned process of institutional rationalisation/re-engineering of regional institutions in LA complements this institutional environment, constraining options such as grand institutional design followed, for instance, by the Andean Pact. In contrast, I maintain that institutional entrepreneurs and decision-makers perceived institutional design options that are problem-based or demand-based more credible. However, the two main features of LA regional institutions persist in the institutional design of the PA — intergovernmentalism and presidentialism — despite criticism on their suitability to pursue integration goals.

Finally, the ideas underpinnings the PA and its primary focus on economic/commercial issues have influenced what types of actors participate in its institutional design. These ideas prioritise some kinds of constituents (eg, business community/elites) over others (eg, civil society). These ideas also contribute to deciding on institutional structures on the basis of what is acceptable to those particular constituents. [627] The programmatic implementation of these ideas gives those constituents power to influence institutional arrangements to develop for instance working groups with an economic focus.

V Conclusion: What does The Evolution of Regional Institutions in LA Mean for the PA?

The considerations about the role of ideas, the waves of regionalism, and the development of regional institutions in LA do not contradict rational design, which is based on cooperation problems and functional accounts of institutional development. The ideological considerations that this Chapter provides try to embed explanations of institution-building within historical and current contexts.[628]

From the analysis in this Chapter, it is clear that multiple factors have played and continue to play a significant role in the formation and change of regional institutions in LA. First, economic ideas and ideas on economic development are explanatory factors in the establishment of regional institutions in LA. I maintain that subsequent shifts in these ideas motivated by exogenous (eg, economic crisis) and endogenous institutional factors (eg, low compliance with formal objectives) partially explain the surge of new institutions and incremental changes in existing institutions in over 60 years of LA regionalism.

Political ideas on regional autonomy from the regional hegemon have also inspired the emergence of regional institutions in LA, such as ALBA and UNASUR. External institutional environments, particularly the evolution of the EU, served as a reference point for establishing and enlarging regional institutions in the cases of the CAN, SICA and MERCOSUR.

627 Campbell, *Institutional Change*, above n 392, 100-7.
628 Wendt, above n 380, 1021.

Contrary to what some stakeholders and academics argue,[629] this Chapter presents evidence that the PA has significant ideational underpinnings, as did regional institutions established under the post-liberal wave of regionalism and previous waves. PA institutions embraced the neoliberal economic program of regional institutions during the 90s, supporting open markets, free trade, and the need for international economic insertion. However, these institutional ideas also present new traits, which I further explore in Chapter 8.

I claim that cooperation problems such as coordination problems, distribution problems, commitment problems, and enforcement problems have been present throughout the lifespan of regional institutions in LA. Collectively, these problems have also posed challenges to the consolidation of these regional institutions. Although in most of the cases, these problems have not led to their extinction, they have triggered a sense of institutional crisis and decline.

Regional institutions in LA have endured as an expression of regionalism. This Chapter also puts forward the view that incremental changes in regional institutions are the result of the perceived internal crisis and expanding regional goals and agendas. Regional institutions have systematically tackled these two issues through institutional expansion, leading to institutional complexity. More recent incremental changes have tried alternative approaches, moving towards institutional rationalisation and thematic prioritisation. This situation is significant for the PA because it creates an external institutional environment, which I claim influenced institutional entrepreneurs and decision-makers in their design of the PA's institutional framework. This external environment made more attractive to these stakeholders options of institutional development by demand or problem-based institutional solutions.

I maintain that negative perceptions about the performance of other regional institutions in LA prevented their institutional design from acting as models in the establishment of the PA's institutional framework.[630] These perceptions constrained the options that PA decision-makers saw available at cognitive and normative levels when defining their institutional approach. Nonetheless, intergovernmentalism and presidentialism have been and continue to be prevalent features of governance for regional institutions in LA,[631] despite their limitations. These two traits are also replicated in the institutional framework of the PA, as I examine in greater detail in Chapter 5.

Chapter 4 applies some of the notions of the analytical framework — ideas and cooperation problems — put forward in Chapter 3 to explore the extent to which they have played a role in the institutional design and change of LA regional institutions.

629 See, eg, Ministerio de Relaciones Exteriores de Perú, *La Alianza del Pacífico*, Congreso de la República de Perú, 6 < http://www.congreso.gob.pe/Docs/DGP/CCEP/files/cursos/2017/files/presentacion-alianza-pac%C3%ADfico.pdf > [Ministry of Foreign Affairs of Peru, *The Pacific Alliance*, Congress of the Republic of Peru, 6 < http://www.congreso.gob.pe/Docs/DGP/CCEP/files/cursos/2017/files/presentacion-alianza-pac%C3%ADfico.pdf >].

630 See also Larry Crump, 'National Resilience through a Regional Alignment: The case of the Pacific Alliance' (Paper presented at the 25th Conference IPSA World Congress of Political Science, Brisbane, July 2018) 7.

631 Nolte, above n 583, 140.

This Chapter also explored the implications that these external institutional environments have had in the original institutional design of the PA as part of a multifactorial frame that attempts to explain institutional choices in the institutional framework of the PA.

Chapter 5 examines in more detail the implications of Chapter 4, which outlines a problem-based and demand-based approach to institution-building in the PA. Chapter 5 presents and describes the current institutional framework of the PA, comprised of the legal regime and the organisational structures. Chapter 8 relies on the findings of this Chapter regarding the ideological foundations of regional institutions in LA and the PA in particular. It addresses the role of four specific ideas — (i) open regionalism; (ii) deep integration; (iii) flexibility; and (iv) pragmatism — building upon the explanations provided here in this Chapter on open regionalism while addressing the evolution of each idea for the PA.

5 MAPPING AND CHARACTERISING THE INSTITUTIONAL FRAMEWORK OF THE PA

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I INTRODUCTION

Chapter 5 addresses one of the key questions of the thesis: what comprises the PA's institutional framework? This Chapter characterises and categorises the institutional framework of the PA, which refers to the set of rules, procedures, standard practices, and organisational structures such as bodies, committees, and working groups that support the day-to-day operation and decision making of this regional institution.[632]

Mapping and providing an account of the institutional rules and organisational structures in the PA and proposing ways to categorise them represents a meaningful contribution of the thesis and has not been conducted previously.[633] This Chapter offers a novel way to characterise the PA's institutional framework, based on the conceptual understandings that I outline in Chapter 3. The Chapter relies on a systematic review of the primary sources that the PA bodies have produced. This exercise has proved challenging due to the decentralisation of the information. The empirical analysis through interviews and secondary sources contribute to mapping an array of informal structures and practices.[634] This mapping is an input to understand the PA's institutional design.

Part II characterises the PA's legal regime, comprised by a continuum of hard-law and soft-law instruments operating at the bilateral and plurilateral levels. A multiplicity of plurilateral soft-law instruments, including trans-governmental agreements across public agencies of the four members, complement plurilateral legal agreements and pre-existing bilateral treaties. The PA's legal regime presents a low degree of legalisation because its institutional rules are predominantly non-binding rules, with a low degree of precision, and no or minimal delegation for its implementation or dispute resolution. I demonstrate that institutional rules in the PA are predominantly soft-law. Hard-Law commitments are limited to commercial matters in the establishment of a free trade area and double taxation regimes. The focus on soft-law rules confirms the relevance that PA members have given to cooperation as a building block of economic regionalism.

More than eight years since the signature of the *Framework Agreement*, and five years after the PA entered into force, there is no consolidated legal regime beyond these limited areas. Bodies such as the Council of Ministers or the Free Trade Commission having the primary responsibility to develop a legal regime for the PA have barely advanced on this task and show an intentional passiveness to do so. These bodies have not engaged in developing secondary norms, limiting their roles to regulating procedural matters, or in the case of the Council of Ministers to producing guidelines to deal with third parties.

Part III charts the decentralised organisational structures that exist in the PA. Organisational structures include treaty bodies and other informal arrangements such as committees and ad hoc working groups. The Chapter surveys how these structures emerged and operate. Part IV unveils institutional structures and practices in the PA and concludes by identifying the types of organisational structures and institutional rules prevailing in the PA.

632 See above Ch 3, Part II (C).

633 See, eg, Anne, Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609, 621.

634 Ibid 614-15, 622-24.

I argue that institutional structures within the PA emerged and continue to expand informally, despite the rhetoric against developing them. These structures encompass a web of formal and informal bodies, such as committees, subcommittees, and ad hoc working groups, more intricate than what PA governments claim it to be.[635]

Structures established this way respond either to a demand-based approach or a problem-based approach. These categories do not exclude one another. The demand based-approach to institution-building means that institutions and organisational structures are established at the request of specific interest groups such as business elites seeing the need/opportunity to deal with a topic at the regional level. The problem-based approach means that PA members decide to develop regional structures to work on problems that have a regional or national scope. A first source of the problem-based approach lies in the regional nature of the issues at hand, such as transnational organised crime, which exceeds national boundaries and demands a regional response. A second source is the domestic nature of the problem that is present individually in all four members, creating an interest to share experiences and 'good' practices in tackling these national challenges (eg, innovation gaps, national competitiveness).

The institutional arrangements also show that the ideas of flexibility and pragmatism that underpin the institutional framework have not prevented the PA from developing institutional structures, as government officials and some interest groups often claim. However, these institutions have ultimately developed in a more informal and less legalised way, providing both benefits and challenges to the PA's consolidation.

Characterising and categorising the PA's institutional framework are building blocks to comprehend the particular choices that PA members have made in its institutional framework and their implications for future changes as I subsequently explain in Chapters 7 and 8. Presenting the institutional framework is a mandatory step to explain its rationale and ideational underpinnings, which are the aims of Chapters 7 and 8.

II LEGAL REGIME: WEB OF HARD-LAW AND SOFT-LAW OF LIMITED SCOPE

This Part explores the nature of the institutional rules in the PA, their scope, and the relationship between them. The legal regime for the PA comprises pre-existing bilateral economic, commercial, and integration agreements; and plurilateral treaties between the four members. Moreover, the members have concluded a series of plurilateral and soft bilateral instruments. There are also multiple trans-governmental agreements between government agencies of the PA members.

Section A charts the bilateral treaties between the PA members prior to the establishment of the *Framework Agreement*. Section B maps the plurilateral treaties concluded within the PA outlining their scope, type of rules, and their subject matter. I examine the relationship between these two types of legal sources because they are meant to coexist to discipline the economic and non-economic relations of the PA members. I also study the soft-law nature of many of the provisions in the PA treaties.

635 See below Part III (C).

PA international agreements cover not only legally binding obligations but also an array of commitments that lack enforceability or delegated authority for their interpretation.

Sections C and D explore the subject matter and nature of the decisions of treaty bodies with the role to develop the PA's legal regime. The review of the few decisions adopted by treaty bodies shows their procedural nature and limited scope vis à vis the encompassing aim of deep integration. Procedural rules of the Free Trade Commission offer a high level of precision and obligation, and a moderate degree of delegation for its interpretation and dispute resolution. In contrast, despite having the power to develop a biding legal regime for the PA, the Council of Ministers has adopted minimal rules of a soft-law nature. This intentional passiveness of the decision-making bodies to develop a more comprehensive and binding legal regime is counterproductive for the aims of progressive liberalisation of goods, services, capital and people where higher levels of legalisation than the ones practised today are necessary. Section E locates and describes the multiple soft-law instruments produced in the context of intergovernmental cooperation and trans-governmental collaboration.

The PA's legal regime has a low degree of legalisation represented in rules that use vague and open language that tend to create political commitments rather than internationally binding obligations. They offer moderate degrees of delegation for their implementation and interpretation, particularly in administrative and executive treaty bodies. Except for the rules provided in the *Commercial Protocol*, these rules do not delegate authority in judiciary or quasi-judiciary bodies to interpret or solve disputes arising from their application, which accentuates the overall low degree of legalisation of the legal regime. I establish that institutional rules in the PA are predominantly soft-law, while hard-law commitments are limited to commercial and double taxation matters.

I demonstrate that the rules adopted by the PA members for the PA are far from being a comprehensive commercial and economic regime amongst the four members. The existing rules depict the efforts to build a free trade area[636] at the commercial level and a preference towards cooperation activities as a building block of (economic) regionalism in other areas such as education, entrepreneurship, science and innovation, and SMEs promotion. The institutional rules are only small steps towards the PA's goal of progressively liberalising the flow of goods, services, people and capital.

A *Pre-Existing Bilateral Agreements between the PA Members*

The PA attempts to build deep integration based on existing commercial agreements, through the homologation of such agreements. One of the conditions of the PA is the pre-existence of PTAs between the members. This is also a requirement for candidates wishing to join the PA, according to Article 11 (1) of the *Framework Agreement*. As I summarise in Table 6, the pre-existing agreements at the bilateral and regional levels include trade agreements, investment, and taxation agreements.

636 See above Ch 3, Part II (B).

Table 6 Pre-Existing Bilateral Agreements

	Chile	Colombia	Mexico	Peru
Chile	–	-ACE 24 1993[637] with 8 additional protocols, FTA 2009 -ARPPI 2000 (not in force) -FTA Investment Chapter 9 2009[638] - Double Taxation Avoidance A 2009[639] -Double Taxation Avoidance A	-FTA 1999[641] -Strategic Association Agreement 2006 on Political Dialogue and Cooperation[642] - FTA Investment Chapter 9 1999 -Double Taxation Avoidance A 1998[643]	-FTA 2009 (Substitutes ACE 38 1998)[644] -FTA Investment Chapter 11 -Double Taxation Avoidance A 2004[645]

637 *Agreement on Economic Complementarity for the Establishment of a Greater Economic Area between Chile and Colombia*, signed 6 December 1993, 1866 UNTS 417 (entered into force 6 December 1993) (*'Agreement on Economic Complementarity between Chile and Colombia'*).

638 *Free Trade Agreement between the Republic of Colombia and the Republic of Chile (Ninth Additional Protocol to the Economic Complementation Agreement No 24*, signed 27 November 2006 (entered into force 8 May 2009) Ch 9 (*'Free Trade Agreement between Colombia and Chile'*) < http://apw.cancilleria.gov.co/tratados/SitePages/TemasBilaterales.aspx>.

639 *Convention between the Republic of Chile and the Republic of Colombia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital*, signed 19 April 2007 (entered into force 11 December 2009) (*'Convention between Chile and Colombia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion'*)< http://apw.cancilleria.gov.co/tratados/SitePages/TemasBilaterales.aspx>.

641 *Free Trade Agreement between the Republic of Chile and the United Mexican States*, signed 17 April 1998 (entered into force 31 July 1999) (*'Free Trade Agreement between Chile and Mexico'*)< https://www.direcon.gob.cl/wp-content/uploads/2013/08/Tratado.pdf>.

642 *Strategic Association Agreement between the United Mexican States and the Republic of Chile*, signed 26 January 2006 (entered into force 21 December 2006) (*'Strategic Association Agreement between Mexico and Chile'*) < https://aplicaciones.sre.gob.mx/tratados/ARCHIVOS/CHILE-ASOC_ESTRATEGICA.pdf>.

643 *Convention between the Republic of Chile and the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital* signed 17 April 1998 (entered into force 1 January 2000) ('*Convention between Chile and Mexico for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion*').

644 *Free Trade Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile*, signed 22 August 2006 (entered into force 1 march 2009) (*'Free Trade Agreement between Peru and Chile'*) < http://www.acuerdoscomerciales.gob.pe>.

645 *Agreement between the Republic of Chile and the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital*, signed 8 June 2001 (entered into force 23 July 2003) (*'Agreement between Chile and Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion'*) < https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=7D5E >.

	Chile	Colombia	Mexico	Peru
		concerning Enterprises in Maritime and Air Navigation 1978[640]		
Colombia	-ACE 24 1993 -FTA 2009 -ARPPI 2000 not in force -FTA Investment Chapter 9 2009 -Double Taxation Avoidance A 2009 -Double Taxation Avoidance A concerning Enterprises in Maritime and Air Navigation 1978	–	-FTA 1995[646] (ACE 33) with 7 additional protocols and one amending protocol - Investment Chapter in (ACE 33) Ch XVII - Double Taxation Avoidance A 2013[647]	CAN 1969[648] and implementing decisions - Decision 291, Decision 292; ARPPI 2010 (substitutes a 1994 ARPPI)[649] -Andean Decision 578 on Double Taxation Avoidance -2005
Mexico	- FTA 1999 Strategic Association Agreement 2006 on Political	-FTA 1995 (ACE 33) with 7 additional protocols and one amending protocol	–	- Commercial Integration Agreement 2012 substituted the

640 *Convention between the Republic of Chile and the Republic of Colombia for the Avoidance of Double Taxation on Enterprises in Air and Maritime Navigation with respect to Taxes on Income and Capital*, signed 19 March 1970 (entered into force 10 February 1978) <http://apw.cancilleria.gov.co/tratados/SitePages/TemasBilaterales.aspx>.

646 *Free Trade Agreement between the United Mexican States, the Republic of Colombia and the Republic of Venezuela (ACE 33)*, signed 13 June 1994 (entered into force 1 January 1995) (*'Free Trade Agreement between Mexico, Colombia and Venezuela (ACE 33)'*) < http://apw.cancilleria.gov.co/tratados/SitePages/VerTratados.aspx?IDT=7de85973-f0b3-4818-a257-a3d2c4211d5c>.

647 *Convention between the Republic of Colombia and the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital*, signed 13 August 2009 (entered into force 11 July 2013) ('*Convention between Colombia and Mexico for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion*') <http://apw.cancilleria.gov.co/tratados/SitePages/TemasBilaterales.aspx>.

648 *Cartagena Agreement*.

649 *Agreement between the Government of the Republic of Peru and the Government of the Republic of Colombia for the Promotion and Reciprocal Protection of Investments*, signed 11 December 2007 (entered into force 30 December 2010) (*'Agreement between Peru and Colombia for the Promotion and Reciprocal Protection of Investments'*) < https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=9B42 >.

	Chile	Colombia	Mexico	Peru
	Dialogue and Cooperation -FTA Investment Chapter 9 1999 -Double Taxation Avoidance A 1998	 -Investment Chapter in (ACE 33) Ch XVII - Double Taxation Avoidance A 2013[650]		ACE 8 from 1987[651] - FTA Investment Chapter 11 -Double Taxation A 2014[652]
Peru	- FTA 2009 (substituted ACE 38 1998) - FTA Investment Chapter 11 - Double Taxation A 2004	-CAN 1969 and implementing decisions -Decision 291, Decision 292; ARPPI 2010 (substitutes a 1994 ARPPI) - Andean Decision 578 on Double Taxation Avoidance 2005	- Commercial Integration Agreement 2012 substituted the ACE 8 from 1987 - FTA Investment Chapter 11 -Double Taxation A 2014	–

Source: Author's compilation based on multiple sources, including primary sources

The PA members have not developed any standard practice regarding the status of previous bilateral agreements on economic and commercial matters. In some instances, parties to a particular agreement have decided to make incremental changes towards deeper bilateral economic relations by a mechanism of layering, through the addition of new rules comprised in additional protocols. In other instances, parties have adopted a displacement mechanism, where new rules once in force replace previous rules, leaving them without legal effect.[653] These bilateral accords comprise a complex web of agreements that are meant to coexist with the legal regime of the PA.

650 *Convention between the Republic of Colombia and the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital*, signed 13 August 2009 (entered into force 11 July 2013) ('*Convention between Colombia and Mexico for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion*') <http://apw.cancilleria.gov.co/tratados/SitePages/TemasBilaterales.aspx>.

651 *Commercial Integration Agreement between the Republic of Peru and the United Mexican States*, signed 6 April 2011 (entered into force 1 February 2012) (*'Commercial Integration Agreement between Peru and Mexico'*) < https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=C736 >.

652 *Agreement between the United Mexican States and the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, signed 27 April 2011, I-52489 (entered into force 19 February 2014) (*'Agreement between Mexico and Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion'*).

653 See, eg, *Agreement between Peru and Colombia for the Promotion and Reciprocal Protection of Investments*, art 40. See also *Free Trade Agreement between Peru and Chile*, art 1.1.2.

In contrast, the PA members have established an explicit rule that agreements adopted in the PA will neither replace nor modify economic, commercial, and integration agreements in force between the parties bilaterally, regionally or multilaterally.[654] They also acknowledge that previous agreements are the basis for the PA while endorsing the obligations and rights arising from PTAs and integration agreements between the PA members.[655] However, overlapping provisions dealing with the same subject matter create the risk of inconsistent interpretations becoming a source of conflict as economic and political relations deepen.

MFN provisions prescribe for non-discrimination, meaning that a party shall accord to the other PA members a treatment no less favourable than the one granted to any other country. Members and private actors could rely on MFN provisions when parallel agreements dealing with the same subject matter are maintained, for instance, for the treatment of investments or services liberalisation commitments. PA members have stated that a MFN treatment for goods, services, investments or persons than the treatment accorded in the *Commercial Protocol* is not a case of incompatibility between the provisions of different treaties.[656] Despite these provisions, maintaining parallel agreements dealing with the same subject could be detrimental to the legal certainty that economic operators demand when dealing intra-regionally.

B *Plurilateral Treaties: Hard-Law and Soft-Law Provisions*

This Part examines the scope and type of provisions in the four international treaties concluded by the PA members: (i) the *Framework Agreement*; (ii) the *Commercial Protocol*; (iii) the *Agreement to Homologate Double Taxation Accords;* and (iv) the *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance*. The topics these treaties deal with and their scope confirm the members' preference to build a free trade area at the commercial level and an inclination towards cooperation activities as building blocks of (economic) regionalism. The only plurilateral taxation agreement concluded in the PA has a narrow scope aiming to provide double taxation rules for retirement and pension funds.

Hard-Law and soft-law operate not as a binary but more as a continuum, resulting from the multiple combinations of attributes of legalisation (precision, obligation and delegation), as I conceptualise in Chapter 3.[657] The international treaties concluded in the context of the PA offer a rich sample of the continuum. These instruments combine hard-law provisions, particularly in the *Commercial Protocol* and soft commitments.

Soft(er)-Law provisions, as I define in Chapter 3,[658] are also a common feature in the PA treaties, identifiable in two ways. The first way is through vague language that does not create an international obligation or merely commits parties to a low threshold onus 'to enhance their efforts' or 'to endeavour to take action'. The second manner is through lack of enforceability, either because there is no authority delegated to perform the task

654 *Framework Agreement*, signed 6 July 2012 (entered into force 20 July 2015) art 8.
655 *Commercial Protocol* Preamble.
656 Ibid art 1.2.2 nn 1.
657 See above Ch 3, Part II (C).
658 See above Ch 3, Part II (C).

or because the provisions are excluded expressly from the only dispute resolution mechanism provided in the PA's institutional framework.

1 *Framework Agreement: An Incomplete Contract*

Two instruments comprise the legal basis of the Pacific Alliance: the *Framework Agreement* signed on 6 June 2012, and the *Commercial Protocol* signed on 10 February 2014.

The *Framework Agreement* establishes the PA as an area of 'regional integration' and states its objectives. The *Framework Agreement* crafts a basic institutional structure, comprising the Council of Ministers and the Pro-tempore Presidency. The agreement also refers to the GAN created during the I Presidential Summit.[659]

The treaty defines the essential requirements for membership, underlying essential institutional values of the mechanism. These values encompass respect for the rule of law, democracy and constitutional order; the separation of state powers; and the promotion and protection of human rights and fundamental freedoms.

Despite being an international treaty, the *Framework Agreement* features an incomplete contract with low levels of legalisation. The *Framework Agreement* uses rather vague and imprecise language, deals with limited areas, such as the basic organisational structure, and delegates in other bodies its implementation and interpretation.

2 *Commercial Protocol and its Amendments*

The *Commercial Protocol* regulates disciplines on market access;[660] transparency;[661] rules of origin and related procedures;[662] trade facilitation and customs cooperation;[663] sanitary and phytosanitary measures;[664] technical barriers to trade;[665] government procurement;[666] and trans-border trade in services,[667] including general provisions and specific regulations on financial services,[668] maritime services,[669] telecommunications,[670] and electronic commerce.[671] The *Commercial Protocol* also regulates investment, including provisions on dispute resolution and arbitral tribunals between a member and an investor from another member.[672]

659 *Framework Agreement* art 4, art 7.
660 *Commercial Protocol* ch 3.
661 Ibid ch 15. The *Commercial Protocol* includes commitments on transparency across the disciplines. See, eg, art 6.9; art 7.8; art 8.8; art 9.8.
662 Ibid ch 4.
663 Ibid ch 5.
664 Ibid ch 6.
665 Ibid ch 7.
666 Ibid ch 8.
667 Ibid ch 9.
668 Ibid ch 11.
669 Ibid ch 12.
670 Ibid ch 14.
671 Ibid ch 13.
672 Ibid ch 10.

The *Commercial Protocol* establishes rules on settlement of disputes between the members concerning all the matters covered in the Protocol.[673] It stipulates general and specific exceptions to the core obligations. Finally, the *Commercial Protocol* includes general provisions on interpretation and compliance, its relationship with other international agreements, and prescriptions for the administration of the Protocol, led by a Free Trade Commission. The agreement also establishes a series of committees, subcommittees and working groups to deal with the implementation of Chapters.[674]

The *Commercial Protocol* overall depicts a greater degree of legalisation than the *Framework Agreement* and the highest in the PA legal regime. The Protocol prescribes multiple rules that are largely precise, legally binding obligations, and subject them to the dispute resolution system established for this purpose.[675]

There is delegated authority in the Free Trade Commission to interpret and implement these rules[676] and also on ad hoc arbitral tribunals to interpret less precise rules. Arbitral tribunals have the authority to solve disputes that may stem from their application.[677]

The Protocol combines hard-law provisions with softer rules in the continuum of legalisation. These softer rules offer less precise language that makes them weak obligations such as 'enhance their efforts' or 'to endeavour to take action.'[678] There are provisions that despite the imprecise language are legally binding and subject to dispute settlement. Moving along the continuum the softest rules of the Protocol are those excluded from the dispute resolution system that lack an enforceability mechanism,[679] are drafted in vague terms, and do not prescribe legally binding obligations.[680]

On July 2015, the members concluded the *First Protocol Modifying the Commercial Protocol* to incorporate: (i) an additional Chapter on regulatory improvement, (ii) an annex on the elimination of the technical barriers to trade in cosmetic products, and (iii) amendments to and new provisions to the *Commercial Protocol* on telecommunication services and electronic commerce.

Following this layering practice for the incorporation of new rules, on 1 July 2016, the members signed the *Second Protocol Modifying the Additional Protocol to the Framework Agreement of the Pacific Alliance* ('*Second Protocol Modifying the Commercial Protocol'*).[681] The amendment gives to the Free Trade Commission the role of approving the annexes negotiated to deepen the disciplines provided in Chapter 7 on TBT. This amendment reduces uncertainty regarding the scope of the executive

673 Ibid ch 17.
674 Ibid art 16.2.
675 See, eg, Ibid ch 11, ch 14.
676 Ibid art 16.2 (a) (e).
677 Ibid art 17.3
678 Abbott et al, above n 261, 412.
679 *Commercial Protocol* ch 10, s C.
680 Ibid, s C, art 10.30.
681 *Segundo Protocolo Modificatorio del Protocolo Adicional al Acuerdo Marco de la Alianza del Pacífico*, suscrito 1 de julio de 2016 (entró en vigencia el 1 de abril de 2020) ('*Segundo Protocolo Modificatorio al Protocolo Comercial'*) < http://www.cancilleria.gov.co/juridicainternacional/tratados/depositarios > [Second Protocol Modifying the Additional Protocol to the Framework Agreement of the Pacific Alliance, signed 1 July 2016 (entered into force 1 April 2020) ('*Second Protocol Modifying the Commercial Protocol'*) < http://www.cancilleria.gov.co/juridicainternacional/tratados/depositarios >].

powers on the implementation of an international agreement in relation to the approval of these annexes. It makes clear that there is no need to follow the treaty approval process for each annex that parties negotiate. This amendment also plants the seed to follow this approach to deepen disciplines in other areas of the *Commercial Protocol*.

3 *Double Taxation Agreement: Treatment of Retirement and Pension Funds*

The PA members also signed an agreement in October 2017 for the homologation of the taxation treatment under the bilateral double taxation accords in force between PA members.[682] The general aim of the *Agreement to Homologate Double Taxation Accords* is to encourage investments of these types of funds across all the PA members, avoiding double taxation for income taxes. The agreement also aims to promote investments through the MILA. The *Agreement to Homologate Double Taxation Accords* modifies double taxation accords in force in relation to the taxation treatment of retirement and pension funds of the four members. The *Agreement to Homologate Double Taxation Accords*, not yet in force, provides the basic rules under which the members will tax the income of retirement and pension funds.[683] It is circumscribed to include these legal persons as fiscal residents of the members allowing them to benefit from the double taxation accords.[684]

In this agreement, the parties give to the concept of homologation, referred to in several presidential declarations, the effect of harmonising the taxation treatment of retirement and pension funds of the four members for income taxes. An aspect that this thesis considers is the variable geometry incorporated in this agreement by allowing for bilateral modifications in the bilateral accords on double taxation, in the absence of consensus between the four PA members to modify the *Agreement to Homologate Double Taxation Accords*.[685]

682 *Convención para Homologar el Tratamiento Impositivo Previsto en los Convenios para Evitar la Doble Imposición Suscritos entre los Estados Parte del Acuerdo Marco de la Alianza del Pacífico*, suscrito 14 de octubre de 2017 (no ha entrado en vigor) *('Convenio de Homologación Tributaria de Acuerdos de Doble Tributación'*) [*Agreement to Homologate the Taxation Treatment under the Accords to Avoid Double Taxation Signed between the Member States to the Framework Agreement of the Pacific Alliance*, signed 14 October 2017 (not yet in force) *('Agreement to Homologate Double Taxation Accords*')].

683 *Agreement to Homologate Double Taxation Accords* art 5-6.

684 *Gobiernos de la Alianza del Pacífico culminan negociación de acuerdo de doble tributación para fondos de pensiones: Boletín 132*, (29 Julio 2017) Ministerio de Hacienda de Colombia < http://www.minhacienda.gov.co/HomeMinhacienda/ShowProperty?nodeId=%2FOCS%2FP_MHCP_WCC-079128%2F%2FidcPrimaryFile&revision=latestreleased > [Governments from the Pacific Alliance conclude negotiations for a double taxation agreement for retirement funds: Bulletin 132, (29 July 2017) Ministry of Finance of Colombia < http://www.minhacienda.gov.co/HomeMinhacienda/ShowProperty?nodeId=%2FOCS%2FP_MHCP_WCC-079128%2F%2FidcPrimaryFile&revision=latestreleased >].

685 See below Ch 9, Part II (A).

4 *Agreement for the Establishment of the Cooperation Fund*

In May 2013, the PA members signed the *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance*.[686] The agreement aims to finance all the cooperation activities and projects within the PA. Contributions to the Fund are open not only to PA members but also to third parties.[687] The resources of the Fund will finance cooperation activities related to the environment and climate change; innovation; science and technology; micro, small and medium enterprises; and social development. Parties could agree to extend the use of these financial resources to other cooperation areas.

The agreement prescribes the basic rules for the management of the Cooperation Fund. It mandates rotation of the operative administration of the Fund every three years amongst the national agencies (ie, national cooperation agencies) of the members that each member designates. The operative administrating agency can contract on behalf of the members to use the resources of the Fund. The Working Group on Cooperation of the PA controls the management of the Fund, including approving, coordinating and supervising the implementation of the cooperation plans and activities.

Table 7 summarises the current international treaties signed within the framework of the PA and their international legal status.

Table 7 Plurilateral Treaties among PA Members

Treaty Name	International Status
Framework Agreement	In force
Commercial Protocol	In force
Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance	In force
First Protocol Modifying the Commercial Protocol	In force
Second Protocol Modifying the Commercial Protocol	In force
Agreement to Homologate Double Taxation Accords	Not yet in force

Source: Author's compilation based on multiple sources, including primary sources

C *Decisions of the Free Trade Commission: Procedural Matters*

The Free Trade Commission has issued four decisions dealing with internal administrative matters and operational processes. Table 8 summarises the decisions and their subjects.

Table 8 Free Trade Commission Decisions

Decision Number	Subject Matter	International Status
Decision No 1: Recognition of Electronically Signed Documents within the Interoperability	Trade Facilitation/Single	Signed 30 June 2016

686 *Acuerdo para el Establecimiento del Fondo de Cooperación de la Alianza del Pacífico*, suscrito 22 de mayo de 2013 (entró en vigencia el 6 de Julio de 2019) [*Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance*, signed 22 May 2013 (entered into force 6 July 2019)].

687 Ibid art III.

Decision Number	Subject Matter	International Status
Frame for the Single Windows for Foreign Trade in the Pacific Alliance	Windows for Foreign Trade	Entering into force: NIA
Decision No 2: Rules and Procedures for the Free Trade Commission	General Administration	Signed and entered into force 28 June 2017
Decision No 3: Rules and Procedures for Arbitral Tribunals regarding Chapter 17 of the Additional Protocol to the Framework Agreement of the Pacific Alliance	General Administration	Signed and entered into force 28 June 2017
Decision No 4: General Procedures for the Issuance and Reception of Certificates of Origin Electronically Issued and signed within the Interoperability Frame for the Single Windows for Foreign Trade in the Pacific Alliance	Trade Facilitation	Signed 28 June 2017 Entering into force: NIA
Decision No 5:		

Source: Author's compilation based on multiple sources

The procedural rules of the Free Trade Commission offer high precision and oblige the PA members following the clear distinction between decisions stricto sensu and recommendations.[688] They have a moderate degree of delegation for its interpretation and implementation in the Free Trade Commission as the administrative body of the *Commercial Protocol*. Delegated authority for their interpretation and application by ad hoc arbitral tribunals is limited to the relation they have with matters arising from the implementation of the *Commercial Protocol* and is subjected to the criteria outlined in the *Vienna Convention*.[689]

D *Decisions of the Council of Ministers: Procedural Matters and Informal 'Goodwill Agreements'*

The Council of Ministers has formalised only one decision, despite having met on around 22 occasions since its establishment. Decision No 1 of the Council of Ministers provides the general guidelines and procedures for becoming an associate state of the PA. The decision is in force from its signature.

There is no rule or standard practice about the type and nature of agreements among the members of the Council that will be formalised through a decision or will be kept as a guideline, declaration or mere verbal agreement between the representatives. This point is significant because the *Framework Agreement* provides that the decisions and other agreements made by the Council of Ministers constitute the legal regime of the PA.[690] There are public references to approved Rules of Procedure for this Council in 2018, although the content of these rules is not public. Thus, it is not possible to assess the nature and degree of legalisation of these rules or the status of the agreements achieved in this body.

688 Free Trade Commission, *Decision No 2: Rules and Procedures for the Free Trade Commission*, signed 28 June 2017, art 8.4.

689 *Vienna Convention*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

690 *Framework Agreement* art 6.

Table 9 summarises the formalised decisions issued by the Council of Ministers up to July 2019 and their subject. Regardless of the limited number of formalised decisions, the interview materials suggest a practice of informal 'goodwill agreements' driving the works of the Council.[691] Through informal 'goodwill agreements.' members of the Council have consented to unilaterally change or incorporate domestic regulations without legally obligating the members to do so. This practice indicates that the Council of Ministers' apathy to enlarge the legal regime with binding rules is purposive. However, this practice could risk the PA's ability to fulfil the aims of progressive liberalisation of goods, services, capital and people. These goals cannot be achieved through soft-law rules and 'goodwill agreements' alone.

Table 9 Council of Ministers' Decisions

Decision Number	Subject Matter	International Status
Decision No 1: Guidelines Applicable to Associate States of the Pacific Alliance	Relationship with Third States	Signed and entered into force 2 June 2017

E *Other Soft-Law Developments: Declarations, Guidelines and Memoranda*

This Part identifies and examines three types of soft-law instruments concluded within the PA either by the members or by their national agencies: declarations, guidelines, and memoranda. Section One surveys the scope and themes of the presidential declarations issued since the launched of the PA. It also charts multiple declarations that governmental bodies of the PA members have signed and addresses their purposes. Section Two explores the guidelines that the councils have issued and their subject matter. Section Three studies memoranda that the members have concluded and trans-governmental agreements that their national agencies have signed. I review in this Part the legal effects of this soft instruments, the practices surrounding their conclusion and their purposes.

Even though these sources do not fit into the categories provided by article 38 of the Statute of the ICJ,[692] states are increasingly using soft-law to mediate their interactions and develop interstate cooperation. Soft-Law instruments represent the bulk of the instruments developed by the PA members and are thus a significant trait of its institutional framework. These instruments evidence the primary role that PA members have given to cooperation as a keystone in building economic regionalism.

I demonstrate that most of the rules currently governing the PA are soft-law instruments with a low degree of precision, lacking legal obligations and delegation for their implementation, application or interpretation.[693] These instruments create neither obligations under international law nor international legal responsibility.[694]

691 Interview_ 27 (Bogota, Colombia, 19 October 2016).

692 *Statute of the International Court of Justice*, opened for signature 26 June 1945, UST 993 (entered into force 24 October 1945) art 38.

693 See above Ch 3, Part II C.

694 Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed, 2013) 50.

The proliferation of soft instruments is also a tangible expression of the ideas of flexibility and pragmatism that underpin the PA. Soft-Law in the PA also confirms its strong political base, despite claims that defend its non-political nature as a distinctive feature.[695] These agreements represent political rather than legal commitments.[696]

These instruments evidence a preference to engage in cooperation activities at the inter-institutional level as a means of building regionalism. From the perspective of outcomes, these soft instruments present the PA as a forum for discussion, specifically for the exchange of regulatory and policy experiences and good practices.[697] This trait challenges conventional understandings of the PA as a trade bloc entirely.[698]

1 *Presidential Declarations and Other Inter-Institutional Declarations*

A distinctive characteristic of the PA's flexible approach is the issuance of presidential declarations, which have become a regular practice to guide the PA's work agenda.

In eight years, the presidents have delivered 14 declarations, which follow a general pattern. First, these declarations recall the progress made within the year, outlining achievements and activities completed following what government officials call an 'early harvest' approach.[699] Second, these presidential declarations instruct government officials and technical groups either with general or more concrete mandates on what activities to undertake in each area.[700] The need to spell out positive results for the PA

695 See, eg, Interview_02 (Skype 12 August 2016). The interviewee states:

> 'I think it is fantastic [referring to the PA]. This is a forum that is progressing. It is not a political forum and this is a good thing. Maybe a reason for the great success of the Alliance [referring to the PA] is that it is not a political forum unlike others in the region.'

See also Interview_35 (Skype, 1 March 2017); Dade and Meacham, above n 9, 11; Eduardo Pastrana-Buelvas, Ricardo Betancur Vélez y Rafael F Castro-Alegría, 'Colombia y la Alianza del Pacífico: un proyecto regional de cara a la multipolaridad creciente' en Eduardo Pastrana-Buelvas y Hubert Gehring (eds), *Alianza del Pacífico: mitos y realidades* (Editorial Universidad Santiago de Cali, 2014) 173, 198 [Eduardo Pastrana-Buelvas, Ricardo Betancur Vélez and Rafael F Castro-Alegría, 'Colombia and the Pacific Alliance: a regional project in the face of growing multipolarity' in Eduardo Pastrana-Buelvas and Hubert Gehring (eds), *The Pacific Alliance: myths and realities* (Editorial Universidad Santiago de Cali, 2014) 173, 198] Referring to this self-image that PA members defend; EFE, *Mexico dice a Brasil que la Alianza del Pacífico "no es un foro politico" sino "pragmático"* (13 Junio 2014) < https://www.eldiario.es/politica/Mexico-Brasil-Alianza-Pacifico-pragmatico_0_270523385.html > [EFE, *Mexico tells Brazil that the Pacific Alliance is a "pragmatic" forum not "a political forum"* (13 June 2014) < https://www.eldiario.es/politica/Mexico-Brasil-Alianza-Pacifico-pragmatico_0_270523385.html >]; El Universal, *La Alianza del Pacífico prepara cumbre abierta y diálogo con Mercosur* (2014) [*El Universal, The Pacific Alliance prepares open Summit and dialogue with Mercosur* (2014)]. *Contra* Interview_ 27 (Bogota, Colombia, 19 October 2016).

696 Aust, above n 694, 28.

697 Interview_ 27 (Bogota, Colombia, 19 October 2016).

698 See, eg, Michel Levi, *La Alianza del Pacífico se Limita a lo Comercial* (29 Julio 2018) El Comercio < https://www.elcomercio.com/actualidad/michellevi-alianzadelpacifico-comercio-industria-ecuador.html> [Michel Levi, *The Pacific Alliance is Limited only to Commercial Matters* (29 July 2018) El Comercio < https://www.elcomercio.com/actualidad/michellevi-alianzadelpacifico-comercio-industria-ecuador.html>]. See also Briceño-Ruiz, 'Regional dynamics and external influences' above n 570, 14.

699 Interview_07 (Santiago, Chile, 3 September 2016).

700 Interview_35 (Skype, 1 March 2017).

explains the first component of the presidential declarations. The urgency to show results also relates to the interest in differentiating the PA from regional organisations in LA and in presenting it as a mechanism that delivers results.[701] To a large degree, the PA's ability to show results becomes the measure of its success.

However, these presidential declarations are by no means a new practice. For a long time, regional organisations such as SICA [702] and MERCOSUR [703] and other intergovernmental fora have followed a similar practice. Presidential declarations are commonly used either to give statements or present views over particular areas or states of affairs or to provide specific mandates and guidance on activities to undertake on a regional scale.

Table 10 summarises the presidential declarations resulting from the practice of regular meetings by the heads of states since the inception of the institution in 2011. These declarations have been to date the guide for the works of the PA.

Table 10 Regular Presidential Summit Declaration

Declaration Name	Date
I Presidential Summit, Lima Declaration	28 April 2011
II Presidential Summit, Merida Declaration	4 December 2011
III Presidential Summit, (Virtual Meeting)	5 March 2012
IV Presidential Summit, Paranal Declaration	6 June 2012
V Presidential Summit, Cadiz Declaration	17 November 2012
VI Presidential Summit, Santiago Declaration	27 January 2013
VII Presidential Summit, Cali Declaration	23 May 2013
VIII Presidential Summit, Cartagena Declaration	10 February 2014
IX Presidential Summit, Punta Mita Declaration	20 June 2014
X Presidential Summit, Paracas Declaration	3 July 2015
XI Presidential Summit, Puerto Varas Declaration	1 July 2016
XII Presidential Summit, Cali Declaration	20 June 2017
XIII Presidential Summit, Puerto Vallarta Declaration	24 July 2018
XIV Presidential Summit, Lima Declaration	6 July 2019

Source: Author's compilation based on multiple sources

In addition to the regular presidential declarations, the presidents and other institutions of the PA members have issued several non-binding declarations with multiple purposes. PA members have used presidential declarations to reinforce the like-

701 See above Ch 3, Part II (B) (4).

702 *Reuniones de Presidentes*, SICA < https://www.sica.int/consulta/reuniones.aspx?Idm=1&identstyle=401&ident=1&idm=1 > *Presidential Summits*, *SICA* [https://www.sica.int/consulta/reuniones.aspx?Idm=1&identstyle=401&ident=1&idm=1]

703 *Declaraciones y Decisiones Presidenciales*, MERCOSUR < http://www.mercosur.int/innovaportal/v/4506/11/innova.front/declaraciones-y-decisiones-presidenciales > [*Declarations and Decisions by the Presidents*, MERCOSUR < http://www.mercosur.int/innovaportal/v/4506/11/innova.front/declaraciones-y-decisiones-presidenciales >].

mindedness and their shared ideas. These instruments have also been used to frame cooperation arrangements between the PA members and third states. These declarations are not international agreements/treaties under international law and do not obligate the PA members internationally.

Table 11 summarises presidential declarations other than the ones produced as a result of the regular summits of the presidents, as well as other inter-institutional declarations.

Table 11 Institutional Declarations Other than Presidential Summit Declarations

Other Declarations	Date of Signature	Subject Matter	Third Party
Joint Declaration of the Pacific Alliance on Climate Change (Presidential Declaration)	10 December 2014	Climate Change	General
Joint Declaration on a Partnership between Canada and the Members of the Pacific Alliance (Ministerial Declaration)	8 June 2016	Cooperation	Canada
Joint Declaration between the State Parties to the Pacific Alliance and the Kingdom of Spain (Ministerial Declaration)	20 September 2017	Cooperation	Kingdom of Spain
Declaration between States Parties to the Pacific Alliance and the States Parties to Mercosur signatories to the Asuncion Treaty (Presidential Declaration)	24 July 2018	Cooperation	MERCOSUR
2030 Strategic Vision for the Pacific Alliance	July 2018	Strategic planning	NA
Presidential Declaration in Support of the Multilateral Trading System	6 July 2019	Global Trade	NA
Declaration on the Sustainable Management of Plastics (Presidential Declaration)	6 July 2019	Environmental Management	NA
Joint Declaration between the State Parties to the Pacific Alliance and Japan (Ministerial Declaration)	5 July 2019	Cooperation	Japan
Joint Declaration between the State Parties to the Pacific Alliance and the OECD (Ministerial Declaration)	5 July 2019	Cooperation	OECD
Joint Declaration between the State Parties to the Pacific Alliance and the Eurasian Economic Commission	5 July 2019	Cooperation	Eurasian Economic Commission
Trans-Parliamentary Declarations	**Date of Signature**	**Subject Matter**	**Third Party**
Join Declaration by the Presidents of the Parliaments of the Member States of the PA (Parliamentary Declaration)	13 February 2013	In support of the integration mechanism	NA
Join Declaration by the Presidents of the Parliaments of the Pacific Alliance (Parliamentary Declaration)	6 May 2013	Establishing the Monitoring Parliamentary Commission	NA

Declaration from the III Session of the Inter-parliamentary Commission (Parliamentary Declaration)	16 October 2015	SMEs, Science and Innovation, Environmental Protection	NA
Declaration from the IV Session of the Inter-parliamentary Commission (Parliamentary Declaration)	28 June 2016	Expanding the agenda to the institutional area and recommendations on existing areas	NA
Declaration from the V Session of the Inter-parliamentary Commission (Parliamentary Declaration)	11 November 2016	SMEs, Science and Innovation, energy sector and future challenges	NA
Declaration from the VI Session of the Inter-parliamentary Commission (Parliamentary Declaration)	27 June 2017	Future action with ASEAN Parliaments and other actions in priority areas	NA
Declaration from the VII Session of the Inter-parliamentary Commission (Parliamentary Declaration)	23 November 2017	Tourism promotion, engagement with other regional blocs, strengthening cooperation ties with observer states	NA
Declaration from the VIII Session of the Inter-parliamentary Commission (Parliamentary Declaration)	15 June 2018	Ensuring labour mobility, addressing migratory dynamism	NA
Declaration from the IX Session of the Inter-parliamentary Commission (Parliamentary Declaration)	24 April 2019	Engagement with other regional blocs, strengthening cooperation ties with observer states, negotiations with candidates to associate states	NA
Trans-Governmental Declarations	**Date of Signature**	**Subject Matter**	**Third Party**
Coordination and Support Declaration from the Supervisory Authorities of the Securities Market in the PA Members	2 December 2011	Support to stock market integration private initiatives	NA
Cooperation letter (Ministry of Foreign Affairs of Chile, Ministry of Trade, Industry and Tourism of Colombia, Secretariat of Economic of Mexico, Ministry of Trade, and Tourism of Peru, and the OECD)	19-20 June 2014	Future cooperation on the competitiveness of SMEs	OECD

Joint Declaration from the Intellectual Property Offices of the Pacific Alliance	8 October 2015	Establishing activities for future collaboration	NA
Declaration of Intention to Establish a Passport Mechanism for Collective Investments (Passport Fund) (Ministers of Finance, and Supervision Authorities)	6 October 2017	Financial Integration	NA

Source: Author's compilation based on multiple sources

2 *Guideline Documents*

In response to great international attention attracted by the PA, which includes 59 observer states, the Council of Ministers has issued a few guidelines regarding the relationships with third states and future members. The first guidelines refer to the requirements and procedures to become an associate state. These guidelines also establish the requisites for an observer state to become a full member of the PA. The key condition to be and remain an observer state to the PA is to maintain the commitment with the principles and objectives of the *Framework Agreement*.

The second guidelines contain the requirements and procedures that requesting states and PA bodies need to follow for accession. The guidelines make it clear that new members need to accept without reservations the *Framework Agreement*, its developing instruments, and commitments agreed by the Council of Ministers.

The third guidelines provide general rules and procedures on how to deal with proposals for cooperation with observer states. It specifies the role of the bodies reviewing the proposals, the implementation of the projects and the bodies overseeing their completion. The guidelines apply mutatis mutandis to cooperation works with international organisations and third parties (other than observers).

The CMF also issued guiding principles for the regulation of FinTech in the PA members. The Council outlines eight basic and open principles of the regulation: (i) flexibility; (ii) regulation by type of activity rather than the type of entity; (iii) technological neutrality; (iv) proportionality based on risks; (v) consumer protection; (vi) integrity and financial stability; (vii) preventing the risks of money laundry and financing of terrorism; and (viii) coordination and cooperation with the industry, the local governments and transnational regional jurisdictions.

The FinTech guiding principles do not establish a pattern for future regulatory cooperation practices but could set a pathway for taking this approach in the regulation of other economic areas, considering the PA's clear preference for soft-law instruments. These instruments have a low degree of legalisation because they do not provide legally binding obligations, use open and imprecise language, and do not delegate any particular authority or responsibility regarding their interpretation or implementation.

The CMF followed a similar principles-based approach to address public-private partnerships in the PA to finance infrastructure projects within the region. These

principles encourage predictability, transparency, competitiveness and integrity in the management of these partnerships to attract private capitals.

The CMF also issued Operational Rules for the Working Groups under its umbrella. The rules are concerned with ensuring that representatives to the working groups have sufficient capacities to decide and that technical groups meet regularly. The rules also deal with the quorum for the validity and registration of the meetings of technical groups. Notwithstanding the rules on quorum, the operational rules provide that decisions in the working groups of the CMF are adopted by consensus. Consensus may be sought within the working groups and if not reached the topics are escalated to the National Coordinators (for Finance) and finally to the CMF. These procedural rules suggest a hierarchical relation between the working groups and the national coordinators, while also implying that sensitive topics will ultimately be solved through political compromise. The procedural rules do not deal with the operational aspects of the CMF, leaving this aspect unattended.

Table 12 outlines the guideline documents from the Council of Ministers and the CMF.

Table 12 Guideline Documents of the Councils

Name of Guidelines	Date of Signature	Subject Matter
Guidelines for the Participation of Observer States (unofficially Council of Ministers)	15 November 2012	Rules and procedures to become observer states
Guidelines for Accession to the Pacific Alliance (unofficially Council of Ministers)	30 May 2014	Accession requirements and procedures
Guidelines for the Implementation of Cooperation Projects between the Pacific Alliance and Observer States (unofficially Council of Ministers)	29 April 2015	Cooperation with Observer States. Rules for presenting and approving cooperation proposals
Guiding Principles for FinTech Regulation in the Pacific Alliance (Council of Finance Ministers)	2018	Financial integration
Guiding Principles for the Public and Private Partnerships in the Pacific Alliance	2019	Infrastructure
Communication Guidelines and Glossary of Terms about the PA for Disseminating Key Messages to Targeted Audiences	2019	Communications
Operational Rules for the Working Groups of the Council of Finance Ministers	2019	Internal Administration

Source: Author's compilation based on multiple sources, including primary sources

3 *Memoranda of Understanding and Other Instruments*

These memoranda are political undertakings that do not carry legal weight under international law. However, they create the expectation that parties (states) will honour these commitments in good faith. The effects of not complying with these memoranda are reputational. They could trigger negative political responses from the other PA members, including the right to retorsion (retaliation by a state by non-illegal means).[704]

704 Aust, above n 694, 45, 50.

Several government agencies and ministries have signed bilateral and plurilateral institutional agreements (inter-administrative accords) to cooperate in areas such as consular assistance, tourism, and compliance with sanitary requirements. Inter-administrative agreements between public entities commit only its signatory government bodies and not the PA states in toto. These inter-institutional agreements are not regulated by public international law because the entities that concluded them are not subjects under international law. A review of their content, language and formalities also suggests that they are not legally binding agreements; therefore, they do not create obligations under the domestic law of any of the PA members.

These two types of memoranda that the PA members and/or public agencies within the PA members have signed confirm that cooperation represents a significant building block of the regionalism project advanced through these soft-law mechanisms.

Table 13 condenses a non-exhaustive list of inter-institutional agreements, memoranda of understanding, and other instruments.

Table 13 Inter-Institutional Cooperation Agreements, Memoranda of Understanding and other Instruments

Inter-Institutional Cooperation Agreements	Parties	Date of Signature	Subject Matter	Type
Agreement among the Ministries of Foreign Affairs of the States Parties to the Pacific Alliance Establishing Cooperation Measures for Consular Assistance	Ministries of foreign affairs of the PA members	10 February 2014 Indefinite duration	Consular Cooperation	Plurilateral
Inter-Institutional Agreement for Sanitary Cooperation	Sanitary authorities of the four members	20 June 2013 Indefinite duration	Sanitary Cooperation for registration and good manufacturing practices certification of medicines	Plurilateral
Inter-Institutional Agreement of the Pacific Alliance for a Holiday and Work Program	Ministries of Foreign Affairs and other national entities	19 June 2014 Indefinite duration	Establishing a Holiday and Work Program	Plurilateral
Cooperation Agreement in regard to Tourism	National government agencies in the PA responsible for Tourism	29 August 2012 Definite duration 3 years (automatic renewal for the same time)	Cooperation in the area of Tourism	Plurilateral

Inter-Institutional Cooperation Agreements	Parties	Date of Signature	Subject Matter	Type
Agreement Allowing for the Use of Facilities and Infrastructure from Embassies and Consulates of the other Signatory Party in Third States	Ministries of Foreign Affairs of the Republic of Colombia and Secretariat of Foreign Affairs of the United Mexican States	28 September 2012	Sharing of Infrastructure	Bilateral
Specific Agreement Allowing for the Use of Facilities and Infrastructure of the Embassy of the Republic of Colombia in the Republic of Ghana for the Operation of the Chilean Diplomatic or Consular Mission	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Chile	18 April 2013 Indefinite duration	Sharing of Infrastructure	Bilateral
Specific Agreement Allowing for the Use of Facilities and Infrastructure of the Embassy of the Republic of Chile in the Kingdom of Morocco for the Operation of the Colombian Diplomatic or Consular Mission	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Chile	26 April 2013 Indefinite duration	Sharing of Infrastructure	Bilateral
Specific Agreement Allowing for the Use of Facilities and Infrastructure of the Embassy of the Republic of Chile in the Democratic and Popular Republic of Algeria for the Operation of the Colombian Diplomatic or Consular Mission	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Chile	NIA	Sharing of Infrastructure	Bilateral

Inter-Institutional Cooperation Agreements	Parties	Date of Signature	Subject Matter	Type
Specific Agreement Allowing for the Use of Facilities and Infrastructure of the Embassy of the Republic of Colombia in the Republic of Azerbaijan for the Operation of the Chilean Diplomatic or Consular Mission	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Chile	8 February 2014	Sharing of Infrastructure	Bilateral
Specific Agreement Allowing for the Use of Facilities and Infrastructure of the Embassy of the Republic of Peru in the Socialist Republic of Vietnam for the Operation of the Colombian Diplomatic or Consular Mission	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Peru	10 January 2014	Sharing of Infrastructure	Bilateral
Agreement Allowing for the Use of Facilities and Infrastructure of the Embassy of the Republic of Colombia in the Republic of Ghana for the Operation of the Peruvian Diplomatic or Consular Mission	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Peru	10 January 2014	Sharing of Infrastructure	Bilateral
Agreement Allowing for the Use of Facilities and Infrastructure of the Mission of the Republic of Chile to the Organization for Economic Cooperation and Development	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Chile	5 February 2014 Indefinite duration	Sharing of Infrastructure	Bilateral

Inter-Institutional Cooperation Agreements	Parties	Date of Signature	Subject Matter	Type
(OECD) for the Operation of the Colombian Mission				
Agreement for the Implementation of a Mechanism for the Exchange of Migratory and Police Information	Ministry of Foreign Affairs of the Republic of Colombia and The Secretariat of Government of the United Mexican States	June 2014 Indefinite duration	Exchange of migratory and police information	Bilateral
Mutual Recognition Arrangement of Authorised Economic Operator Programs	Customs Administration Authorities in the four members	22 July 2018	Trade Facilitation & Customs Cooperation	Plurilateral

Inter-Institutional Memoranda of Understanding	Parties	Date of Signature	Subject Matter	Type
Concerning the Cooperation Platform of the Pacific	Governments of the four members (signed by the Ministers of Foreign Affairs)	6 December 2011 3 years duration	Establishes the areas prioritised for cooperation activities in the PA and the Cooperation Platform	Plurilateral
For the Exoneration of Visas under the Business Category	Ministries of Foreign Affairs from the Republic of Colombia and the Republic of Peru	30 June 2013 Indefinite duration	Visas/ Immigration	Bilateral
Allowing for the Use of Facilities and Infrastructure of Embassies and Consulates of the Signatory Parties in Third States	Ministry of Foreign Affairs from the Republic of Colombia and Ministry of Foreign Affairs from the Republic of Chile	9 November 2012	Sharing of infrastructure	Bilateral
Allowing for the Use of Facilities	Ministries of foreign affairs	27 November 2013	Sharing of infrastructure	Bilateral

Inter-Institutional Memoranda of Understanding	Parties	Date of Signature	Subject Matter	Type
and Infrastructure of Embassies and Consulates of the signatory parties in Third States	from the Republic of Colombia and the Republic of Peru			
Establishing a Joint Committee on Services and Investment	Ministry of Foreign Affairs of Chile, Ministry of Trade, Industry and Tourism of Colombia, Secretariat of Economy of Mexico and Ministry of Foreign Trade and Tourism of Peru	4 December 2011 for 5 years	Establishing a Joint Committee on Services and Investment, a subcommittee on services and a subcommittee on investment	Plurilateral
For Establishing a Network of Centres on Entrepreneurial Development	NIA	18 July 2018	Small and Medium Enterprises	Plurilateral
Establishing the basis for the Online Management of Consumer Protection Disputes	Consumer protection agencies in four members	25 October 2017 2 years duration	Consumer dispute resolution	Plurilateral
Regarding Good Governmental Practices and the Development of Cooperation Mechanisms for the Prevention and Fight against Corruption in Public Procurement Systems within the Pacific Alliance	Ministry of Foreign Affairs of Chile Ministry of Foreign Affairs of Colombia, Ministry of Trade, Industry and Tourism of, Colombia, Secretariat of Foreign Relations of Mexico, Secretariat of Economy of Mexico, Ministry of Foreign Relations of	4 July 2019 2 years duration	Public Procurement	Plurilateral

Inter-Institutional Memoranda of Understanding	Parties	Date of Signature	Subject Matter	Type
	Peru, Ministry of Foreign Trade and Tourism of Peru			
For Cooperation in regard to the Media	Public service broadcasters	6 July 2019 5 years duration	Media cooperation in radio, television, and internet	Plurilateral
For Establishing A Network of Technological Platforms for Administrative Procedures for Businesses in the Pacific Alliance	Ministry of Economy, Development and Tourism of Chile, Ministry of Trade, Industry and Tourism of Colombia, Secretariat of Economy of Mexico, Ministry of Production of Peru	4 July 2019	Trade facilitation, Entrepreneurial development, SMEs	Plurilateral

Source: Author's compilation based on multiple sources

III DECENTRALISED ORGANISATIONAL STRUCTURE

This Part examines the PA's organisational structure, mapped through legal documents and empirical information, to show a web of formal and informal bodies more complex than governments in the PA acknowledge and portray.[705]

Section A charts those bodies established through treaties that have functions and rules governing their operation. Sections B examines less formalised institutional structures in the PA. The organisational structures in the PA are better characterised as a continuum rather than the binary between formal and informal bodies. I propose as primary criteria of formalisation their establishment through a treaty and the degree of precision with which legal instruments define their functions and composition. Lower degrees of formalisation include bodies that despite not being established through a treaty are referred to in treaties, for instance, by entrusting them with functions related to the objectives of the PA. Further in the continuum are bodies directly established in political documents or bodies that declarations and other soft-law sources instruct for their creation. At the other end of the continuum, I characterise bodies that emerge from consensual practice.

[705] See below Part III (C).

I maintain that organisational structures in the PA are mainly non-permanent, non-dedicated, decentralised, and intergovernmental. These characteristics do not exclude trans-governmental efforts for regulatory and policy collaboration among national agencies of the PA governments.[706]

Several ad hoc working groups, technical groups, committees, subcommittees, councils, meetings, and coordinators have been set up to implement the aims of the PA. The organisational structure continues to grow and specialise in response to the expanding work agenda.

Growth and specialisation of the PA organisational structures respond in several cases to demand-based or problem-based approaches that I characterise in this Part. These approaches are not mutually exclusive. By demand-based approach, I refer to institution-building that responds to the interests and requests of specific stakeholders, often economic elites. By problem-based approach, I point to regional organisational structures purposefully created to tackle challenges that have either a domestic source that is mutually shared or a regional source.[707]

A *Formal Institutionalisation: Treaty Bodies*

This Part surveys the bodies formally established through treaties in the PA. These formalised bodies are the Council of Ministers, the Free Trade Commission and the Pro-tempore Presidency. Along with these main structures, the *Commercial Protocol* establishes several committees, subcommittees and working groups to implement its provisions. I explain here the functions and composition of these bodies while disentangling their nature and roles.

1 *The Council of Ministers: An Executive Branch of the PA?*

The Council of Ministers that the *Framework Agreement* establishes comprises ministers in charge of foreign affairs and foreign trade. In practice, the Council of Ministers reports to the Presidential Summit on the progress of the PA.[708]

The nature of the Council is not clear because it has a double function. It is formally the main decision-making body of the PA,[709] and the *Framework Agreement* prescribes that its decisions will encompass the legal regime of the PA. Any decision of the Council must be approved by consensus.[710] At the same time, the Council is responsible for implementing the *Framework Agreement* and the presidential declarations. The Council also oversees the implementation of its own decisions. These roles suggest that the Council is an executive branch of the PA. The Council has met around 22 times.

This treaty body is in charge of the overarching political guidance of the PA regarding the relationship with third states, integration schemes and international organisations.

706 See below Part III (B) (9).
707 See below Part III (B).
708 See, eg, VIII Presidential Summit, *Presidential Declaration on the Pacific Alliance* (10 February 2014) The Pacific Alliance, 2 < https://alianzapacifico.net/en/documents-and-studies/>.
709 Interview_10 (Lima, Peru, 7 September 2016).
710 *Framework Agreement* art 5.

The Council unanimously approves new observer states and the accession of new members to the PA. The Council also approves new working groups to pursue its objectives. It also has the function to consider and approve the proposals put forward for amendment of the *Framework Agreement.* This Council approves the working plan and the annual budget of the Cooperation Fund of the PA.

2 *Free Trade Commission and Other Treaty Bodies*

The Free Trade Commission is a treaty-based intergovernmental body comprising public officials at the level of ministers of trade or economy.[711] The Free Trade Commission oversees the implementation of the *Commercial Protocol* and the work of the committees, subcommittees and technical groups created for its implementation.[712] It also receives reports and recommendations from the several committees and technical groups of the *Commercial Protocol* regarding its implementation and administration. In contrast to the *Framework Agreement*'s provisions on the Council of Ministers, the *Commercial Protocol* is precise about the functions and powers of the Free Trade Commission.

The Commission can adopt mandatory decisions and non-mandatory recommendations.[713] It can also delegate functions or tasks to committees or working groups established under the *Commercial Protocol*. The Commission has the power to issue interpretative determinations about provisions of the *Commercial Protocol*, which are binding on ad hoc tribunals deciding disputes under the Protocol.[714] The Free Trade Commission operates similarly to administrative commissions in other PTAs.[715]

The Free Trade Commission adopts decisions by consensus in the presence of all its members.[716] Only in situations regarding scarce supply, when the Scarce Supply Committee cannot agree on an expert opinion, the Commission could meet to decide on the issue with half plus one of its members and decide with the consensus of the attending members.[717]

The Commission must meet at least once a year, with the member in charge of the Pro Tempore Presidency. The chair of the Commission should be the representative of the member that has Pro Tempore Presidency of the PA at the time.[718] The Commission has met three times since its formal installation, but its decisions to date have been of a procedural and administrative nature, with limited implementation of the provisions in the *Commercial Protocol*.

During the consultation phase of dispute resolution, the Commission could intervene at the request of a consulting party, if the other party has not responded to the consultation request or the response does not address the object of the consultation. The Commission

711 *Commercial Protocol* Annex 16.1.
712 Ibid art 16.2.
713 Free Trade Commission *Decision No 2: Rules and Procedures for the Free Trade Commission*, signed 28 June 2017, art 8.
714 *Commercial Protocol* art 16.2.1 (b).
715 Interview_30 (Bogota, Colombia, 18 November 2016).
716 *Commercial Protocol* art 16.1.
717 Ibid Annex 4.31, arts 23-25.
718 Ibid art 16.1.

can mediate for the parties to reach a mutually agreed solution to the matter under consultation.

Along with the Commission, the *Commercial Protocol* and its subsequent amendments established nine committees, two subcommittees, and two working groups, whose primary role is to ensure the application and implementation of the provisions of specific Chapters. In some cases, these bodies can recommend measures to the Commission.

3 *Rotating Chairmanship: Pro-Tempore Presidency's Secretarial Role*

The *Framework Agreement* prescribes that the PA relies on a Pro Tempore Presidency that rotates each year among the members.[719] Government officials of each member carry out the tasks entrusted to the Pro Tempore Presidency, which have an administrative nature, such as organising the meetings of the heads of state and sessions of other bodies. Its secretarial role also includes maintaining a registry of the minutes of the PA meetings and other documents. The Pro Tempore Presidency represents the PA by request of the members.[720]

As a matter of practice, the member in charge of the Pro Tempore Presidency has some control over the topics it is interested in promoting during its presidency. The Pro Tempore Presidency coordinates[721] and leads by proposing the work agenda for the corresponding year.[722] However, it does not have complete control over the agenda because the Pro Tempore Presidency has to submit it for consideration of the Council of Ministers. The Pro Tempore Presidency also monitors the deliverables and progress in the agenda during the year.[723] It is responsible for monitoring the implementation of the presidential mandates.

B *Informal Institutionalisation: Demand-Based and Problem-Based*

This Part reviews the multiplicity of organisational structures that the PA members have established along the continuum of formalisation. I examine seven sections organisational structures within the PA delving into their roles, composition, their hierarchical or non-hierarchical relationships and their origins. I draw inferences to characterise the overall structure. Section Eight summarises the contributions of the private sector as a parallel structure to the intergovernmental one. Section Nine unveils a significant and growing pattern of trans-governmental collaboration that supplements intergovernmentalism.

Rather than treaty bodies, the PA's informal institutions that I discuss in this Part are established or mandated through soft-law instruments or created through practice. In some instances, these soft-law instruments 'formalised' these structures after some time in operation; in others, soft-law sources constitute the first step for their establishment.

719 *Framework Agreement* art 7.
720 Ibid.
721 Interview_35 (Skype, 1 March 2017).
722 Interview_19 (Bogota, Colombia, 5 October 2016).
723 Interview_07 (Santiago, Chile, 2 September 2016); Interview_19 (Bogota, Colombia, 5 October 2016).

Informal institutionalisation in the PA follows in many instances, problem-based and demand-based approaches. These structures indicate that on the ground, the PA moves beyond the commercial realm and towards economic regionalism broadly understood. Structures dealing with financial integration, infrastructure, innovation, and entrepreneurship speak about an expansive scope of the PA, thus the understanding of it, as a trade bloc is reductionist. Informal institutionalisation in the PA offers a more complex picture of institution-building than the organisational structure that PA governments depict today.[724]

1 *Presidential Summit: The Highest Leadership Body*

The presidents of the members do not comprise a formalised body with functions assigned to it, although they represent the highest leadership body in practice.[725] They meet regularly at least once a year and issue declarations containing mandates that the Council of Ministers, the GAN, and the technical ad hoc groups need to implement.[726]

The sponsoring of this type of presidential summits is a salient aspect of the PA's character as an informal intergovernmental institution (IIGI). As Vabulas and Snidal state, these face-to-face meetings foster interpersonal relations, familiarity, trust, and mutual confidence. [727]

As a matter of standard practice, the presidents provide policy direction through their general mandates. Government officials see the Presidential Summit as a political body whose role is not to produce mandatory rules. [728] Although the Presidential Summit is not a treaty-formalised body, the *Framework Agreement* impliedly acknowledges it through the multiple references made to the presidential declarations, which are the primary source for documenting its work. The *Framework Agreement* is broad enough to provide that 'other agreements' within the PA framework will form part of its legal regime. However, it does not say what type of agreements and bodies have the delegated powers to produce them.

2 *The Meeting of Ministers of Health*

The VIII and IX presidential declarations instructed the ministers of health of the four PA members and other relevant authorities to meet and discuss the following topics: mechanisms to improve access to medicines and enhance conditions of competition in the market to reduce medicine prices; and exchange of experiences regarding access to and coverage and quality of health services.[729] The incorporation of this topic in the PA agenda arose from a country-driven initiative, evidencing what I refer to as a problem-based approach to address matters on a regional scale. The de facto institutionalised

724 *Organizational Chart* (16 January 2019) The Pacific Alliance < https://alianzapacifico.net/en/organization-chart-and-objectives/ >. See also Interview_10 (Lima, Peru, 7 September 2016).

725 See, eg Interview_35 (Skype, 1 March 2017).

726 Interview_10 (Lima, Peru, 7 September 2016).

727 Vabulas and Snidal, above n 257, 199.

728 See, eg, Interview_27 (Bogota, Colombia, 19 October 2016).

729 IX Presidential Summit, *Presidential Declaration on the Pacific Alliance* (20 June 2014) The Pacific Alliance, 10 < https://alianzapacifico.net/en/documents-and-studies/ >.

meeting should report on its progress to the Council of Ministers. In practice, the Pro Tempore Presidency monitors the work of the Meeting of Ministers of Health,[730] although this structure is not acknowledged within the organisational chart on the PA website.

The XII Presidential Declaration provided this informal group with a concrete mandate to establish an action plan to enhance access to medicines for the population of the PA and develop common quality indicators for health services to allow for an assessment based on common criteria. Setting an instance to work on these areas shows early signs of concern to address non-economic areas.

3 *National Coordinations: Decentralised Secretariats and National Focal Points?*

The organisational chart in the PA's website,[731] several of the government officials interviewed,[732] and soft-law instruments acknowledge the national coordinations. The de facto institutionalised national coordinations hold key administrative and secretarial roles in the day-to-day operation of the PA. Only in the case of Chile, a National Coordinator is dedicated exclusively to the PA matters. For the other members, the national coordinators share their PA works with other domestic and international responsibilities.

4 *GAN: Decentralised Overseeing and Executive Body*

The body functionally below the Council of Ministers is the GAN, created through the Lima Declaration in 2011.[733] Deputy ministers of foreign affairs and foreign trade comprise the GAN, which has the primary role of monitoring the works of the technical groups and developing a strategy for the PA to manage its external relations.[734] The Council of Ministers assumes a strategic and policy function,[735] whereas the GAN oversees the works of the different technical groups at the micro-level and generally executes the instructions of the Council of Ministers.[736] As a matter of practice, the GAN deals directly with the implementation of the presidential mandates, which it also proposes/recommends for approval to the Council of Ministers and later the presidents.[737]

As a matter of practice, the GAN assesses proposals to establish new working groups and presents recommendations to the Council of Ministers on whether to create them.[738]

730 Interview_19 (Bogota, Colombia, 5 October 2016).

731 *Structure* (2018) The Pacific Alliance < https://alianzapacifico.net/en/organization-chart-and-objectives/>.

732 See, eg, Interview_02 (Skype, 12 August 2016); Interview_10 (Lima, Peru, 8 September 2016); Interview_11 (Lima, Peru, 7 September 2016); Interview_19 (Bogota, Colombia, 5 October 2016).

733 I Presidential Summit, *Presidential Declaration on the Pacific Alliance* (28 April 2011) The Pacific Alliance, 2 < https://alianzapacifico.net/en/documents-and-studies/ >.

734 Ibid.

735 Interview_10 (Lima, Peru, 7 September 2016).

736 Interview_02 (Skype, 12 August 2016); Interview_ 30 (Bogota, Colombia, 18 November 2016); Interview_32 (Skype, 19 January 2017); Interview_35 (Skype, 1 March 2017).

737 Interview_02 (Skype, 12 August 2016).

738 IX Presidential Summit, above n 729, 10.

5 *Council of Finance Ministers: More Than a Commercial Bloc?*

The X Presidential Declaration from 2015 provides for the creation of the CMF. The declaration instructs the Council to develop an agenda for economic and financial integration, reporting directly to the presidents.[739] However, the ministries of finance started informal conversations as early as April 2013 in the sidelines of the meetings of other global and regional institutions.[740]

The CMF has gathered 20 times in the timeframe of analysis, documenting its work as part of the presidential declarations issued during the presidential summits. Its agenda prioritises four areas: financial integration; management of catastrophic risks such as natural disasters; taxation; and infrastructure. Four ad hoc working groups have been established to deal with the four pillars of the CMF agenda.[741] Early works of the CMF also suggested the establishment of an ad hoc working group on services under the umbrella of the CMF,[742] although it seems to have ceased according to the current organisational structure of the working groups available on the PA's website.[743]

The operation of the CMF is informal and guided by 'learning by doing' practice. However, the XIII Presidential Declaration mandated the CMF to develop operational rules for itself, its Technical Secretariat, and its working groups. This instruction has been partially completed with the Operational Rules for the Working Groups of the CMF issued in 2019.

The informal establishment of the CMF and its expanding agenda indicate that on the ground, the PA intends to go beyond the commercial scope.

(a)Ad Hoc Group of Deputy Ministers of Finance: Parallelism with the GAN

The PA's website acknowledges this organisational structure. However, government officials do not refer to it in the interview data neither do presidential declarations. In contrast to the Technical Secretariat or the National Finance Coordinators, the Operational Rules for the Working Groups of the CMF do not mention the role that this organisational structure performs in relation to the works of the technical groups of the CMF. However, there is intended parallelism between the Ad Hoc Group of Deputy Ministers of Finance and the GAN to replicate at the regional level the same hierarchy structures at the domestic level within the PA members.

(b)National Finance Coordinators: Parallelism with National Coordinators?

Interview materials, ministerial declarations and the Operational Rules for the Working Groups of the CMF also acknowledge a parallel structure to the general National

739 X Presidential Summit, *Presidential Declaration on the Pacific Alliance* (3 July 2015) The Pacific Alliance, Annex 2, 8 < https://alianzapacifico.net/en/documents-and-studies/>.

740 VII Presidential Summit, *Presidential Declaration on the Pacific Alliance* (23 May 2013) The Pacific Alliance, 2 < https://alianzapacifico.net/en/documents-and-studies/ >.

741 *Finanzas*, Alianza del Pacífico < https://alianzapacifico.net/finanzas/> [*Finances*, The Pacific Alliance < https://alianzapacifico.net/finanzas/>].

742 XII Presidential Summit, *Presidential Declaration on the Pacific Alliance* (30 June 2017) Annex 2, 17 [15] < https://alianzapacifico.net/en/documents-and-studies/>.

743 *Finances*, above n 741.

Coordinators, at least in name, under the umbrella of the CMF. The work plan of the CMF circumscribes the role of this coordination. However, in dealing with financial matters of the agenda, this coordination has broader powers than the general National Coordinators.

National Finance Coordinators play a role in articulating consensus, and they have a hierarchy over technical groups that could reach to the coordinators for a decision on a matter when technical groups are unable to achieve consensus.[744]

National Finance Coordinators also have the powers to modify the operational rules of the working groups under the umbrella of the CMF.

(c) Technical Secretariat: De Facto Institutionalised and Outsourced

The Operational Rules for the Working Groups of the CMF and the PA's website refer to a dedicated Technical Secretariat under the umbrella of the CMF. This structure is not only de facto institutionalised, but also there is a nominated external organisation to perform its roles — the IDB. The administrative roles of this Technical Secretariat include preparing meeting calls upon the request of any of the four ad hoc group coordinators; registering the meetings; distributing the agenda and preparatory documents; preparing minutes; safekeeping of the minutes; and centralising the comments that representatives to the groups make to preparatory documents under discussion.

The roles of the IDB have gone beyond administrative matters of the technical groups becoming an external branch for technical and policy advice on several topics. The IDB has undertaken the Technical Secretariat of another regional forum in the past. For instance, the IDB and other development banks have performed these roles for IIRSA.[745]

Beyond the administrative roles of a Technical Secretariat, there seems to be an emerging practice in the PA to fill the (intended) gap of in-house technical support through outsourced technical support of development banks.[746] Feasibility studies, reports, and comparative studies have been delivered through cooperation with the CAF, the IDB and the World Bank. These organisations contribute not only with the technical expertise but also by totally or partially funding this knowledge. They operate as decentralised nodes of information production at the request of the PA members.

744 See above Part II (E) (2).

745 Consejo Sudamericana de Infraestructura y Planeación *(COSIPLAN): Organización*, UNASUR < http://www.iirsa.org/Page/Detail?menuItemId=123> [*South American Council of Infrastructure and Planning* (*COSIPLAN): Organisation*, UNASUR < http://www.iirsa.org/Page/Detail?menuItemId=123>. See also Interview_12 (Lima, Peru, 9 September 2016)]. Today incorporated as a technical forum to the works of the South American Council on Infrastructure and Planning of UNASUR.

746 See, eg, XII Presidential Summit, above n 742, 13-4 < https://alianzapacifico.net/en/documents-and-studies/ >; XIV Presidential Summit, *Presidential Declaration on the Pacific Alliance* (6 July 2019) 11 < https://alianzapacifico.net/en/documents-and-studies/ >.

6 *Monitoring Inter-Parliamentary Commission (CISAP): Not a Legislative Body*

Presidents of the national parliaments met in 2013 and constituted a Monitoring Inter-parliamentary Commission of the Pacific Alliance, which held its first formal session in July 2014. The participation of national parliaments signals a positive response to support the PA. The Commission comprises at least six members of the national parliaments. Although its name suggests that it is a supervision body, in my view the Commission is evolving towards a limited advisory role, being able to recommend measures to promote the development of the PA and following up the actions of the executive branches concerning the PA.[747] The monitoring role is marginal and does not go beyond the oversight that national parliaments conduct over the implementation of the PA agreements and PTAs. [748]

The CISAP has implemented parliamentary diplomacy while aiming to become a channel of communication with the citizens.[749] The CISAP in practice facilitates the process of national incorporation of the international instruments signed by the executive branches that require the approval of the national congresses to enter into force. The CISAP is a body without the ambition to become a decision-maker within the PA in the medium-term.[750]

The CISAP has met nine times, defining a prioritised agenda that keeps expanding. CISAP is working on 11 topics: prevention and attention of natural disasters; fishing; institutionalisation; regional governance and decentralisation; transparency; integration in the energy sector; trade facilitation; internationalisation of SMEs; linkage with other regional organisations such as MERCOSUR and ASEAN and their parliamentary instances; engagement with parliaments in observer states and third states; and cooperation on science technology and innovation. The framing of the agenda in these areas is rather vague, the language hortatory and the scope modest. In many instances, the work of the CISAP is limited to the exchange of information and experiences in these areas.

7 *Ad Hoc Groups On-Demand: Technical Scope?*

The organisational framework and the presidential declarations reveal an early institutionalisation practice according to which PA members decided to prioritise areas and tackle these tasks through ad hoc working groups. This ‘on-demand’ or ‘as needed’ practice in the establishment of working groups has three main sources: an initiative promoted by the Pro-tempore Presidency preference to include a topic in the regional agenda (eg, Gender Focus Group); by request of lobby groups (eg, Ad Hoc Group on Fishing and Aquaculture) including the private sector through the CEAP (eg, Education

747 See, eg, Parliamentary Declaration, *Join Declaration by the Presidents of the Parliaments of the Pacific Alliance* (6 May 2013) < https://cisap.info/?page_id=126>. See also Interview_14 (Lima, Peru, 9 September 2016).

748 Interview_14 (Lima, Peru, 9 September 2016).

749 See eg, Ley 1868 de 2017, ‘Por medio de la (sic) establece la entrega del informe annual sobre el desarrollo, avance y consolidación de los acuerdos comerciales ratificados por Colombia’ (Colombia) [Law 1868 from 2017, ‘Establising the delivery of an annual report regarding the development, progress and consolidation of trade agreements ratified by Colombia’ (Colombia)].

750 Interview_35 (Skype, 1 March 2017).

Group); or by initiative of the presidents or recommendation of public officials (ie, ministers, deputy ministers).[751] The latter case often entails an initiative of government officials working within existing working groups (eg, Digital Agenda Committee). The several paths through which a working group is established suggest that not only technical but also political considerations are deciding factors in setting them up and defining their composition. Although these groups ultimately have to deal with technical matters.

Informal coordinators that rotate annually amongst the four members administer each ad hoc group. Group coordinators are standard practice for the PA;[752] they are also in charge of ensuring the progress of the agenda in each group. Group coordinators report either to the respective national coordinators or directly to the GAN, as there is no rule or established practice on the matter. [753] Although not a formalised rule, in practice, the working groups follow a consensual approach to their works.[754]

According to my empirical mapping, close to 23 working groups and one subcommittee on digital agenda under the umbrella of the Council of Ministers constitute ad hoc groups on-demand, established under the practice I describe. Four additional ad hoc working groups operate under the aegis of the CMF. The degree of formalisation is not the same for all working groups,[755] varying in response to the personal leadership of group coordinators. Some groups have issued rules of procedure to regulate their operation, but this is neither a requirement nor a general practice.[756] The degree of precision in the definition of the scope, tasks and aims of each ad hoc working group also varies considerably across the groups.

In limited cases, these groups have been subsumed or displaced by more formalised structures in the *Commercial Protocol*, such as in the case of the Rules of Origin and Trade Facilitation and Customs Cooperation Committee, which replaced the ad hoc Trade and Integration Group. However, this institutional evolution has not happened in all cases where a degree of overlap exists between some of the ad hoc working groups (eg, government procurement) and more formalised structures within the *Commercial Protocol*. This issue deserves attention because it creates the risks of duplicating structures to work on similar subjects encouraging institutional inefficiencies. Maintaining parallel groups dealing with similar subject matters makes monitoring and accountability for progress on the work agenda more difficult.

8 *Private Sector Participation: Advisory Role*

A distinctive aspect of the PA is the support achieved from the business sectors of the members. This support has been formalised through the establishment of a private body within the business sector, named CEAP. Similarly to ABAC, The Business Advisory Council of APEC,[757] the CEAP has advisory roles in formulating recommendations to

751 Ibid.
752 Interview_02 (Skype, 12 August 2016).
753 Interview_07 (Santiago, Chile, 2 September 2016).
754 Interview_31 (Bogota, Colombia, 24 November 2016).
755 Interview_27 (Bogota, Colombia, 19 October 2016).
756 Ibid.
757 *Founding and Structure*, ABAC APEC Business Advisory Council< https://www2.abaconline.org/ >.

the governments and business unions about the PA and ways to promote cooperation among the members. It encourages collective actions in the business community towards developing third markets, especially in the Asia Pacific.[758] The CEAP has presentation in each member, and four business people per country (CEAP presidents) lead its work.[759]National charters in each member are responsible for the coordination from the business sector.[760] A 'Sherpa' per country carries out administrative and secretarial roles and follows up with the governments (ie, Expert Committee for CEAP) on the implementation of the CEAP's recommendations.[761] National sherpas also propose actions to implement the guidelines provided by representatives of the CEAP.[762]

The CEAP has met more than a dozen times since its establishment, promoting an ambitious and expanding agenda for the PA that includes: financial integration; taxation rules; insolvency regimes; trade facilitation; convergence, harmonisation and equivalence in regulations covering various areas, such as technical regulations and sanitary and phytosanitary measures; logistical competitiveness; SMEs; education; labour and education mobility; public procurement; services trade; entrepreneurship and innovation; and maritime cabotage for goods.[763] Each national Chapter of the CEAP has responsibility for coordinating public-private works on specific areas at the regional level.[764] The CEAP serves as the chief spokesperson between the business and productive sector and the government officials, identifying the primary interests and concerns of major industry actors. The CEAP informally monitors the implementation of its recommendations, once they are incorporated in the agenda of the PA.

9 *Networked Structures: A Sign of Trans-Governmentalism*

Following trends in contemporary international cooperation documented since the 1950s[765] and 1970s,[766] the PA practices and engagement among national public agencies and public and private actors evidence a network trend.[767] My empirical work shows that two types of networks reinforce the decentralisation feature of the PA. First, I map public-private networks involving interactions between government agencies, the private sector, and academia (eg, Network of Centres on Entrepreneurial

758 *Constitutive Document of the Pacific Alliance Business Council* (29 August 2012) Pacific Alliance Business Council, 2-3 < https://alianzapacifico.net/download-category/ceap/ >.

759 *Constitutive Document of the Pacific Alliance Business Council* (29 August 2012) Pacific Alliance Business Council < https://alianzapacifico.net/download-category/ceap/ >.

760 Interview_16 (Lima, Peru, 13 September 2016).

761 Ibid; Interview_31 (Bogota, Colombia, 24 November 2016).

762 Interview_31 (Bogota, Colombia, 24 November 2016).

763 *Declaration of the Pacific Alliance Business Council* (8 December 2014) Pacific Alliance Business Council < https://alianzapacifico.net/download-category/ceap/ >. See also *Declaration of the XI Session of the CEAP* (28 July 2017) Pacific Alliance Business Council 3 < https://alianzapacifico.net/download-category/ceap/ >.

764 Interview_16 (Lima, Peru, 13 September 2016); Interview_31 (Bogota, Colombia, 24 November 2016).

765 Philip C Jessup, *Transnational Law* (Yale University Press, 1956).

766 See, eg, Robert O Keohane and Josepth S Nye, 'Transgovermental Relations and International Organisations' (1974) 27 (1) *World Politics* 39-62; Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 (1) *Virginia Journal of International Law* 1-91. See also Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 10-1.

767 Raustiala, above n 766, 3-4.

Development). Second, I record regulatory collaboration networks through some of the working groups comprising regulators and policymakers of the members, such as the Regulatory Improvement Committee, and ad hoc working groups on Consumer Protection, Intellectual Property, and Tourism. Even CISAP comprises a network of legislators, given its roles and agenda. Even CISAP comprises a network of legislators, given its roles and agenda.[768]

Raustiala asserts that RCNs encompass regulatory agencies of different states that network with their functional counterparts through the sharing of information, ideas, resources, and policies.[769] They form trans-governmental collaboration networks because states relate to one another through their disaggregated[770] sub-units[771] not as single units such as the case of traditional intergovernmental cooperation.

RCNs play several roles depending on the global distribution of regulatory power in the field (eg, financial, environmental, security, economic, trade) where the network operates. Generally, regulatory networks help in achieving subtle regulatory convergence, harmonisation or uniformity,[772] contribute to domestic regulatory and enforcement capacity building,[773] and make possible cross border enforcement cooperation.[774] Trans-governmental networks that bring regulators, as individuals, repeatedly together become a means for the diffusion of ideas, practices and rules.[775]

There is evidence that RCNs contribute to treaty compliance in those fields where the global distribution of regulatory power has allowed for international treaties to be established. They boost treaty compliance by promoting capacity building and socialisation processes.[776]

Peer-to-peer interactions and linkages of government officials that regularly gather at broader international and regional fora often initiate PA regulatory networks. The interviews[777] and the primary sources show that PA RCNs are not purely trans-governmental because they operate under the aegis of the intergovernmental structure of the PA. RCNs in the PA are subject to the oversight of the presidents, the Council of Ministers, the GAN, and the Free Trade Commission.[778]

Raustiala points out that non-binding memoranda of understanding often instrumentalise trans-governmental collaboration.[779] The PA legal regime confirms the role of non-binding memoranda of understanding in instrumentalising trans-governmental collaboration.

768 Interview_14 (Lima, Peru, 9 September 2016). See, eg, Slaughter, *A New World Order*, above n 766, 11.
769 Raustiala, above n 766, 13.
770 Slaughter, *A New World Order*, above n 766, 12.
771 Keohane and Nye, above n 766, 39.
772 Raustiala, above n 766, 91.
773 Ibid 51.
774 Ibid 7.
775 Ibid 52, 55.
776 Ibid 83, 90.
777 See, eg, Interview_07 (Santiago, Chile, 2 September 2016); Interview_21 (Bogota, 6 October 2016).
778 Ibid. Referring to the operation of the Ad Hoc Working Group on Consumer Protection.
779 Raustiala, above n 766, 22, 31, 91.

C *Between Formal Simplicity and Informal Complexity*

From the examination above, I infer that growth and specialisation of PA organisational structures in many instances follow problem-based and demand-based approaches that are not mutually exclusive. By problem-based approach, I refer to a practice where organisational structures are purposefully created to deal with challenges that have either a shared domestic-based or a regional source. The regional source of these problems points to the need for coordinated action to tackle the full dimension of the problem. These problems include, for instance, irregular migration, or organised crime. In contrast, domestic bottlenecks that are a source of concern for individual PA governments encourage institutionalisation of regional dialogues, exchange of experiences, and good practices. This is the case of institutionalised instances in the area of innovation, intellectual property, entrepreneurship, and SMEs.

The problem-based approach to institution-building results from the understanding that parties can learn from one another, their respective strengths and also previous mistakes.[780] The problem-based approach goes beyond trade and investment and brings into question the depiction of the PA as a trade bloc entirely. It challenges the understanding that the PA only pursues commercial goals because it shows that members and their national agencies are opening the agenda to broader economic areas related to financial integration, productive integration, infrastructure and positive dimensions of the integration.

By demand-based approach, I refer to institution-building responding to the interests of specific stakeholders. This means that some organisational structures are the result of the requests from business elites and technocrats. The institutionalisation of some ad hoc working groups (eg, Ad hoc Working Group on Fishing and Aquaculture) and committees (eg, Expert Committee for CEAP) evidences this practice. [781]

These approaches to institution-building and the works within formal and less formalised groups also account for the significant role that cooperation plays as a building block of (economic) regionalism for the PA. The type of rules predominant in the PA confirms this aspect.

Parts A and B show that the intergovernmental institutional framework of the PA is hierarchical/vertical and top-down. These structures are non-permanent, non-dedicated, decentralised, and intergovernmental. This means that representatives in these bodies gather to discuss topics of common interest as the regional agenda demands and to the extent that national priorities allow the time. The decentralised nature of the PA's organisational structure means that there is not an independent single focal point in which key tasks are allocated.[782] Instead, the PA has multiple bodies for coordination, light monitoring, and management. The intergovernmental institutional structure means that the key participants are the states who play the predominant role. Each state is seen as an aggregated unit in the decision-making. The intergovernmental institutional structure of the PA also refers to the composition of the bodies, which in all instances is through government officials of the four members, either democratically elected by

780 See, eg, Interview_27 (Bogota, Colombia, 19 October 2016); Interview_31 (Bogota, Colombia, 24 November 2016).

781 See above Part III (B) (7).

782 See above Ch 3 (III) (3).

national constituents (eg, presidents and congresspersons), or appointed by national governments or national civil servants of the PA members.

Similar to the PA's rules and procedures, organisational structures in the PA present different levels of formalisation. The most legalised structures are those bodies expressly constituted through treaty documents that prescribe their composition, functions, and decision-making rules. Less legalised institutional structures include bodies that, although not established through a treaty, are referred to in legally binding documents that allocate functions and tasks to them. Bodies established with the agreement of the four PA members, through sources other than treaties, are also a common feature of PA's institutionalisation, representing another layer of formalisation. Finally, the least formalised structures are those bodies acknowledged by government actors through practice.

I claim that the PA is an informal intergovernmental institution (IIGI) in its organisational structure that follows Vabulas and Snidal's characterisation loosely[783] despite formal membership and a formalised treaty in the *Framework Agreement*.[784] The PA falls in the characterisation of an IIGI along the informal-formal spectrum of institutional arrangements when considering the role of 'summit meetings' of heads of state and the rotating chairmanship through the Pro-tempore Presidency.[785] Based on this setting, my view that the PA does not represent a new, innovative, and sui generis institutional framework, as government stakeholders and academics often claim.[786]

Figure 4 below outlines the organisational structure of the PA, comprising a series of meetings, committees, subcommittees, and ad hoc working groups that depict different levels of formalisation. The figure maps the types of role that each body undertakes, and some of their relationships. The organisational structure that I portray below does not include committees and subcommittees established within the bilateral agreements between the PA members.

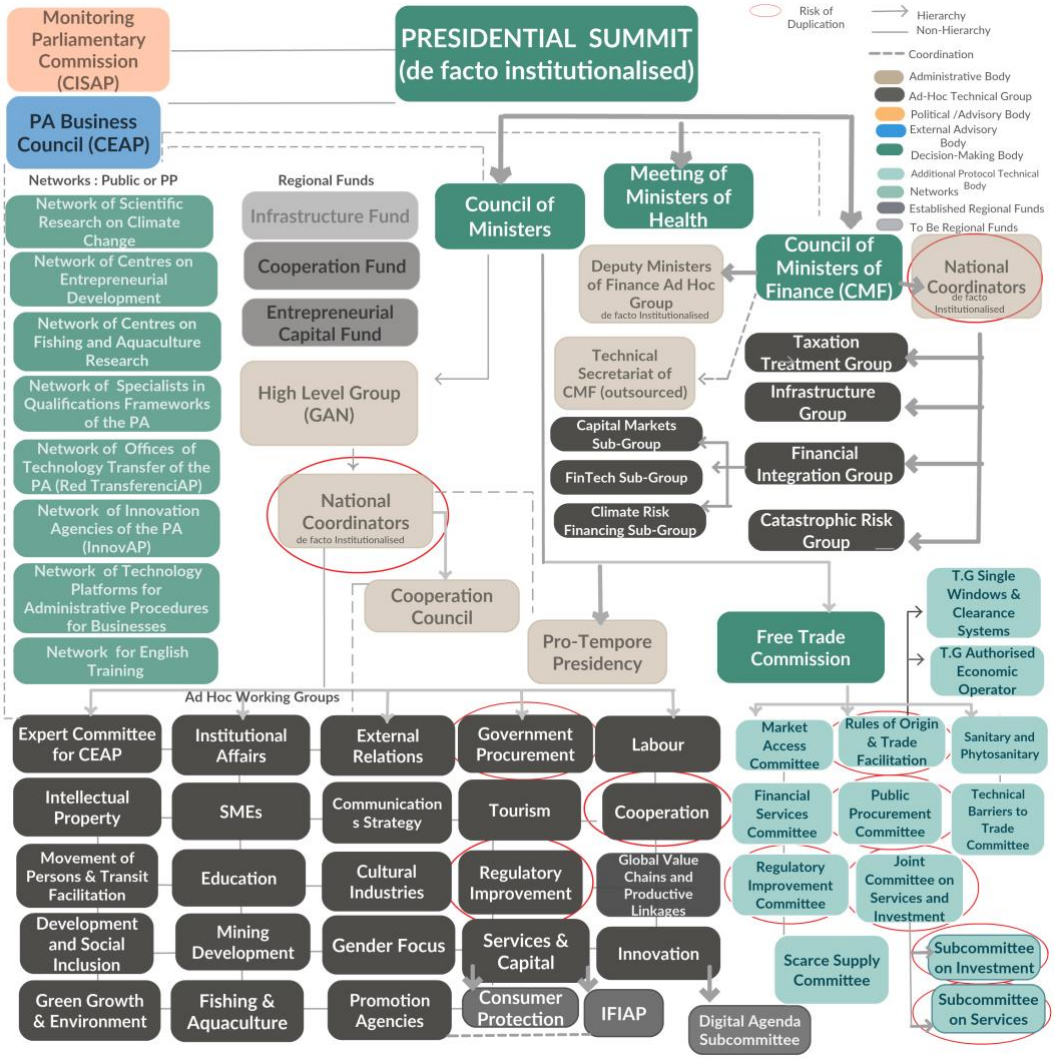
783 See Vabulas and Snidal, above n 257, 199.

784 See above Ch 3, Part II (C), Table 3.

785 Vabulas and Snidal, above n 257, 204.

786 Interview_17 (Lima, Peru, 13 September 2016); Interview_30 (Bogota, Colombia, 18 November 2016). See also La Alianza del Pacífico; ¿el Futuro de la Integración Latinoamericana? (Documentos de Análisis Serie 1, Centro de Estudios Internacionales Gilberto Bosque, Julio de 2014) 3, 63 <http://centrogilbertobosques.senado.gob.mx/docs/Doc_Analisis_Jul2014.pdf> [The Pacific Alliance: the Future of Latin American Integration? Analysis Documents Series 1, Centre for International Studies Gilberto Bosque, July 2014) 3, 63 <http://centrogilbertobosques.senado.gob.mx/docs/Doc_Analisis_Jul2014.pdf>]. Cf Interview_02 (Skype, 12 August 2016).

Figure 4 PA Organisational Chart, 2020



Source: Author's analysis based on treaty documents, presidential declarations, secondary sources and interview data.

These structures show empirically that institution-building in the PA has been more active than what PA governments are either aware of or willing to accept. As a result, the decentralised organisational structure comprised of committees, subcommittees, networks, and working groups is complex. This situation creates two risks: lack of accountability and cumbersome coordination. I explore these risks further in Chapter 8. The complex chart above contrast with the simple organisational chart available on the PA's website.[787]

IV Conclusion

This Chapter maps and characterises the institutional framework of the PA to reveal the multiplicity of formal and informal organisational structures and the limited legal regime developed since its establishment. This mapping provides the basis for

[787] *Organizational Chart*, above n 724. See also Interview_10 (Lima, Peru, 7 September 2016).

examining the reasons why the PA relies on this institutional framework in Chapters 7and 8.

As I describe in this Chapter, the PA's institutional framework presents a low degree of legalisation through arrangements (guidelines, memoranda, guiding principles, and declarations) that intentionally use imprecise language and non-binding rules. The absence of delegated authority to third parties for the interpretation or resolution of disputes also shows the low degree of legalisation. The rules developed in the PA correspond mainly to soft-law, limiting the scope of hard-law provisions to double taxation, and commercial and investment matters incorporated in the *Commercial Protocol* and its amending accords. The degree of legalisation in these areas is higher than in any other area.

The focus of soft-law rules and the organisational structures developed to date evidence the importance of cooperation as a building block of economic regionalism for the PA. However, the passiveness of decision-making bodies in developing the PA's legal regime could jeopardise its ability to fulfil the aims of (progressive) liberalisation of goods, services, capital and people. I develop this issue in greater detail in Chapter 8.[788]

The organisational structures I canvass here suggest a hierarchical and top-down structure, through a predominantly intergovernmental cooperation model. The organisational structures are non-permanent, non-dedicated, and decentralised. However, the PA's organisational structures are flexible, to accommodate networked approaches for trans-governmental cooperation. The PA shows that trans-governmental cooperation supplements rather than contradicts intergovernmental cooperation. The organisational structure also confirms the PA's nature as an IIGI within the spectrum of intergovernmental arrangements that Vabulas and Snidal conceptualise.

The development of organisational structures in the PA results from a pattern of specialisation and horizontal expansion. The examination I undertake in this Chapter suggests that organisational structures are more complex than often claimed by members.[789] Although these structures have developed more informally in the PA than in other regional organisations across LA, they are still present and continue to build incrementally and in layers.

In many instances, the PA's organisational structures emerge from what I call a demand-based or problem-based approach. This means that rather than long-term and grand-design views on institutional development, they are established by the requests of specific actors to give their interest a regional dimension. In other instances, the working groups and committees emerge from initiatives either to provide holistic solutions to challenges that exceed domestic boundaries or to encourage the exchange of experiences and good practices.

A high informality in the way PA institutional structures are established benefits agility to deliver results and provides a forum for regional dialogue. However, this high informality cannot secure long-term accountability for the work of the PA or the transparency it pursues. I examine these shortcomings in Chapter 8.[790]

788 See below Ch 8, Part III (B), (C).
789 See above Part III (C).
790 See below Ch 8, Part III (B), (C).

The institutional framework indicates that the PA has evolved beyond the goals of liberalisation of a purely trade bloc, moving towards an expression of (economic) regionalism broadly understood. Organisational structures, trans-governmental agreements for cooperation, and soft instruments to deal with innovation, financial integration, and entrepreneurship are examples that the PA is not circumscribed to trade and investment matters, as I further discuss in Chapter 8.[791]

In comparison to the present Chapter, which collects hidden aspects, and maps rules and organisational structures of the PA's institutional dimension to provide a general account of what it looks like, Chapter 6 focuses on specific features of that institutional design. Chapter 6 presents the features, cooperation problems in institutional agreements, and the characteristics in the aggregate of the PA members to be able to explain underlying reasons for the institutional design outcomes in Chapters 7 and 8.

[791] See below Ch 8, Part II, (B) (1) (2).

6 AN EXAMINATION OF INSTITUTIONAL DESIGN FEATURES, COOPERATION PROBLEMS, AND CHARACTERISTICS OF THE MEMBERS IN THE AGGREGATE

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I INTRODUCTION

Chapter 6 provides an account of what (rational) factors have influenced the institutional features of the PA, based on the theoretical framework that I delineate in Chapter 3. Part II identifies and describes the institutional features of the PA. Part III presents the status of the two rational explanatory factors: (i) interstate cooperation problems; and (ii) characteristics of the PA members in the aggregate. This Part is twofold. First, it describes which of the cooperation problems that I outline in Chapter 3 are present in the negotiation of the PA international agreements and explains why I consider that specific problems underlie each agreement. Second, it identifies the characteristics of the PA members in the aggregate. This way, the Chapter contributes to answering the research question of what factors explain the design features of the PA's institutional framework.

Part II describes four features: (i) the scope of issues covered (ii) the level of centralisation, (iii) the rules for control, and (iv) the adjustability of arrangements in the PA. This Part uses the theoretical approach in Chapter 3, particularly Koremenos' research program — COIL— and in this way complements the account that Chapter 5 offers of the PA's institutional framework.

I maintain in this Part that the PA primarily features decentralisation of its tasks, with some exceptions in dispute settlement, monitoring and punishment. The scope of the PA's international and trans-governmental agreements is broad and continues to expand. This scope moves around the economic area, including economic cooperation, although the PA opens up space for non-economic cooperation. Based on the consensus rule that governs the PA agreements, I also argue, following Koremenos' conceptualisation of control, that we are witnessing a model with no control from individual PA members in this regional institution rather than shared control.

The PA international agreements feature a plethora of adjustability mechanisms to keep flexibility and allow for the conclusion of agreements in the first place. These mechanisms include escape clauses, exception clauses, imprecision in treaty drafting, and withdrawal provisions. I add other adjustability tools that I claim perform the role of reservations in PA agreements, notably the *Commercial Protocol*.

Part III examines the cooperation problems among the PA members prevailing at the time of its establishment and when negotiating the *Commercial Protocol* and other international agreements. I argue that at the time of establishing the PA, political and economic uncertainty about the state of the world was prevailing. In contrast, problems of enforcement, domestic commitment or time-inconsistency, distribution, and coordination were more relevant when negotiating the free trade area outlined in the *Commercial Protocol*. My appraisal is that the *Agreement to Homologate the Taxation Treatment* primarily underscores a coordination problem. The *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance* and most of the trans-governmental agreements address non-strategic problems of cooperation. Commitment problems are also present in the *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance*. Overall, the presence and combination of cooperation problems change according to the objectives in each agreement.

Part III also examines the characteristics of the four PA members in the aggregate: (i) number of members; (ii) the degree of domestic regime-type asymmetries; (iii) the degree of heterogeneity in preferences; and (iv) the level of economic power asymmetries.

Supported by empirical evidence, I claim that characteristics in the aggregate for the PA members have remained unchanged throughout the period under analysis, covering a decade before the negotiation of the *Framework Agreement*.[792] There are no domestic-regime asymmetries because all members meet the yardstick as democracies during the last 19 years. However, there are governance differences that give rise to commitment problems in the key PA international agreements. Full membership has been maintained at four States since the establishment of the PA.

The PA members have had rather homogenous (foreign policy) preferences throughout the period,[793] and their preferences remain moderately close to the United States' preferences when compared to other reference countries. In contrast, the PA members display great economic power-asymmetry when comparing Mexico to the rest of the members. However, I consider that it is necessary to take into account that economic power-asymmetry from Chile, Colombia, and Peru is not paired with a strong economic dependency on Mexico.

In brief, the PA features high decentralisation, a broad scope of issues covered, no material control from individual members, and a variety of adjustability devices in its international agreements. The cooperation problems and their combinations in PA agreements vary with each agreement, although uncertainty about the state of the world and commitment problems prevail. The characteristics in the aggregate of the PA members are stable for the period under analysis. The PA represents a moderately homogeneous group of states.

The insights I provide in this Chapter about the institutional features in the PA, the underlying cooperation problems in PA's international and trans-governmental agreements and the characteristics of the PA members in the aggregate are a building block for Chapter 7. In the latter, I address how these cooperation problems and characteristics have influenced the design features of the PA's institutional framework.

II FEATURES OF THE INSTITUTIONAL DESIGN

This Part elaborates on four key institutional features of the PA defined in Chapter 3:[794] (i) scope of issues and areas covered; (ii) the level of centralisation of tasks; (iii) rules providing for control of the institution; and (i) adjustability of arrangements in the PA.

When applicable, I discuss these features through the lenses of six tasks that underpin international cooperation: (i) decision-making or adoption of rules; (ii) administration (iii) monitoring; (iv) information production and management; (v) dispute resolution; and (vi) enforcement/punishment. I explain these tasks in relation to the notion of

792 See above nn 359, 360.
793 See above Ch 3, Part III (B).
794 Ibid.

delegation and the relationship between formal and informal design. This Part examines the four institutional features in the *Framework Agreement*, the *Commercial Protocol*, other international agreements, and soft-law instruments of the PA. This approach entails a dynamic rather than a static analysis.

I maintain that PA international agreements evidence high decentralisation of most of the cooperation tasks with limited exceptions for dispute settlement, monitoring and punishment. The PA's scope in its international and trans-governmental agreements is broad for the variety of issue-areas. This scope is expanding not only to economic areas such as trade and investment but also to non-economic cooperation. Inducements for compliance are low in the PA international agreements;[795] PA members use punishment as a means for inducing compliance only in the *Commercial Protocol*.

Regarding the feature of rules for control, I argue that they ultimately entail no material control from individual PA members. Thanks to the consensual decision-making, the PA members preclude control as a form of exercising (member) dominance through voting rules. The PA's international agreements feature an array of adjustability mechanisms such as withdrawal provisions, escape clauses, and exception clauses.

A *Broad and Expanding Scope of Issues Covered*

According to the *Framework Agreement*, the PA covers two issue-areas: economic, including economic cooperation; and non-economic cooperation.[796] The PA members initially prioritised their works in the economic field to the movement of businesspeople and migratory transit; trade and integration, including trade facilitation; services and capital. Non-economic cooperation has been part of the PA since its inception, including topics such as climate change and the environment, the sharing of diplomatic physical facilities, and sports diplomacy.[797]

The scope of the PA is one of the most dynamic aspects of this institution. As Chapter 5 stresses, the scope of issues that the members are willing to address through the PA has experienced significant growth and specialisation.[798] The PA has transitioned from dealing with trade and investment issues to discuss broader economic goals.[799]The works in these emerging economic areas are addressed primarily through soft instruments and cooperation frameworks.[800]

Non-economic cooperation has also extended its scope to good governance and public administration practices, youth volunteering programs, and the academic scholarships program.

795 Ibid.

796 See I Presidential Summit, above n 568, 1. See also *Framework Agreement* art 3.2.

797 *Memorando de Entendimiento entre el Gobierno de los Estados Unidos Mexicanos, El Gobierno de la República de Colombia, el Gobierno de la República de Chile, el Gobierno de la República de Perú sobre la Plataforma de Cooperación de la Alianza del Pacífico* (6 de Diciembre de 2011) [*Memorandum of Understanding between the United Mexican States, The Government of the Republic of Colombia, the Government of the Republic of Chile and the Government of the Republic of Peru Concerning the Cooperation Platform of the Pacific* (6 December 2011)].

798 See above Ch 5, Part III.

799 See above Ch 5, Table 7 and Table 13.

800 See above Ch 5, Part II (E). See also Table 13.

Under Koremenos analytical framework, the financing of the interstate cooperation is relevant under the feature of scope to assess the presence of members' payoffs from one issue-area to another issue area.[801] These payoffs do not seem to have taken place in the PA's international agreements. Up to the establishment of the Cooperation Fund, members financed cooperation activities through the model of shared costs, triangular cooperation, or external funding from multilateral intergovernmental organisations. The Cooperation Fund created in the *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance* prescribes for the parties to contribute yearly to finance the activities of the cooperation platform.

As I map out in Chapter 5, institutional rules in the PA are predominantly soft-law, while hard-law is limited to trade and investment matters and the establishment of a free trade area. This rule-making approach significantly limits the inducement for compliance mechanisms — rewards or punishments — with PA's international and trans-governmental agreements. The PA relies heavily on suggested or recommended behaviours to its members rather than prescribed or proscribed behaviours.

The *Commercial Protocol* is the only agreement that has inducement for compliance mechanisms in the form of formal punishment.[802] First, Chapter 17 of the *Commercial Protocol* incorporates punishment provisions applicable between members in three instances: (i) for actual or proposed measures by a member inconsistent with an obligation under the Protocol; (ii) for failure to carry out an obligation under the Protocol; (iii) for the application of a measure by a member that is not inconsistent with the Protocol but causes another member the nullification or impairment of benefits that the latter could reasonably have expected to accrue to it from selected Chapters of the Protocol.[803]

Arbitral awards rendered under the *Commercial Protocol* are final, not subject to appeal, and mandatory for the members who are party to a dispute. If a responding member fails to bring a measure into conformity with its obligations under the *Commercial Protocol* or to eliminate the nullification or impairment of benefits to a complaining party, the *Commercial Protocol* provides for temporary punishment in the form of compensation to the affected party. The Protocol ultimately allows for the suspension of benefits and obligations by the claiming member.[804]

Second, the *Commercial Protocol* incorporates punishment provisions applicable when a member violates its investment obligations under the Investment Chapter. The financial compensation awarded under investor-state disputes by arbitral tribunals is a form of financial sanction for the member found in breach. [805]

801 Barbara Koremenos, *Project: The Continent of International Law (COIL)/ Coding Instrument*, University of Michigan < https://cps.isr.umich.edu/project/the-continent-of-international-law-coil/> 19.

802 See below Appendix C.

803 *Commercial Protocol* ch 17.

804 Ibid arts 17.16, 17.20.

805 See, eg, Koremenos, *The Continent of International Law*, above n 265, 229.

B *(De)Centralisation of Tasks and Delegation*

Building upon the descriptions in Chapter 5 about the organisational structures, this Part identifies the degree of centralisation in the PA in relation to five key tasks of interstate cooperation: (i) information production and management; (ii) decision making; (iii) administration; (iv) monitoring; (v) dispute resolution; and (vi) enforcement/punishment. While Chapter 5 focuses on studying the degree of organisational centralisation, depicting it as a primarily decentralised framework,[806] this Part concentrates on task-related (de)centralisation.

This Part confirms that the PA does not have a single focal point for delegation of critical tasks.[807] The limited delegation is a distinctive feature of the PA's institutional framework, confirming its character as an IIGI.[808] Moreover, the limited delegation of essential tasks falls on intergovernmental bodies of non-permanent nature, rather than supranational bodies.

Although decentralisation seems an obvious overall feature of PA's institutional framework, I unpack the dimensions of this decentralisation — organisational and task-related. This account sheds light on this feature beyond a binary of centralised vs decentralised and more as a continuum of multiple combinations of aspects along the scale. I discuss here the task-related (de)centralisation and the aspects encompassing it.

1 *Information Production and Management*

Information production, gathering, and management tasks are disseminated among the four members and their respective national coordinations.[809] The PA members delegate in the Pro-tempore Presidency developing progress reports on the agenda and the presidential mandates.[810] In practice, this corresponds to an information-gathering task rather than real monitoring.

The production of technical information to support policy decisions has been entrusted to external organisations such as development banks, the OECD, the OAS and private consultancy firms that have produced multiple reports in areas regarding infrastructure, financial integration and capital markets, taxation, productive linkages, and SMEs.

The PA provides limited centralisation mechanisms for the management and dissemination of information such as a website.

2 *Decision-Making*

Decision-Making is the most formally centralised task, although the practices suggest some deviation. Despite the Council of Ministers being the body officially entrusted with the decision-making and implementation of the *Framework Agreement*,[811] it is the

806 See above Ch 5, Part III.
807 See above Ch 5, Part III (A) (B).
808 Vabulas and Snidal, above n 257, 200.
809 See above Ch 5, Part III (B) (3).
810 See interview_21 (Bogota, Colombia 6 October, 2016).
811 *Framework Agreement* art 4.2.

de facto institutionalised Presidential Summit that informally provides the policy guidance and in this way decides on matters concerning the direction and future of the PA.[812] Moreover, the Free Trade Commission is delegated with decision-making on matters regarding the implementation of the *Commercial Protocol*.

3 *Administration*

The administration is delegated formally or informally to several bodies including the Free Trade Commission on the subjects related to the *Commercial Protocol*;[813] national coordinators;[814] and the Pro-tempore Presidency.[815] Administrative tasks are also informally delegated to an external Secretariat — the IDB — on matters regarding the financial agenda.

4 *Dispute Settlement and Enforcement*

Dispute settlement is decentralised. Most of the instruments concluded in the PA, including the *Framework Agreement*,[816] provide for political and non-legalised dispute resolution, such as diplomatic dispute resolution,[817] where parties directly settle their differences.[818] Under Koremenos' analytical framework, diplomatic or friendly negotiations are informal mechanisms for dispute settlement.[819]

The *Framework Agreement* mandates to start negotiations, within six months from its conclusion, for a dispute settlement regime applicable to the decisions of the Council of Ministers and other agreements adopted in the PA.[820] These negotiations have not started, despite the expiry of the deadline.

Legalised dispute settlement, which moves one step ahead in the centralisation continuum, has been circumscribed to the areas in the *Commercial Protocol*.[821] This agreement still establishes a decentralised model for adjudicating disputes that is internally delegated to ad hoc arbitral tribunals/panels.[822] Under COIL there is internal delegation because a body comprised of representatives of the members handles the arbitration. There is external delegation when a third party, such an IGO, a third state or an NGO is involved in solving the dispute.

812 See above Ch 5, Part III (B) (1).
813 *Commercial Protocol* art 16.1.
814 See above Ch 5, Part III (B) (3).
815 See above Ch 5, Part III (A) (3).
816 *Framework Agreement* art 12.1.
817 See below Appendix C. See, eg, *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance* art VI.
818 See, eg, *Agreement to Homologate Double Taxation Accords*, signed 14 October 2017 (not yet in force) art 8. See also Appendix C.
819 Koremenos, *The Continent of International Law*, above n 265, 203.
820 *Framework Agreement* art 12.2.
821 See above Ch 5, Part II (B) (2).
822 Koremenos, *The Continent of International Law*, above n 265, 205-6.

These tribunals are non-permanent, appointed on a case-by-case basis, to solve disputes between the PA members regarding the application, implementation, and interpretation of the *Commercial Protocol*.[823]

The Free Trade Commission has a limited role in settling disputes between the PA members during consultations.[824] At the request of one party, the Commission could intervene to provide recommendations, good offices, conciliation or mediation; or to seek technical advice that would assist the parties to solve their differences.

Legalised dispute settlement in the *Commercial Protocol* is also available to solve investment disputes between PA members and investors from the PA members through ad hoc arbitral tribunals. Notwithstanding the legalised dispute settlement of investor-state-disputes, the contending parties in the dispute are not just encouraged to settle the investment disputes informally; they have a duty to try to solve their differences through consultations and direct negotiation.[825] This regulation of ISDS in the *Commercial Protocol* is another step further in the continuum of centralisation.

The PA follows the general pattern that Koremenos outlines about dispute resolution mechanisms in the economic area.[826] Most of the international economic agreements follow informal dispute resolution or dispute resolution through arbitration.[827]

Enforcement mechanisms in a strict sense are absent in the PA. The PA's international agreements rely on self-enforcement — self-help — as is the case with international agreements more generally. Punishment is applicable only to the obligations in the *Commercial Protocol* and operates in a decentralised way. The *Commercial Protocol* is the only agreement that allows for a legalised 'retaliation' by imposing trade 'sanctions' through the suspension of benefits and obligations under the Protocol. Retaliation is the most severe and final consequence that a PA member will face if not implementing the ruling of an arbitral tribunal constituted under the dispute settlement system.

5 *Monitoring: Hierarchical 'Police Patrols' and Fire-Alarm Monitoring*

This is the task where the most significant gap exists between formal rules, informal rules and PA practices due to the presence of informal organisational structures that despite not being treaty bodies perform monitoring tasks.

The *Framework Agreement* prescribes that the central monitoring body is the Council of Ministers through 'police patrols'. The Council oversees the implementation of its decisions and assesses the correct application of its decisions periodically.[828] The *Framework Agreement* does not attribute monitoring functions to any other formal intergovernmental body.

823 *Commercial Protocol* ch 17.
824 Ibid arts 16.2. (c), 17.3.
825 Ibid art 17.5.
826 See Appendix C.
827 Koremenos, *The Continent of International Law*, above n 265, 206.
828 *Framework Agreement* art 4.2 (b) (c).

Under the *Commercial Protocol*, the Free Trade Commission oversees the implementation of this agreement and the works of the several committees in the Protocol. Thus, all monitoring is delegated to internal bodies.[829] No external IGO has formal monitoring functions.

However, in practice, informal bodies also monitor the works. The PA lacks a centralised focal point for monitoring; instead there are several instances of regular compliance monitoring[830] — 'police patrols'— adding layers of centralisation. There is no independent monitoring. The intergovernmental structure of its bodies, which mimics structures of the national executive branches of the PA members, provides for informal, vertical, and hierarchical monitoring. For instance, the GAN oversees the progress of the works conducted in the technical groups comprised by government officials subordinated to their deputy ministers.[831]

The Council of Ministers monitors the implementation of presidential mandates through the reports received by the GAN.[832] In turn, the Presidents informally assess the progress through the reporting of the Council of Ministers.[833] Information gathered in compliance and implementation monitoring is available only to the members and intergovernmental bodies. Internally delegated monitoring operates mostly by self-reporting with inputs from the members through their government officials. Intergovernmental internal bodies established in the PA agreements have the task to verify these reports. This situation means that in practice, the distinction between both types of monitoring systems — self-reporting and delegated monitoring —blurs, even if one argues that an internally delegated monitoring system prevails.

Under COIL, the fact that investors of other PA members are provided with the right to submit claims for member violations of their investment obligations entails a form of formal monitoring capacity for NGOs under the treaty. This monitoring complements other means for formally monitoring compliance with the Protocol.[834] Koremenos names it a 'fire-alarm' type of compliance monitoring. 'Fire-Alarm monitoring operates in response to allegations of noncompliance [835]

The ISDS system in the *Commercial Protocol* internally delegates the monitoring of noncompliance with arbitral awards rendered by investment tribunals. The ISDS system prescribes that if a respondent in an investor-state case fails to comply or does not abide by a final investment award, an arbitral tribunal for state-to-state disputes, under Chapter 17, will be established.[836] The requesting party may seek a determination that the failure to abide by or comply with the final award is inconsistent with the obligations under the *Commercial Protocol*, or a decision that the respondent complies with the final investment award.

829 Koremenos, *The Continent of International Law*, above n 265, 265 n 3.
830 Ibid 265 n 4.
831 See interview_21 (Bogota, Colombia 6 October, 2016).
832 See above Ch 5, Part III (B) (4).
833 See interview_21 (Bogota, Colombia 6 October, 2016).
834 Koremenos, *The Continent of International Law*, above n 265, 264.
835 Ibid 265 n 4.
836 *Commercial Protocol* art 10.26.10.

The monitoring of noncompliance — compliance review — with a state-to-state final report under Chapter 17 is delegated to the same ad hoc arbitral panel under the internal monitoring system. The *Commercial Protocol* prescribes that the complaining party shall refer the matter to the original panel for determination. The respondent party can also refer to the original panel if it considers that the level of suspension of benefits the claiming party applies is manifestly excessive.[837]

The Monitoring Inter-parliamentary Commission of the Pacific Alliance, despite its name, has limited monitoring functions.[838] The nature of the Pro-tempore Presidency also restricts the scrutinising role of this body. The CEAP informally monitors the implementation of mandates that incorporate its recommendations to the PA.[839]

This situation means that the monitoring system adopted through the *Framework Agreement*, the *Commercial Protocol*, the informal rules and the practices of the PA members is highly cumbersome and more complex than what the formal treaties prescribe.

C *Rules for Control: No Material Control*

Rules for control in the PA generally do not vary according to the task. The PA is consensus-based. The PA highlights in its formal objectives the need to build the deep integration goal in a consensual and participatory manner.[840]

Under the *Framework Agreement* and the *Commercial Protocol*, the Council of Ministers and the Free Trade Commission decide by consensus.[841]The same applies as a standard practice for the Presidential Summit, the GAN and the CMF.[842] The technical groups also follow a consensus practice in their works.[843] When the representatives to these technical groups fail to reach agreement on how to deal with a topic, the practice is to escalate them to upper intergovernmental bodies in the hierarchy (ie GAN, Council of Ministers, and eventually the presidents) for final deliberation by consensus.[844]

Exceptionally, the *Commercial Protocol* applies a modified consensus rule regarding scarce supply. The rule provides that consensus can be reached among representatives to the Free Trade Commission attending the meeting.[845] The consensus from the non-attending parties is presumed.

The institutional rules of the PA refer to voting exceptionally. The *Framework Agreement* prescribes the unanimity rule when the Council of Ministers needs to decide

837 Ibid art 17.22.
838 See above Ch 5, Part III (B) (6).
839 See above Ch 5, Part III (B) (8).
840 *Framework Agreement* art 2.
841 See above Ch 5, Part III (A) (1), (2).
842 Interview_11 (Lima, Peru, 7 September 2016); Interview_19 (Bogota, Colombia, 5 October 2016); Interview_35 (Skype, 1 March 2017).
843 Interview_02 (Skype, 12 August 2016).
844 Ibid.
845 *Commercial Protocol* annex 4.31, arts 23-25.

on the entrance of new members and new observer states.[846] There is no majority-voting in the *Framework Agreement.* No weighted-voting applies in the *Framework Agreement* or the *Commercial Protocol*. PA members distribute representation in the inter-governmental bodies without consideration to the members' size, population, market share, or value of financial contributions. Votes are equally allocated — one per PA member — when applicable. I argue that, in the PA, voting is the exception rather than the rule.

Regarding dispute settlement, ad hoc tribunals under the *Commercial Protocol* are bound to apply the majority-voting rule subsidiarily, only if arbitrators cannot reach consensus.[847] There are no super-majorities or special majorities applicable to the decision-making in the PA, or voting rules that vary according to the issue decided.

The use of different terminology suggests that PA members wanted to distinguish unanimity and consensus. The consensus is not a voting rule in legal terms but the result of cooperative decision-making. Consensus relates to the processes where the group reaches general agreement even if it does not involve following everybody's individual interests or ideas.

The consensus rule is embedded in the general operation of the PA and representatives' take pride in this outlining the relevance of interpersonal relationships and like-mindedness to make it work.[848]

D *Adjustability of Arrangements*

The adjustability of arrangements is one of the most salient features of the institutional framework in the PA. Koremenos limits the study of this feature to six types of adjustability devices: finite duration, renegotiation escape clauses, withdrawal clauses, reservations, and imprecision. [849]

This Part examines each of these adjustability devices in the PA's institutional rules and calls on the need to consider additional instruments. I argue that the PA presents a broad range of adjustability mechanisms in its institutional rules designed to adapt to changes in circumstances and to be able to reach international agreements in the first place.[850] I also expand the scope of analysis to capture the full spectrum of adjustability of arrangements that PA members use. To this end, this Part describes carve-outs, NCMs, 'bundle' withdrawal clauses, exception clauses, and 'customised commitments' present in the PA's international agreements.

1 *Finite Duration and Renegotiation Clauses*

None of the international treaties encompassing the legal regime of the PA has finite duration or renegotiation provisions, the first two devices in the COIL research

[846] *Framework Agreement* arts 10-11.
[847] *Commercial Protocol* art 17.14.7.
[848] Interview_02 (Skype, 12 August 2016); Interview_35 (Skype 1 March 2017).
[849] See above Ch 3, Part III (B) (3).
[850] Koremenos, *The Continent of International Law*, above n 265, 131.

program. A few of the inter-institutional agreements supporting the cooperation dimension of the PA have a short and finite duration.[851]

2 *Withdrawal and Denunciation*

All of the international treaties in the PA incorporate denunciation provisions, allowing the members to withdraw. Except for the *Agreement to Homologate Double Taxation Accords*, the PA international agreements tie the withdrawal from the particular agreement to denouncing the *Framework Agreement*. The notice period provided in the *Framework Agreement* is six months, allowing for the remaining parties to adjust their policies (regional and national) to the new environment.[852] The withdrawal will take effect six months after the notification date.

The most noticeable withdrawal device is in the *Commercial Protocol* regarding the Investment Chapter. In this case, there is, apart from the notice period, a waiting period when the member's obligations are effective beyond the withdrawal date.[853] Thus, the Investment Chapter will apply for five years more after denouncing the Protocol for investments made at least one year before the denunciation date.

3 *Escape Clauses and Exception Clauses: A Fuzzy Distinction*

In contrast to the rest of the international treaties, the *Commercial Protoco*l offers a variety of escape clauses. These clauses, in the analytical framework, are broadly understood as temporarily allowing a member to depart from full compliance with the agreement, or specific provisions of the accord, under certain conditions.[854] These provisions permit a member to be temporarily exempt from a requirement of an international agreement, to change its obligations, or to avoid liability for non-performance provided the member meets the defined conditions.[855]

COIL distinguishes between escape clauses and exception clauses based on the temporary nature of the former.[856] COIL focuses on the analysis of escape clauses, leaving unattended exception clauses, which are a significant adjustability device in economic agreements such as the *Commercial Protocol*.

As Rosendorff and Milner point out, escape clauses are a prominent feature of most PTAs,[857] and the *Commercial Protocol* is no different. Under the *Commercial Protocol*, escape clauses include[858] temporary safeguard measures. They allow for individual PA members to respond to shocks by imposing restrictions on transfers or payments for the current account transactions, restrictions on transfers or payments on capital movements, restrictions to trade in goods for imports and trade in services to safeguard

851 See below Appendix C.
852 Koremenos, *The Continent of International Law*, above n 265, 142.
853 Ibid 147-9.
854 Koremenos, *The Continent of International Law*, above n 265, 129.
855 Ibid 125-6.
856 See also Krzysztof J Pelc, 'Seeking Escape: The Use of Escape Clauses in International Trade Agreements' (2009) 53 *International Studies Quarterly* 349, 351.
857 B Peter Rosendorff and Helen V Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape' (2001) 54 (4) *International Organization* 829, 830.
858 Pelc, above n 856, 366.

the balance of payments or the external financial position. [859] Moreover, article 18.3 provides that nothing in the Protocol shall be interpreted to preclude a party from adopting measures necessary for the protection of its essential security interests.[860]

Article 18.2 of the *Commercial Protocol* also reinstates, concerning the Investment Chapter, the power that PA members have to adopt or maintain measures applicable to natural persons of other members. This power is present under the condition that these measures are necessary to preserve the public order and are not unjustified or arbitrarily discriminatory.

Article 9.13.3 incorporates an escape clause allowing for one PA member to delay or stop transfers or payments related to the cross-border supply of services in specific cases and provided that the member applies its domestic regulations in good faith, equitably, and in a non-discriminatory manner.

The expropriation provision of the Investment Chapter is an escape clause, under Koremenos' characterisation, because it allows for expropriation [861] under specific conditions. [862] I maintain that the temporality criterion that Koremenos stresses for escape clauses is problematic regarding the expropriation provision in the Investment Chapter of the *Commercial Protocol* and other PTAs more generally. This is because the conditions that allow for a member to expropriate in the public interest do not have a temporary nature. This situation may be the reason why Koremenos claims that expropriation provisions fall on the spectrum of escape clauses — although at one extreme end.[863]

The expropriation provision is the only escape clause that attaches a cost for the member that uses it by way of compensation to the affected person. This burden confirms empirical observations.[864] These observations indicate that the use of escape clauses does not match the prevalent theory asserting that escape clauses need to attach a cost to the member; otherwise they would undermine the integrity of international agreements.[865]

The *Commercial Protocol* does not have a Trade Remedies Chapter. As a result, the Protocol does not contemplate one of the typical forms of escape clauses in the WTO [866]

859 *Commercial Protocol* art 18.6.

860 Koremenos, *The Continent of International Law*, above n 265, 129.

861 Ibid 129-31. Some authors may argue that this clause only delimits the scope of the obligation not to expropriate.

862 *Commercial Protocol* 10.12. See Koremenos, *The Continent of International Law*, above n 265, 129.

863 Koremenos, *The Continent of International Law*, above n 265, 131.

864 Pelc, above n 856, 352-3.

865 See, eg, Rosendorff and Milner, above n 857, 831. But see Koremenos, *The Continent of International Law*, above n 265, 131-2, 140; Pelc, above n 856, 352.

866 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') art XIX; *Marrakesh Agreement Establishing the World Trade Organization* , opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Safeguards*').

and PTAs,[867] namely temporary safeguards on imports of goods that cause or threaten to cause serious injury to specific domestic industries.

Escape clauses are not present in any of the other international agreements in the PA.[868] Unsurprisingly, these clauses are not a feature of the multiple inter-institutional cooperation agreements, with only two agreements featuring escape clauses.

Exception clauses under the *Commercial Protocol* are the general exceptions under Chapter 18; [869] Chapter-specific exceptions regarding services trade,[870] and financial services (ie, prudential carve-out);[871] and exceptions applicable to specific provisions such as the exception to the obligation by customs authorities in the PA members to provide mutual assistance.[872]

Exception clauses are not present in the *Framework Agreement*, other treaties, and other soft instruments of the PA.[873]

4 *Reservations, Carve-Outs, NCMs, and 'Customised' Commitments*

The *Commercial Protocol* does not allow for reservations in a strict sense.[874] However, other PA international agreements do not prohibit reservations in a strict sense. This approach confirms Koremenos' findings that a few international economic agreements prohibit reservations. [875]

I propose that it is necessary to stretch the legal concept and examine unilateral declarations, annexes, and notes included in international agreements to fully understand this adjustability device. These documents include carve-outs used to exclude the application of provisions to a specific state measure or an (economic) sector in PTAs. These agreements also include clauses that modify the legal effect of a provision for a particular state; this device is what I call 'customised' commitments extending Koremenos' claims on legal reservations.[876]

Members included annexes that modify the effect of a provision for a particular PA member or carve out a sector or measure from its application. For instance, Mexico incorporates an annex to carve out from the application of ISDS and the general dispute settlement mechanism of the Protocol some measures (resolutions) that the National Commission on Foreign Investment takes.[877] Chile excludes its foreign investment statute and other measures from the application of the Investment Chapter through a

867 Robert Teh, Thomas J Prusa and Michele Budetta, 'Trade Remedy Provisions in Regional Trade Agreements' (World Trade Organization, Staff Working Paper ERSD 2007-03, September 2007) 3-4.
868 See below Appendix C.
869 *Commercial Protocol* art 18.1.
870 Ibid art 9.3.
871 *Commercial Protocol* art 11.11.
872 Ibid art 5.20.
873 See below Appendix C.
874 See *Commercial Protocol* art 19.8.
875 Koremenos, *The Continent of International Law*, above n 265, 158.
876 Ibid 191.
877 *Commercial Protocol* ch 10, annex on Exclusions from Dispute Settlement: Mexico.

special annex.[878] These declarations in annexes or otherwise are effectively reservations.

Moreover, NCMs or reservations on the application of treaty provisions generally — horizontal NCMs — or to specific economic sectors are commonly scheduled in PTAs dealing with services trade and investment. The *Commercial Protocol* follows this approach. The *Commercial Protocol* features a list of NCMs for each PA member.[879]

PA members also use 'customised' commitments that allow for varying degrees of compliance of the *Commercial Protocol*. This tailored commitments to the situation of a member has a tint of variable geometry. I mean by variable geometry the incorporation of legal mechanisms or others that allow for differentiated obligations or differentiated implementation of obligations among the members to a regional institution.[880]

For example, Colombia made the application of number portability obligations to landline telephone services conditional upon technical feasibility.[881] Peru allowed itself three years from the entry into force of the *First Protocol Modifying the Commercial Protocol* to implement number portability obligations to landline telephone services.[882]

5 *(Im)precision*

Imprecision is the adjustability device that institutional entrepreneurs and decision-makers most commonly use. Institutional designers employ them to accommodate different positions at the outset or during the implementation of the institutional rules of the PA.[883] It is a distinctive feature of the *Framework Agreement*.

Imprecision or intentional vague language is also distinctive of the inter-institutional agreements that are part of the PA's institutional rules.[884]

In contrast, the length of the *Commercial Protocol* — 287 pages — is a proxy of the overall higher level of precision of this international agreement in comparison to other international and trans-governmental agreements of the PA. I assess this agreement as somewhat precise,[885] due to the combination of hard-law and soft-law provisions in the continuum of legalisation.[886]

An example of targeted precision is Chapter 10 of the *Commercial Protocol* on investment. PA members specifically designed this Chapter to provide higher levels of precision on the scope of substantive and procedural obligations vis à vis the rules on investment contained in previous bilateral agreements. The Investment Chapter

878 Ibid annex on the Exclusion of Decree-Law 600: Chile.
879 See Ibid annexes I, II and III.
880 See, eg, Elisa Tino, 'The Variable Geometry in the Experience of Regional Organizations in Developing Countries' (2013-2014) 18 *Spanish Yearbook of International Law* 141-62.
881 *First Protocol Modifying the Commercial Protocol* annex 3, art 14.5 n 4.
882 Ibid art 14.5 n 5.
883 See above Ch 5, Part II, and Appendix C.
884 See below Appendix C.
885 Ibid.
886 See above Ch 5, Part II (B) (2).

contrasts the precision on substantive and procedural 'standards' for the treatment of investors and their investments (eg, indirect expropriation, MFN treatment, the minimum standard of treatment, full protection and security) with soft-law rules in relatively new areas such as corporate social responsibility.[887]

III Cooperation Problems and Characteristics of the Members in the Aggregate

This Part is divided in two. Part A examines the cooperation problems that PA members attempted to address through the *Framework Agreement*, the *Commercial Protocol*, other international treaties signed among the four PA members, and its soft inter-institutional agreements. This Section justifies and explains why I consider certain problems to be present in each agreement. Overall, I maintain that the most prevalent cooperation problems of PA's international agreements are uncertainty about the state of the world and commitment problems. Trans-governmental agreements present non-strategic cooperation problems primarily.

Part B presents four characteristics of the PA members in the aggregate: (i) number of members; (ii) the degree of domestic regime-type asymmetries; (iii) the degree of heterogeneity in preferences; and (iv) the level of economic power asymmetries.

I maintain that PA members represent a homogeneous group regarding preferences and domestic regime-type, according to the benchmark proposed in COIL. One substantial asymmetry amongst the four members is economic power. Full membership has remained at four since the PA's establishment.

A *Cooperation Problems*

Part A is descriptive and explanatory. It gives an account of the cooperation problems present in the international and trans-governmental agreements concluded in the PA. At the same time, it explains why I estimate specific cooperation problems and no others to be present in particular agreements. I base my analysis on the characterisations in Chapter 3 of the potential cooperation problems in interstate cooperation, according to COIL.[888] I apply adjusted thresholds to the ones Koremenos defines to assess the presence of cooperation problems, according to Table 4 above.

I address in sections One, Two, Three, and Four all the international agreements that the four PA members have concluded in the PA explaining the problems present in the negotiation of each agreement. I provide an overall account of the most significant cooperation problems present in the PA's trans-governmental agreements in Section Five. Appendix C has the detailed support for this analysis on cooperation problems.

I claim here that the most prevalent cooperation problem explaining the institutional rules of the *Framework Agreement* is economic and political uncertainty about the state of the world.

887 *Commercial Protocol* art 10.30.
888 See above Ch 3, Part III (B) (1).

Uncertainty about the state of the world is also present in the negotiation of the *Commercial Protocol*, although to a lesser degree than other cooperation problems. The rules in the *Commercial Protocol* are the result of a complex combination of commitment, distribution, coordination, and enforcement problems. I argue that distribution problems met the threshold proposed in Koremenos' analytical framework for this type of economic agreement, although substantially mitigated by previous bilateral PTAs.

The *Commercial Protocol* involves aspects that underpin coordination problems. For instance, the agreement requires coordination in defining the scope of main concepts ensuring a common ground for the application of substantive obligations on rules of origin and cumulation, services disciplines, and investment. The protocol deals with coordination problems and features institutional rules to tackle them.

The *Agreement to Homologate the Taxation Treatment* is the only agreement within the PA that deals exclusively with a coordination problem amongst the four members and a non-strategic cooperation problem.

The *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance* involves a non-strategic cooperation problem. The majority of trans-governmental agreements in the PA present non-strategic cooperation problems and uncertainty about the state of the world.[889]

Uncertainty about preferences, uncertainty about behaviour, and norm exportation do not meet the threshold as significant cooperation problems either in the international agreements or in the trans-governmental agreements concluded in the PA. Only one of the trans-governmental agreements amongst public agencies in the PA presents norm exportation problems.[890]

1 *The Framework Agreement*

Enforcement problems were not significant cooperation problems at the time of establishing the PA, particularly when negotiating the *Framework Agreement*. Members were hoping to develop long-term and stable interactions that made defecting undesirable. Expectations of the (mainly economic) benefits of future interactions among the PA members reduced incentives to defect. In cooperation terms, incentives to defect were small relative to the shadow of the future.[891] Low membership and frequent interactions discouraged free-riding at this point. Thus, the *Framework Agreement* goal was not to solve underlying enforcement problems.

Distribution problems did not represent a challenge for interstate cooperation among the PA members at the time of negotiating the initial agreement. The cooperation situation did not fit a zero-sum scenario where a better outcome for one member would have left the others with less. Moreover, in establishing the *Framework Agreement*, the

889 See below Appendix C.

890 See *Inter-Institutional Cooperation Agreement Concluded amongst the Sanitary Authorities of the Pacific Alliance Countries* (20 June 2013) < https://alianzapacifico.net/download-category/acuerdos-interinstitucionales/ >.

891 Koremenos, *The Continent of International Law/ Files*, above n 308, 2.

PA members did not need to make substantial changes (or in fact any changes) in their national legislation, other than those related to the domestic incorporation of an international treaty. This situation confirms the absence of distribution problems.

In contrast, there was a high degree of uncertainty about the state of the world, meaning uncertainty about how well the regional economic cooperation endeavour would work. The background of the failed attempt to integrate through ARCO and negative perceptions about the performance of other regional institutions in LA[892] reinforced this uncertainty.[893]

Uncertainty about the state of the world was also high because PA members individually were not sure how committed other participating members would be in the long-term to deepen their economic relations. I distinguish here between not knowing how committed in the long-term other members would be, a situation that creates political uncertainty about the state of the world, and actual commitment problems. When negotiating the *Framework Agreement*, there was no certainty that the enthusiasm for the launch of a new integration initiative would withstand changes in domestic government shifts. Thus, the prevailing cooperation problem at the time of establishing the PA was uncertainty about the state of the world at the economic and political level.

I also maintain that commitment problems underlie the *Framework Agreement*. The adjusted threshold I propose evidences the presence of this problem.[894] To provide a better account of the institutional framework of the PA, I need to relax the threshold on commitment problems to consider individual governance levels in the PA members. My presumption here is that weak governance levels, as estimated in the WGI, have a strong connection to domestic commitment problems,[895] as Koremenos defines them.[896]

With these adjustments to the original analytical framework, I argue that commitment problems underlie the *Framework Agreement* because at least one PA member features political instability to a significant degree in the period under analysis. The Part below on the degree of domestic regime-type heterogeneity and governance levels examines this characteristic in all the PA members.[897]

There is no evidence of uncertainty about behaviour problems because the small membership would have made it easy for other PA member to identify breaching parties. More importantly, the absence of enforcement problems in the negotiation of the agreement also reduced the probability of problems related to uncertainty about behaviour.

Norm exportation problems were not relevant for the negotiation of either the *Framework Agreement* or the other PA international agreements. Considering the aims of the *Framework Agreement*, none of the PA members had a particular interest to

892 See above Ch 4, Part IV (D).
893 See above Ch 4, Part III.
894 See above Ch 3, Part III (B) (1) and Table 4.
895 See below Part III (B) (2).
896 Koremenos, *The Continent of International Law*, above n 265, 209. See above Ch 3, Part III (B) (2).
897 See below Part III (B) (2).

'spread' its norms/rules.[898] However, this situation does not prevent norm exportation problems arising in the future when negotiating specific agreements. For instance, setting up common technical regulations or requirements for regional trade in goods or services creates incentives for PA members that already have these rules in place at the domestic level or in other subregional institutions, such as CAN, to push for the adoption in the PA of their own national or subregional rules.[899] Adopting a member's standards or requirements would avoid the adjustment costs for its domestic industries to trade regionally in the PA.

2 *The Commercial Protocol*

Uncertainty about the state of the world was present in the negotiation of the *Commercial Protocol*, although to a lesser degree than in the *Framework Agreement*. This cooperation problem still meets the threshold proposed under COIL.[900] In the case of the *Commercial Protocol*, there was still 'uncertainty about whether cooperation would be beneficial in all possible future conditions'.[901]

Although the *Commercial Protocol* overall still meets the threshold for distribution problems, the pre-existing bilateral PTAs ameliorated these problems. The *Commercial Protocol*, which creates a free trade area, builds on existing bilateral PTAs, limiting the need for bargaining over substantive provisions. Thus, despite most PTAs featuring significant distribution problems, I argue that, against intuition, this problem is not as pervasive in the case of the PA as in other PTAs amongst 'new' trading partners.

For trade in goods, tariff reduction and elimination in prior bilateral agreements already represented a substantial bargain in the distribution of costs and benefits of liberalisation. In highly sensitive goods such as sugar and related goods,[902] PA members eradicated any potential distribution problem by excluding them from the agreement. Tariff quotas on sensitive products are dealt with through bilateral agreements already in operation.[903]

Table 14 below summarises the tariff reductions under bilateral agreements prior to the *Commercial Protocol*.

Table 14 Tariff Reductions Levels under Bilateral PTAs

Exporting →	**Chile**		**Colombia**		**Mexico**		**Peru**	
Importing ↓	% Items	% Exports	% Items	% Exports	% Items	% Exports	% Items	% Exports

[898] Koremenos, *The Continent of International Law/ Files*, above n 308, 6.
[899] See above Ch 9, Part II (D) (4) (a).
[900] See above Table 4.
[901] Barbara Koremenos, 'The Role of State Leadership in the Incidence of International Governance' (2015) 6 (3) *Global Policy* 237, 238.
[902] Decreto 713 de 2016, *Por el cual se desarrollan los compromisos de acceso a los mercados adquiridos en virtud del "Protocolo Adicional al Acuerdo Marco de la Alianza del Pacífico"* (Colombia) 'Decreto 713/2016' art 8 [Decree 713 of 2016, *Implementation of Market Access Commitments undertook under the Additional Protocol to the Framework Agreement of the Pacific Alliance"* (Colombia) 'Decree 713/2016' art 8].
[903] See, eg, *Agreement on Economic Complementarity between Chile and Colombia* (Seventh Additional Protocol).

Chile	NA	NA	NIA[904]	99	98.3	99	99.6	98.9
Colombia[905]	NIA[906]	99	NA	NA	NIA[907]	92	100 CAN	100 CAN
Mexico[908]	98.3	99	NA[909]	92	NA	NA	NIA	83
Peru[910]	99.6	98.5	100 CAN	100 CAN	NIA	85	NA	NA

Source: Author's compilation based on multiple sources

In some instances, PA members limited bargaining to specific goods such as pork meat, poultry meat, dairy products, wheat, corn, soy, barley, edible oils and their derivatives that were subject to the Andean Price Band System in Colombia and Peru. For these products, the bargain was limited to the variable component of the tariffs subject to fluctuations in international prices. The fixed part of the tariff for these goods was already supressed under bilateral PTAs (eg, with Chile).[911] In other instances, the bargain consisted of accelerating the phasing out of tariffs schedules already committed for full liberalisation in bilateral PTAs.

In the case of services and investments, pre-existing bilateral PTAs — NAFTA institutional type — and ARPPIs also offered previous substantive disciplines restricting the bargaining to targeted sectors and disciplines. This situation reduced the domestic distribution problems associated with the liberalisation of services trade and the reduction of barriers for investment.

Table 15 below summarises the sectors subject to disciplines under pre-existing PTAs and ARPPIs.

904 Estimates by the Ministry of Trade, Industry and Tourism of Colombia suggest that only 41 sub-items or sub-headings are not liberalised because they are subject to price bands.

905 Since 2005 the Andean Community has been a free trade zone.

906 The Ministry of Trade, Industry and Tourism of Colombia estimates that 97.6 per cent of the items are liberalised under the pre-existing PTA. Around 182 sub-items are not yet liberalised.

907 The Ministry of Trade, Industry and Tourism of Colombia estimates that 95 per cent of the items are liberalised with the pre-existing PTA. Around 373 sub-items are not liberalised.

908 According to the Ministry of Foreign Affairs of Chile, 98.3 per cent of the tariff lines imported from Chile to Mexico were liberalised immediately and 99 items have exceptions. The same situation takes place for imports from Mexico to Chile where only 99 items have exceptions and 98.3 per cent of the tariff lines are liberalised.

909 The Ministry of Trade, Industry and Tourism of Colombia estimates that 97 per cent of the items are liberalised with the pre-existing PTA. Around 413 sub-items are not yet liberalised.

910 Including items liberalised from the start and items subject to 3, 5, 6, 8, 10 and 15 years. Only three items are excluded from liberalisation and 24 more are subject to a liberalisation schedule for 18 years.

911 *Beneficios y Principales Hitos Comerciales de la Alianza del Pacífico*, Prochile <https://www.prochile.gob.cl/wp-content/uploads/2018/05/BROCHURE-ALIANZA-DEL-PACIFICO-v5-1.pdf> [*Benefits and Main Commercial Milestones of from the Pacific Alliance*, Prochile <https://www.prochile.gob.cl/wp-content/uploads/2018/05/BROCHURE-ALIANZA-DEL-PACIFICO-v5-1.pdf>].

Table 15 Sectors Subject to Prior-PTAs and ARPPIs

PTA	Cross-Border Trade	Telecomm	Financial	Ecommerce	Investment	Maritime	Air Transport	Related Services in Air Transport	Professional Services	Temporary entry
Chile-Colombia	ch 10	no	no	ch 12	ch 9	no	no	ch 10 (limited scope)	Annex 10.9	ch 11
Chile-Mexico	ch 10	ch 12	no	no	ch 9	no	no	ch 10 (limited scope)	Annex 10-12	ch 13
Chile-Peru	ch 12	no	no	no	ch 11	no	no	ch 12 (limited scope)	Annex 12.10.5	ch 13
Colombia-Mexico	ch X	ch XI	ch XII	no	ch XVII	no art 3 Annex 2 to art 10.2	no	Annex 2 to art 10.02 (limited scope)	Annex 1 to art 10.02	ch XIII
Colombia-Peru	D 439, D 510, D 659	D 462, D 439	D 659	no	D 291, D 292 ARPPI 2010	D 314 multimodal: D 331, 393 D 609	D 582, D 619, D 650, R 1271, R 1381 multimodal: D 331, D 393	D 439, 510	D 439, D 510	D 503 R 527 D 504, D 525 D 526
Mexico-Peru	ch 10 and 14	no	ch 12	no	ch 11	no	no	ch 9	Annex 10.11 Ch XIV	ch 13
CP	ch 9	ch 14	ch 11	ch 13	ch 10	ch 12	no	ch 9 (limited scope)	Annex 9.10	no

Source: Author's compilation based on multiple sources

Negotiations on services liberalisation focused on disciplines for services not covered under the pre-existing bilateral agreements such as telecommunications and financial services between Chile and Colombia. Disciplines on ecommerce are also new, and only the PTA between Chile and Colombia includes them. The *Commercial Protocol* also incorporates new disciplines of soft-law type on maritime services that only Colombia and Peru regulate through CAN.[912]

Neither the bilateral PTAs nor the *Commercial Protocol* establishes disciplines on air services as they are usually in dedicated agreements. Nonetheless, bilateral PTAs apply services disciplines to some related services in support of air services. The *Commercial Protocol* extends the application of services disciplines to specialised air services not covered in bilateral PTAs such as the Mexico-Peru[913] and Chile-Peru PTAs. The

912 See above Ch 5, Part II (B) (2).

913 See, eg, *Commercial Integration Agreement between Peru and Mexico* art 10.2

Commercial Protocol also extends the services disciplines of the Protocol to services for the selling and marketing of air transport, not included in some bilateral PTAs such as the Chile-Mexico PTA[914] the Chile-Peru PTA, [915] the Colombia-ChilePTA, [916] and the Colombia-Mexico PTA.[917]

The above examples indicate that domestic distribution problems in the negotiation of services disciplines in the *Commercial Protocol* took place for specific services and areas.

Generally, Koremenos assesses investment agreements (eg, BITs) as having low distribution problems regarding what substantive and procedural provisions should be included in comparison to agreements in other fields such as human rights.[918] She argues that BITs do not meet the threshold for high distribution problems. [919]

Regarding the negotiation of investment disciplines in the PA, the members circumscribed the bargaining to updating and clarifying the scope of substantive and procedural obligations already contained in pre-existing bilateral agreements. I argue that this 'scoping' still underlies distribution problems although even lower than in negotiating an entirely new investment agreement between two states. By design, there are distribution problems in the selection of what economic sectors or domestic measures to subject or exclude from the investment protection disciplines such as market access, national treatment, MFN, or FET.

These two factors provide support to my argument that, contrary to what Koremenos generally asserts about distribution problems in BITs, the Investment Chapter in the *Commercial Protocol* and the overall Protocol still meets the threshold for distribution problems.

Another point that supports my claim on lower distribution problems in the *Commercial Protocol* than in PTAs between new trading partners is that the PA members did not need to make regulatory changes. The members did not make any changes in their national legislation, other than those related to the domestic incorporation and implementation decrees, such as the tariff elimination schedules.[920]

This scenario means that PA members did not face significant distribution problems resulting from legal modifications that might have affected the interest of domestic elites or national constituents. Members' (regulatory) practices, as set in domestic laws, other international agreements — including other PTAs and ARPPIs — did not differ greatly from the proposed 'standards' in the *Commercial Protocol*.[921] In brief, even though the *Commercial Protocol* and its investment disciplines still meet the threshold for distribution problems in their negotiation, these problems were less than the

914 *Free Trade Agreement between Chile and Mexico* art 10.02.3 (b).
915 *Free Trade Agreement between Peru and Chile* 12.1.3 (b).
916 *Free Trade Agreement between Colombia and Chile* art 10.1.4 (b).
917 See, eg, *Free Trade Agreement between Mexico, Colombia and Venezuela (ACE 33)* annex 2 to art 10.02.
918 Koremenos, *The Continent of International Law*, above n 265, 86.
919 Ibid.
920 See, eg, Decree 713/2016.
921 Koremenos, *The Continent of International Law*, above n 265, 85.

distribution problems involve in negotiating an entirely new agreement among 'new' partners.

As in the case of the *Framework Agreement*, the *Commercial Protocol* evidences domestic commitment problems or time-inconsistency problems as members in the agreement are the same. The latter agreement is also a direct development of the incomplete contract that the *Framework Agreement* represents in cooperation terms. The negotiations of the *Commercial Protocol* faced the dilemma that the best plans of national governments for the future — economic regionalism and deep integration towards the free movement of factors — would not be optimal when that future period arrives. Changes in national governments and policies over time reinforce time-inconsistency problems in the PA members.

Enforcement problems — understood as incentives to defect — are present in the negotiation of economic agreements, including PTAs such as the *Commercial Protocol*. This agreement meets the COIL threshold. However, the expectation of frequent future interactions of the regionalism project and the overall PA objectives as opposed to one stand-alone agreement ameliorate this cooperation problem. PA members prefer long-term cooperation with their other PA peers as opposed to long-term defection, but due to the nature of the issues addressed in the Protocol they face incentives towards noncompliance or defection.

The *Commercial Protocol* raises coordination problems because although PA members have a common goal to increase intra-regional trade and investment, they have different preferences with respect to outcomes in particular sub-issue areas. Thus, coordination problems are present in the negotiation of the *Commercial Protocol* in a differentiated way according to the area. In the sample of five Chapters that I examine coordination problems, as defined in COIL, are present in four Chapters.

The Chapters on SPS, TBT, market access, and to a lower extent services, meet the threshold because they involved issues where PA members needed to coordinate on exact outcomes to be better off. For instance, having different technical standards on products, sanitary and phytosanitary requirements, and licensing requirements to supply services make less probable trade in goods and services from the territory of one member into the territory of another member. In some instances, PA members must agree on a specific measure or set of requirements, in Koremenos' terms a 'specific solution', to be able to trade products. This situation involves a coordination problem. Chapter specific provisions also anticipate future coordination problems aligned with the overall objective of progressing towards the free movement of factors.

For example, suppose the *Commercial Protocol* would only stipulate 'parties shall reduce tariffs on goods coming from other PA members'. Reducing tariffs by any level would mean compliant behaviour.[922] If the PA members reduce tariffs to different levels in this competitive area, one or some PA members could be economically impacted. A member that reduces its tariffs more would prefer not to have had any agreement at all. Thus, PA members need to coordinate and agree in advance their tariff

922 Koremenos, *The Continent of International Law/ Files*, above n 308. I extrapolate this example to the area of market access from Koremenos examples and definitions on cooperation problems.

reduction levels because this 'specific solution' impacts their respective utility functions.

These Chapters also deal with issues where the policy match does not need to be exact. This means where parties do not need to coordinate on exact outcomes.

3 *Agreement to Homologate Double Taxation Accords*

Coordination problems with no distribution problems characterise the only taxation agreement signed among the PA members. Double taxation agreements such as this one, aim for coordinating the taxation laws of the members and for exchanging information with the ultimate goal of preventing tax evasion and limiting double taxation.[923] In this case, the agreement focuses on coordinating the members' taxation treatment for double taxation purposes of a specific type of legal entity —Retirement Funds.

Despite other PA international agreements meeting the adjusted threshold of commitment problems, the negotiation of the *Agreement to Homologate Double Taxation Accords* does not implicate this problem. I maintain that there are no time-inconsistency problems in this agreement because the government and congressional preferences on this narrow subject area are stable, in contrast to trade and other economic negotiations. In some instances, not only the regime-type and institutional strength but also the sub-issue area is relevant to assess the presence of commitment problems. Thus, there could be cases where despite a state generally having commitment problems due to governance issues, commitment problems may not be present in a specific agreement concluded by that state because the issue area is stable and not a focus of policy shifts when there are changes in national government leadership.

4 *Agreement for the Establishment of the Cooperation Fund*

The *Agreement for the Establishment of the Cooperation Fund* presents a non-strategic cooperation problem. The goals and nature of this international agreement make identifying defection easy for other PA members. Zero-Sum resembling game settings are absent because a better outcome for one member would not necessarily leave less for other PA members. This is the situation at least at the negotiating stage, where no specific funds for cooperation are allocated to members. Moreover, the agreement specifies the areas of collaboration where the Fund would devote resources broadly through shared priorities and preferences. The PA members equally share the operational costs of the fund, which means that no distribution problems arise at this stage.

I maintain that uncertainty about the state of the world and commitment problems also characterise this agreement when studied systematically with the other PA international agreements. Membership is the same as the *Framework Agreement* and the *Commercial*

923 Koremenos, *The Continent of International Law*, above n 265, 167.

Protocol, which means the commitment problems present in those agreements are replicated in this agreement.[924]

5 *Trans-Governmental Agreements*

A problem of uncertainty about the state of the world and non-strategic cooperation problems underlie the trans-governmental agreements amongst national regulatory agencies within the PA members. I argue that most of the areas where this cooperation concentrates are not strategically related to the economic goal of the PA — deep integration towards the free movement of factors.[925]

Cooperation in areas such as the sharing of diplomatic facilities, the work and holiday program, or the reduction of corruption in public procurement does not deal directly with economic issues. These agreements aim respectively at reducing operational costs of diplomatic presence that would allow extending that presence, cultural exchange, and the exchange of good practices and information. There is a high degree of political uncertainty about the state of the world in these agreements. For instance, national sovereignty concerns could arise in the future with the implementation of the agreements for sharing diplomatic facilities. Future bilateral tensions in diplomatic relations could make these agreements unsustainable or politically unpalatable. Overall, the consequences of that cooperation and the distribution of benefits were not clear at the negotiating stage.

The Inter-Institutional Agreement for Sanitary Cooperation presents a norm exportation problem. Three of the four PA members cooperate through a soft instrument with a view to Peru implementing international sanitary standards already incorporated by the other PA members. There is a coordination problem underlying the Mutual Recognition Agreement for Authorised Economic Operators aiming at facilitating intra-regional trade in goods by recognising in the territory of one PA member those economic operators authorised in the territory of another PA member. The agreement of the national customs authorities operates on a reciprocal basis. It deals with coordinating the exchange of information and negotiating legal and operative compatibility of the domestic programs for AEOs.

B *Characteristics of the PA Members in the Aggregate*

The four characteristics of the PA members in the aggregate that this Part examines are (i) number of members; (ii) the degree of domestic regime-type asymmetries; (iii) the degree of heterogeneity in preferences; and (iv) the level of economic power asymmetries. I demonstrate that the PA members in the aggregate represent a moderately homogeneous group of states. Membership to the PA has remained low and stable. Despite the differences in governance levels between Chile and the rest of the PA members, there are no regime-type asymmetries because all the PA members meet the threshold to be considered democratic regimes.[926] Foreign policy preferences of the PA members are homogenous rather than heterogeneous.

924 See above III (A) (1) (2).
925 See Appendix C.
926 See above Table 4.

The main factor of asymmetry in the group is economic power where a significant difference exists between Mexico's economic power and the rest of the group. However, I argue that taking into account not only economic power-asymmetry but also economic dependency provides a more accurate picture of the role of economic power-asymmetry in the PA.

1 *Number of Members*

The PA comprises a limited number of four states, which facilitates interstate cooperation as opposed to large groups of cooperating states, such as APEC or ASEAN. Full membership has been stable since the establishment of the institution. Although the PA practices a program of open regionalism, full membership requires compliance with entry requirements, including having a prior PTA with each of the full members.

2 *Degree of Domestic Regime-Type Heterogeneity and Governance Levels*

This Part gauges the degree of heterogeneity in the domestic regimes and evaluates qualitatively the differences in governance levels between the four members. As the Table 4 above shows, these two factors are closely connected to one another and to the threshold for commitment problems.

I argue that there are not domestic regime-type asymmetries among the PA members since the four members manage to maintain democratic regimes. [927] However, there are substantial differences on the governance levels between Chile and the rest of the PA members. These differences suggest high domestic institutional weaknesses in Colombia, Mexico, and Peru.

(a)Degree of Domestic Regime-Type Heterogeneity

According to the Polity scores, the four members are democracies. Their democracy scores range between seven and ten within the ten years before the conclusion of the *Framework Agreement* and up to 2018, the most recent year for which data is available in the Polity Dataset.[928] Chile scores the highest with a ten while Colombia rates the lowest in the group with a seven. Mexico and Peru score eight and nine respectively.

The Freedom House Index on democracy has information available only until 2014. Scores for this Index suggest similar patterns to the Polity Dataset although on a different scale and with slight variances. The Freedom House Index shows slightly higher heterogeneity in the democratic scores of the PA members. The highest democratic score is 99.96 out of 100 points on a liberal democracy standardised scale.

Chile is the only PA member that has reached a stable score of 99.96 points since 2004, along with states such as Norway, the United States, and Switzerland. Overall,

927 See above Ch 3, Part III, (B) (2), Table 4.

928 See Center for Systemic Peace, above n 367. See also Center for Systemic Peace, *Data Page*, above n 367. Scores for democratic regime range between six and ten. For instance, Finland reached a score of a stable ten over the last 74 years and Colombia scored a stable seven.

Colombia scores the lowest out of the four PA members with a score of 64.26 between 2008 and 2014. The Freedom House Index indicates a slight decline of over seven points in the democratic conditions for Colombia. For both benchmarks, Colombia presents the lowest democratic levels of the four PA members. Between 2006 and 2014 the Index continues to report a slight decline in seven points for the democratic conditions in Mexico, although its scores stayed stable at 71.4 since 2010.[929] Peru has maintained a score of 78.54 points in the Freedom House Index from 2004 to 2014.

Despite the Freedom House Index showing higher heterogeneity than the Polity Dataset, these variations do not amount to differences in regime-type. Nowadays, the four members are democracies despite individual challenges to the democratic institutions of the four members. The democratic regime-type is engraved as a formal rule of the PA's *Framework Agreement*.[930]

The variations for Colombia do not meet the demanding threshold for domestic regime heterogeneity that Koremenos proposes in COIL. The four members are still considered democracies.[931] However, it is my view that the differences point towards heterogeneity in the strength of democratic institutions and governance levels that I consider relevant to measure commitment problems.

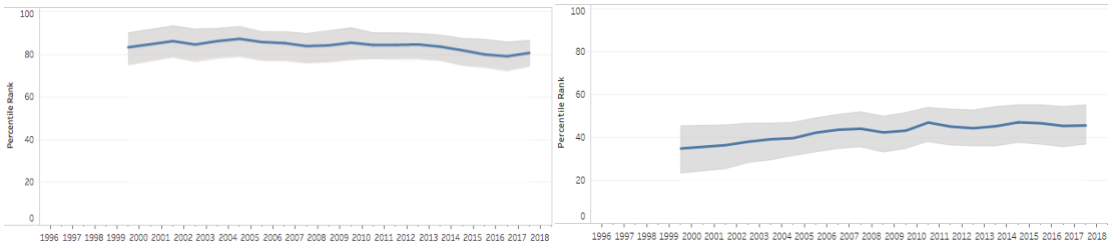
(b)Differences in Governance Levels

I study governance levels among the four members individually and in the aggregate. I present in figures 5 to 10 below the results of the WGI rankings from the ten years before the negotiation of the *Framework Agreement* and up to 2018, the latest year for which data is available.

The percentile rank from 0 (lowest) to 100 (highest) gives a good measure of the governance perceptions for the four members in comparison to the rest of the PA members and worldwide.

The percentile rank indicates the percentage of countries worldwide that rate below the selected country. Higher values indicate better governance ratings.

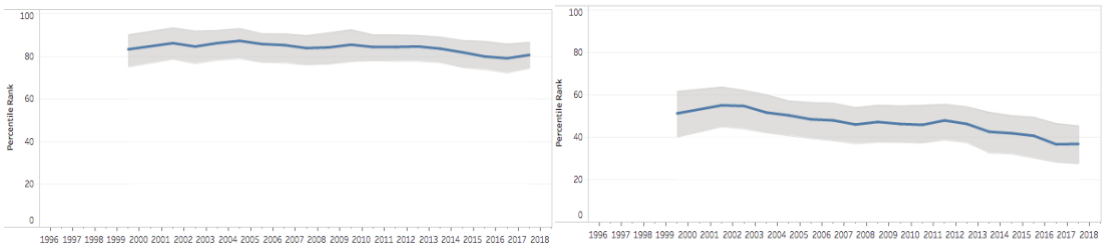
Figure 5 Comparison Percentile Rank Chile-Colombia 2000-2018



929 Pipa, above n 368.
930 *Framework Agreement* art 2.
931 George, above n 7, 7, 14.

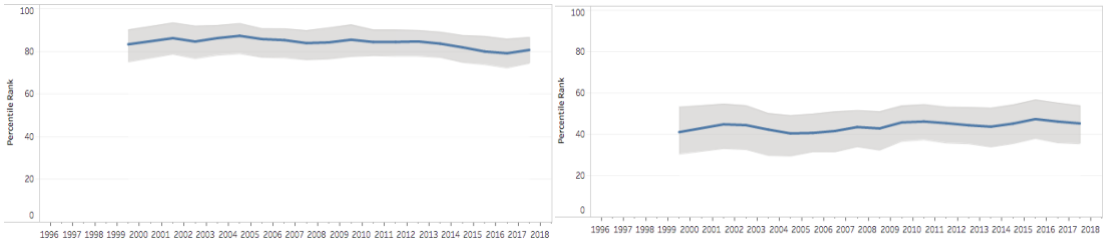
Source: WGI (from left to right)[932]

Figure 6 Comparison Percentile Rank Chile-Mexico 2000-2018



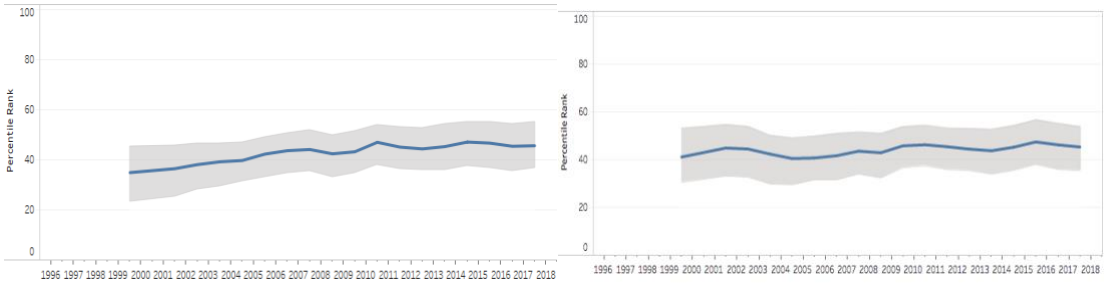
Source: WGI

Figure 7 Comparison Percentile Rank Chile-Peru 2000-2018



Source: WGI

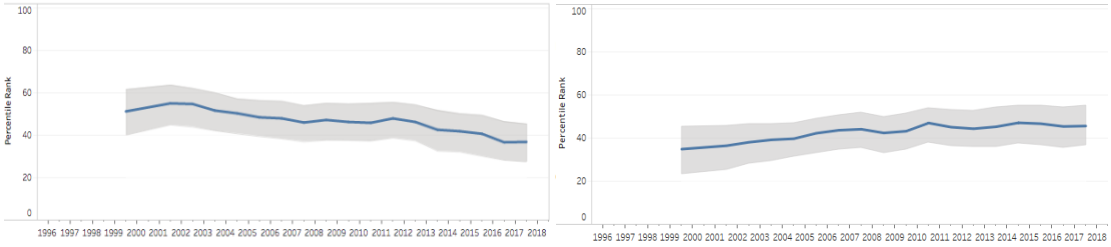
Figure 8 Comparison Percentile Rank Colombia-Peru 2000-2018



Source: WGI

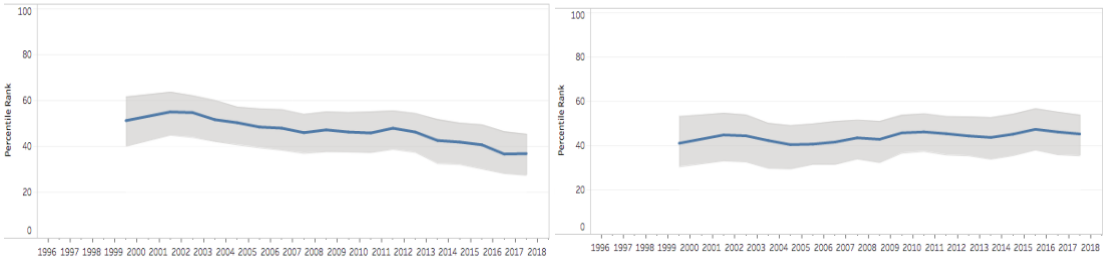
[932] The solid blue line shows the selected country's percentile rank on each of the six aggregate indicators. The grey-scaled region indicates the margin of error.

Figure 9 Comparison Percentile Rank Mexico-Colombia 2000-2018



Source: WGI

Figure 10 Comparison Percentile Rank Mexico-Peru 2000-2018



Source: WGI

Individually, the WB ranks Chile in the 80th to the 95th percentiles with a stable trend through the period. Five of the six indicators rate between the 80th to the 95th percentiles while political stability has been most of the time ranked below 65 per cent and on average 64. This result means that for the political stability indicator, around 36 per cent of countries in the world rate better than Chile and around 64 per cent of the countries rate worse.

Mexico ranks in the 35th to the 50th percentiles for the aggregate indicator with a slight declining trend in its overall governance. For the political stability indicator, Mexico ranges between around 20th to 40th percentiles, which is below its global rank. On average it scores 27.5 out of 100 on political stability. This result means that for the political stability indicator, around 73 per cent of countries in the world rate better than Mexico and approximately 27 per cent of the countries rate worse.

Colombia ranks in the 35th to 50th percentiles for the aggregate indicator with a slightly improving trend in its governance levels throughout the period. Colombia ranks between the 0 to 20th percentile for political stability with an improving pattern between 2000 and 2018. Its lowest percentile was 1 in 2003. By 2011 Colombia ranks 12.3 out of 100, while it reaches its highest individual rank in 2017 with 17.6 and remains stable in 2018. On average Colombia ranks 8.5 in this indicator. This result suggests that for the political stability indicator, over 90 per cent of countries in the world rate better than Colombia and just fewer than 10 per cent of countries rate worse. These results confirm significant political instability (or at least perceptions thereof) within the decade before the *Framework Agreement*. This scenario for Colombia has implications for the analysis of commitment problems.

Peru ranks in the 40th to 50th percentiles for the aggregate indicator with a stable trend in its governance levels. Similarly to its PA counterparts, political stability is its worse

performing governance indicator, although it shows improvements in the last six years. On average Peru ranks 23 in this indicator. For the political stability indicator around 77 per cent of countries in the world rate better than Peru and around 23 per cent of countries rate worse than Peru. These results show levels of political stability to consider for the analysis of commitment problems.

Overall, in the almost two decades under analysis, the highest levels of governance in the PA members are in Chile. This member presents statistically significant differences with the rest of the PA members.[933]

I argue, based on the previous analysis, that overall governance levels in the aggregate of PA members are moderately heterogeneous although they do not amount to differences in regime-type. This heterogeneity accounts for disparities between the best performing member and the lowest performing member. However, three out of the four members — Colombia, Mexico, and Peru— show a good degree of homogeneity with variations in scores not expected to be statistically significant governance differences between the three countries. This result takes into account that confidence intervals among the three members often overlap.

Significant differences are present only in regards to the individual indicator of political stability and the absence of violence, particularly between Chile and the rest of the PA members. There is a striking difference between the best performing member and the worse performing member — Colombia— while Mexico and Peru also perform below 70 per cent of the rest of countries worldwide. I argue here that low governance scores, particularly for the political stability indicator, have implications for assessing the presence of commitment problems. Thus, political instability creates commitment problems, according to the adjusted threshold.[934]

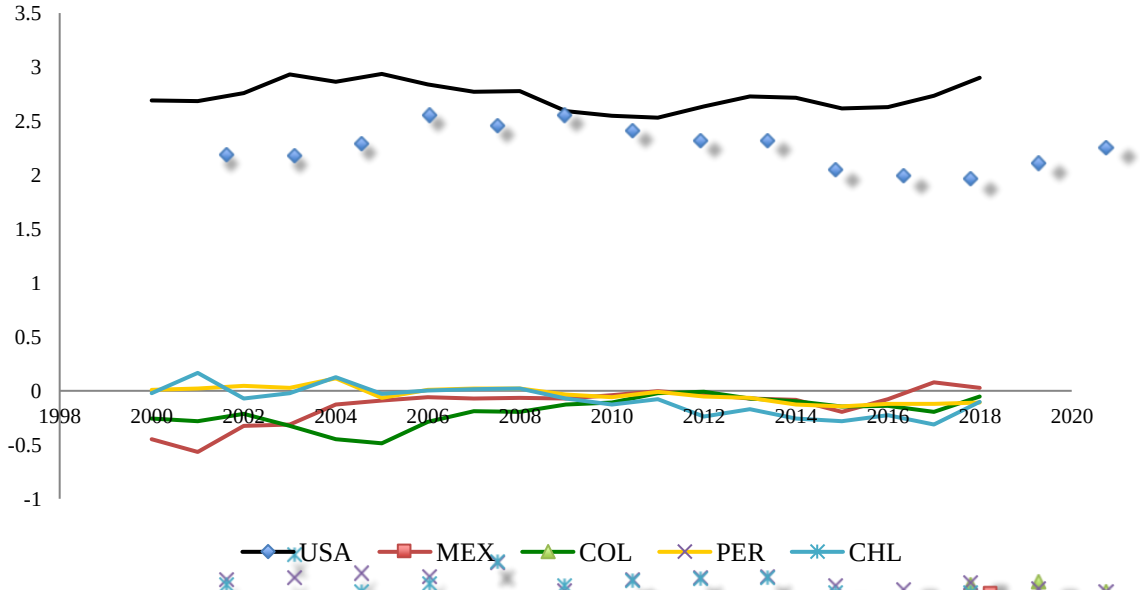
3 *Degree of (Foreign Policy) Preference Heterogeneity*

I use the United Nations General Assembly votes to measure PA members' preferences concerning foreign policy to estimate their heterogeneity or homogeneity over the last 18 years to cover the decade before the PA's establishment.[935] I base this analysis on the dataset and ideal point model that Bailey, Strezhnev, and Voeten propose.[936] Their estimates capture the positions of PA members vis à vis a US-Led order. These estimates correlate with democratisation, financial liberalisation, and government ideology.

Figure 11 below shows a clear pattern of ideal points similarity among the PA members. Thus, Bailey, Strezhnev and Voeten estimations confirm significant homogeneity in preferences among the four PA members throughout the period and particularly in the last decade.

933 WGI, above n 317.
934 See above Table 4.
935 See above Ch 3 Part III (B) (2)and Table 4.
936 Voeten, Strezhnev and Bailey, above n 370; See also Michael A Bailey, Anton Strezhnev, and Eric Voeten, 'Estimating Dynamic State Preferences from United Nations Voting Data' (2017) 61 (2) *Journal of Conflict Resolution* 430-456.

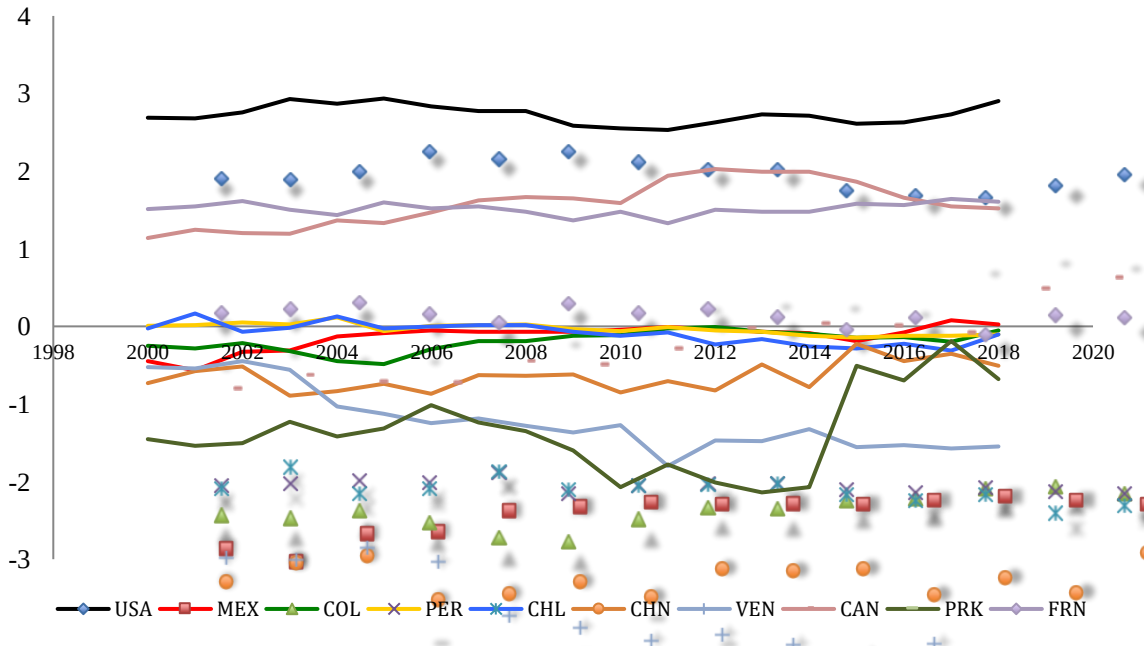
Figure 11 Ideal Points Estimations 2000-2018



Source: Author's analysis based on Bailey, Strezhnev and Voeten database

Figure 12 below shows that preferences among the PA members are moderately close to US preferences when compared to other reference countries such as Venezuela, People's Republic of China, People's Republic of Korea, or other closer allies to the US such as France and Canada.

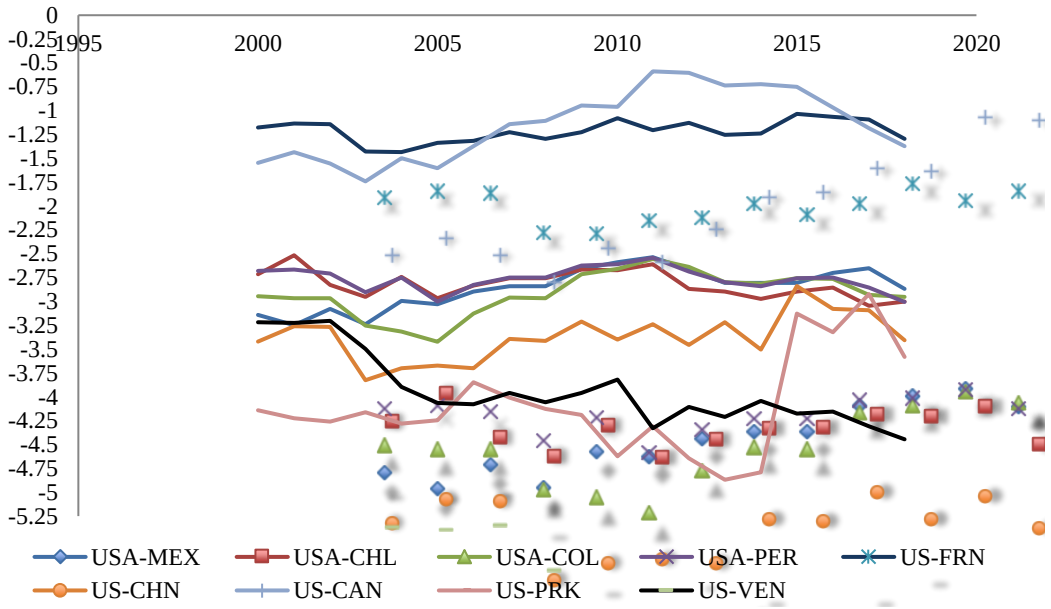
Figure 12 Preferences in Reference Countries and the PA Members 2000-2018



Source: Author's analysis based on Bailey, Strezhnev and Voeten database

I calculate absolute distances between ideal points of the four PA members, multiplied by -1 for comparability, as Bailey, Strezhnev and Voeten suggest.[937] I include data for the selected countries for comparability purposes. Figure 13 below presents these results and illustrates the comparative differences in the sample countries. Values close to 0 indicate more homogeneity with the preferences of the United States.

Figure 13 Absolute Distances between Ideal Points 2000-2018



Source: Author's estimations based on Bailey, Strezhnev and Voeten

It is conventional wisdom that Venezuela shifted away from the US since the election of Hugo Chavez. This shift from the US liberal-led order continues and has strengthened over the last 19 years, showing the highest degree in preference heterogeneity — the distance between ideal points— in 2011 and again in 2018. In contrast, this figure shows moderate homogeneity of the four PA members with US preferences. Patterns show that Chile, Colombia, Mexico and Peru preferences have been close to one another when measured against the yardstick of the US's (foreign policy) preferences.

I argue, based on the estimations above that rather than heterogeneity what prevails among the PA members as a characteristic in the aggregate is the homogeneity in (foreign policy) preferences.

Regarding levels of preference heterogeneity, I use a complementary qualitative yardstick based on the membership of PA members to other regional LA fora and Asia-Pacific fora for political and economic cooperation. This benchmark indicates similarities and differences in foreign (economic) policy among the four PA members without a need to reference it directly to the US, as the ideal points methodology does. This yardstick assists in assessing economic policy closeness, whereas the ideal points methodology estimates are on overall foreign policy, including nuclear, security, the Middle East, economic and other areas.

[937] Bailey, Strezhnev and Voeten, above n 936, 445.

Table 16 below summarises the membership in these fora or institutions for the four members.

Table 16 Memberships to Regional Institutions

Member	OECD	Membership Regional Fora Asia-Pacific				Membership Regional Fora LA								
		APEC	FEALAC	PECC*	CP-TPP	ARCO	CELAC	CAN	UNASUR	SOUTH PRO-	ALBA	COSUR MER		OAE
Chile	X	X	X	X	X	X	X	A	W	X	no	A		X
Colombia	X	no	X	X	no	X	X	X	W	X	no	A		X
Mexico	X	X	X	X	X	X	X	no	no	no	no	no		X
Peru	In process	X	X	X	X	X	X	X	W	X	no	A		X

Source: Author's compilation based on multiple sources
X: member
A: associate member
W: membership withdrawn
*: public-private membership

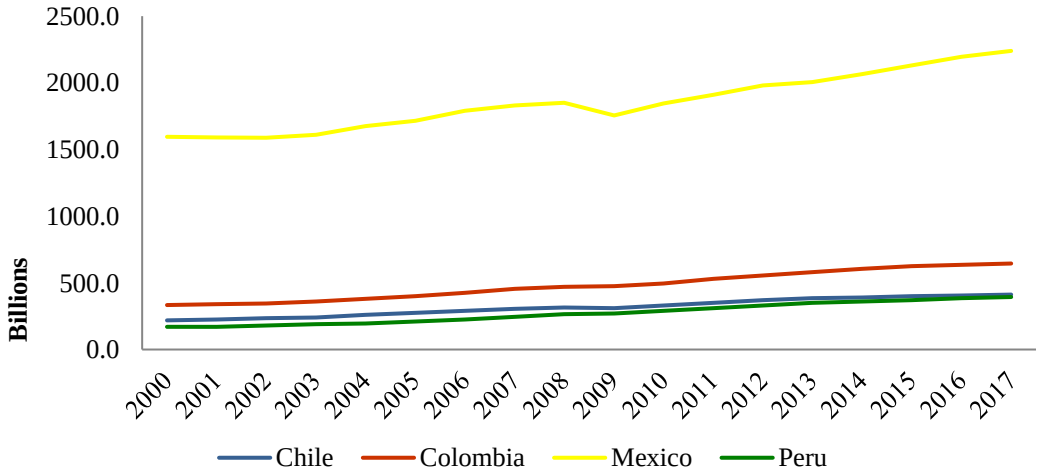
From the membership and withdrawal to other regional fora/institutions, I also conclude that preferences among the PA members are homogeneous. The absence of Mexico in the fora/institutions where other PA members are parties is because these fora/institutions have sub-geographic restrictions on membership (eg, UNASUR) rather than due to substantial differences in preferences. The absence of Colombia in some of the Asia-Pacific institutions is due to the moratorium on new memberships applicable in APEC and supposedly replicated in the TPP negotiations.

4 *Level of Economic Power Asymmetries*

Economic power asymmetries in the PA are high between Mexico and the rest of the members. Colombia, Chile and Peru show closer patterns of economic power and more homogeneity.

Figure 14 below presents GDP (PPP) values in international dollars for the four PA members covering the ten years before the conclusion of the *Framework Agreement* up to 2017, according to the World Bank available data.

Figure 14 GDP (PPP) in constant 2011 international dollars (2000-2017)



Source: Author's analysis based on the World Bank GDP PPP database

GDP (PPP) values confirm the asymmetry in economic power between Mexico and the rest of its PA counterparts. Mexico's GDP (PPP) is significantly higher than the combined GDP (PPP) of the rest of the PA members. This pattern has been stable during the decade preceding PA's establishment and over the course of the PA. While Mexico's GDP (PPP) was 1.91 trillion international dollars in 2011, the combined value for Chile, Colombia, and Peru was 1.19 trillion for this year.[938] In the last eight years, the asymmetry in economic power, measured by GDP (PPP) values, between Mexico and its counterparts' aggregate has been annually over 700 billion dollars. By 2018, Mexico's GDP (PPP) was 2.38 trillion international dollars; the second largest was Colombia's reaching around 662 billion dollars.[939] Chile and Peru had close values at around 428.4 and 409.2 billion international dollars respectively.[940]

Economic power from Mexico is not paired with strong economic dependency from Chile, Colombia and Peru to Mexico's market. The main trading partners for PA members, including Mexico, are the US, China,[941] and the EU.[942] Around 50 per cent of the Chilean exports in goods and 54 per cent of its imports are to and from the US, China and the EU.[943] Exports to these markets are 54 per cent of Colombia's total exports in goods while 57 per cent of Colombia's imports come from these countries. For Peru, around half of its exports and imports go to or come from the United States, China, and the European Union.[944]

938 *GDP, PPP: World Bank International Comparison Database*, The World Bank <https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.KD>.
939 Ibid.
940 Ibid.
941 Ángel Licona Michel and José Carlos Rodríguez Chávez, 'Share of Exports and Imports in GDP and Concentration of Trade in Countries of the Pacific Alliance' (2019) 13 (26) *Revista Mexicana de Estudios sobre la Cuenca del Pacífico Tercera Época* 75, 85-4.
942 Blanco Estévez, above n 7, 4.
943 Ibid.
944 Ibid.

IV CONCLUSION

This Chapter characterises four key institutional features in the PA. It describes and explains what interstate cooperation problems existed when each of the international and trans-governmental agreements was concluded. This Chapter also assesses the characteristics in the aggregate of the PA members.

I maintain in this Chapter that the PA features decentralisation of tasks with tints of centralisation and delegation limited to dispute settlement, monitoring, and punishment. Information production and management, decision-making, and administration are primarily decentralised tasks performed through various intergovernmental bodies. In the case of monitoring tasks, the PA combines aspects of centralisation, primarily formal delegation for police patrols in the Council of Ministers — an internally delegated intergovernmental body — with informal monitoring by other informal intergovernmental bodies.

PA's international agreements focus on the economic arena, including economic cooperation, although with an emphasis on trade and investment, and taxation matters. International and trans-governmental agreements also cover non-economic cooperation. I stress that the scope of the PA in its institutional rules is one of the most dynamic aspects of the PA. The inducements for compliance mechanisms in the form of rewards or punishments are remarkably low in the PA.

The PA is consensus-based and voting is available only in a handful of situations. The PA does not provide for weighted voting or qualified majorities in its decision-making. Thus, I question whether this situation underlies shared control or no control at all. Since control in Koremenos' terms relates to the display of dominance through the formal and informal design of decision-making rules, I conclude that there is no individual member control in the PA but instead a veto rule.

The PA's international agreements feature a broad range of adjustability mechanisms that are not only evidence of flexibility but also allow for the PA members to reach agreement in the first place. I also put forward institutional rules for consideration that merit special attention because they broaden the scope of the adjustability devices available to PA members. I argue that institutional rules such as NCMs, carve-outs, and 'customised' commitments perform a similar function to reservations in a strict sense as Koremenos proposes.

Following Koremenos' COIL research program in Chapter 3,[945] I argue in this Chapter that PA international and trans-governmental agreements result from the combination of several interstate cooperation problems in their negotiations. At the time of launch, uncertainty about the state of the world, particularly on how the agreement could work and how far members were willing to integrate, was the critical underlying cooperation problem that the *Framework Agreement* attempts to solve.

Due to the broad range of sub-issue areas the *Commercial Protocol* deals with, I argue that this agreement addresses enforcement, distribution, coordination, and commitment problems. Uncertainty about the state of the world is also present in the negotiation of

945 See above Ch 3, Part III (B).

the *Commercial Protocol* but to a lesser extent than in the *Framework Agreement*. The degree of each cooperation problem varies according to the sub-issue area.

PA's international agreements follow the pattern that Koremenos highlights regarding the prevalent cooperation problems in economic agreements. As with the COIL sample, the cooperation problems underlying the PA's international agreements are predominantly uncertainty about the state of the world, enforcement, commitment and coordination.[946] Uncertainty about behaviour and preferences were not significantly present in the negotiation of the PA's institutional framework.

Non-strategic cooperation problems, commitment problems, and uncertainty about the state of the world problems underlie the *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance*. This appraisal takes into account the relationship of the scope and objectives of this agreement with the overall economic objectives of the PA.

For the reasons above mentioned, I also characterise trans-governmental agreements among domestic government agencies, which outline PA's active cooperative component, with non-strategic cooperation problems.

As for the *Agreement to Homologate Double Taxation Accords*, its negotiation is an archetype of a coordination problem in Koremenos' analytical framework. The agreement's objective is to coordinate the PA members' domestic tax laws and the exchange of information to ensure they limit double taxation (and prevent tax evasion) for pension and retirement funds in the four members.

I maintain that the PA is a modestly homogenous group. Characteristics in the aggregate of the members have remained stable throughout the period under analysis, which covers a decade before the negotiations of the *Framework Agreement* up to the first semester of 2019, subject to data availability. The number of full members to the PA has remained four since the negotiation of the original agreement, and I consider it small in relation to the PA's economic objectives. All domestic regimes in the PA members meet the threshold of democratic systems, despite relevant differences in their governance levels and internal institutional stability. These governance disparities are broader when comparing Chile to the rest of the PA members, especially Colombia. I claim that these differences result in domestic commitment problems, particularly for the negotiation of the *Framework Agreement* and the *Commercial Protocol*.

In contrast, I claim that (foreign policy) preferences among the four members are substantively homogeneous. These preferences are moderately close to the US' foreign policy preferences, when I compare them to the preferences of other reference countries based on the UN voting results.

I show evidence of significant economic power asymmetry in the aggregate when considering Mexico's greater economic power vis à vis the rest of its PA counterparts. However, this economic power asymmetry is not correlated with a strong economic dependency of Chile, Colombia or Peru on Mexico. Although Mexico has a share in

946 Koremenos, *The Continent of International Law*, above n 265, 307.

the exports and imports from the other PA members, Chile, Peru, and Colombia do not rely on Mexico for their international trade.

The accounts I give in this Chapter about interstate cooperation problems and characteristics in the aggregate of the PA members are mandatory to address how these two rational factors have influenced the design features of the PA's institutional framework. This is the task I undertake in the next Chapter. Chapter 7 relies on the external institutional environments I develop in Chapter 4, the rational explanatory factors I present here, and the descriptions of institutional structures, rules, practices and institutional features in Chapters 5 and 6.

7 CONNECTING THE DOTS: EXPLAINING DESIGN FEATURES THROUGH (A) RATIONAL INSTITUTIONALISM

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I INTRODUCTION

This Chapter elucidates the concrete roles that interstate cooperation problems and the characteristics of the PA members in the aggregate have had in the design of the PA's institutional framework, accounting for how these rational factors explain the PA's design features.

The scope of the Chapter is explanatory. It examines the institutional framework of the PA using the theoretical approach in Chapter 3. It also builds on the characterisation of the current institutional structures in Chapter 5 and the institutional features that I describe in Chapter 6. The Chapter uses two explanatory rational factors: (i) interstate cooperation problems; and (ii) characteristics of the PA states in the aggregate. This Chapter also relies on a complementary factor that refines the analytical framework: external institutional environments, which I address in Chapter 4. No single factor alone can explain the design of the institutional framework of the PA.

Part II connects these three factors to the outcomes of the institutional design. I draw causal and contributing relationships between these factors and the institutional features. My claim is that the institutional features of the PA are a rational response to specific cooperation problems that PA members attempted to solve when negotiating particular international agreements. The characteristics of the PA members also help to explain institutional design outcomes to a lesser extent than cooperation problems.

I argue that uncertainty about the state of the world, particularly as to how the agreement could work and how far members were willing to integrate, explains the high imprecision of the *Framework Agreement*. The choice for an incomplete contract and informal and decentralised organisational structures is deliberate to avoid formalised and centralised architectures. Members chose informal and decentralised institutional arrangements in the face of concrete and visible costs arising from centralisation and higher levels of formality.

At the micro-level, the combination of commitment, distribution, enforcement, and coordination problems explains several institutional rules in the *Commercial Protocol*. Legalised rules on dispute settlement and punishment in conjunction with informal means for dispute settlement are the result of the institutional entrepreneurs' efforts to tackle commitment and enforcement problems in the areas and aims of this PTA. Uncertainty about the state of the world also explains withdrawal clauses, while the combination of this problem and enforcement problems makes escape clauses (and exception clauses) the optimal solution to reach agreements in the first place.

I maintain that efforts to address domestic distributional problems caused the negotiation of institutional rules such as carve-outs, NCMs and 'customised' commitments within the Protocol in lieu of treaty reservations. This type of provision implies variable geometry in rule design.[947]

Non-strategic cooperation problems explain the informal institutional rules in the trans-governmental agreements amongst PA public agencies and the soft-law approach of the *Agreement for the Establishment of the Cooperation Fund*.

947 See above Ch 6, Part II (D) (4).

Part III summarises the results of my empirical testing of Koremenos' analytical tools in the institutional framework of the PA. PA's institutional design upholds nine of the 32 hypotheses confirmed in COIL on the design of international agreements.[948]

This Part also identifies limitations in Koremenos' research program, including the program's inability to explain the design of trans-governmental agreements that proliferate in the PA. Therefore, I claim that COIL is insufficient to give a comprehensive account of the institutional rules of agreements that present non-strategic cooperation problems. I identify gaps in explaining the features of monitoring and punishment. Her framework is inadequate to explain the lack of effects of economic power asymmetries in the institutional design of punishment and monitoring provisions. I propose avenues for further research that could enhance this rational institutionalist research program. The limitations and gaps in COIL make it necessary to resort to constructivist institutionalism insights for a comprehensive review of the case study, as I detail in Chapter 8.

Part IV concludes this analytical Chapter. I claim here that institutional design in the PA is deliberate and attempts to tackle the cooperation problems present when negotiating PA's agreements. At the micro-level, I claim that institutional rules in the PA international agreements are not a simple copy and paste from other international agreements. They are intentionally drafted to reduce uncertainty about the state of the world, make members' commitments more credible, and promote compliance. These rules respond to specific conditions of the PA members and accommodate domestic sensibilities, addressing in this way domestic distributional problems. To a lesser degree, institutional rules are also the result of the characteristics of the PA members in the aggregate, such as its reduced membership and their democratic-status.

II Explaining Design Features in Specific Agreements and the Overall PA Framework

This Part explains how the design features of the PA institutional agreements have arisen from cooperation problems and characteristics in the aggregate of the PA members. It examines the institutional choices of the *Framework Agreement*, the *Commercial Protocol*, and the limited number of international agreements. I explain here salient design features and the presence (or absence) of specific institutional rules in the international treaties.

At the micro-level, I maintain here that specific provisions in these international agreements could only be explained as a response to particular cooperation problems and characteristics in the aggregate of the PA members. I present empirical support in these agreements.

I confirm that up to today, the weight that the characteristics of the PA members in the aggregate have had in determining institutional design outcomes/features and institutional rules varies depending on the characteristic.[949] The number of cooperating states has played the most significant role in shaping institutional design outcomes,

948 See below Appendix D.
949 See above Ch 6, Part III (B).

particularly its rules for control through consensual decision-making. This rule for control makes that economic power asymmetries between Mexico and the rest of the PA members have no effect for formal and informal institutional design.

Preferences amongst the four members have been stable and aligned in economic interests. Thus, the lack of significant heterogeneity of preferences has facilitated cooperation. Like-mindedness of the four members in their democratic status justifies the democratic requirements for membership to the PA.

A *The Framework Agreement*

This Part explains the specific roles of the cooperation problems and the characteristics of the PA in the aggregate to explain the institutional rules of the *Framework Agreement* and some of the overall institutional features. When relevant, I examine their role for the design of key tasks of regular interstate cooperation such as monitoring, dispute settlement, and punishment. I argue that uncertainty about the state of the world played a crucial role in the definition of the rules comprising the *Framework Agreement* and the overall (de)centralisation feature. This problem explains the choice for low precision, informality and soft-law and the *Framework Agreement* nature as an incomplete contract.

Low membership contributes to explain the consensus rule that underpins PA's decision-making. PA's institutional framework does not show any signs of formal (or informal) effects of economic power asymmetries amongst the members in the design of dispute settlement, punishment, or monitoring provisions. The democratic status of the four members in the aggregate, which implies no regime-type asymmetries, justifies the incorporation of democratic requirements on membership to the PA, as outline in the *Framework Agreement*.

1 *The Role of Uncertainty about the State of the World in the Design of Features and Rules: (De)centralisation and Adjustability of Arrangements*

Uncertainty about the state of the world partially explains the choice for an incomplete contract and the low legalisation of the *Framework Agreement*. I argue that the low number of full members has favoured soft-law in rulemaking or less formalised institutional rules.[950] Although conventional wisdom suggests that small numbers make it less costly to reach legally binding agreements, this characteristic of a limited number of states in conjunction with the uncertainty problem contributed to the prevalence of soft-law rules and the low degree of precision[951] in the *Framework Agreement*.[952]

Uncertainty about the state of the world also helps explain the light institutional framework, the decentralised institutional structure, and the informal approach to institution-building. PA members decided on this type of organisational structure to avoid locking in an institution (ie, international organisation) that has ongoing economic costs to operate, such as a dedicated bureaucracy and a physical

950 See above Ch 3, Part II (C).
951 See below Appendix C.
952 See above Ch 5, Part II (B) (1).

infrastructure. While the costs of setting up permanent and centralised structures are visible upfront, the potential economic and non-economic benefits of integrating are uncertain and more difficult to calculate. Besides, a lighter structure would not tie PA members to an institution if the cooperation endeavour did not yield political commitment in the future or the expected material benefits.

The drafting of the objectives in the *Framework Agreement* epitomises the relationship between uncertainty about the state of the world and the use of imprecision as an institutional feature. I claim that addressing this cooperation problem explains the vague terms of these objectives, the lack of mandatory deadlines, and the process drafting rather than result drafting of the goals.[953] PA members commit to constructing in a participatory and consensual manner a deep integration area to advance progressively towards the free circulation of goods, services, capital and persons. This provision is process-based because rather than choosing an action that entails an end result such as 'achieve,' 'attain' or 'realise' the free circulation of factors it emphasises on the deep integration as a means to 'advance progressively'. Thus, one could argue that the commitment is not on accomplishing that free circulation — result drafting — but just on working on it. In contrast to other regional institutions in LA, the goal does not set a timeframe to realise this aim. Hence, imprecision in the drafting of the objectives is a rational response to the uncertainty about the state of the world problem.

Uncertainty about the state of the world explains other adjustability devices in the *Framework Agreement*. The denunciation clause is a typical example of an exit clause, protecting the PA members' fundamental interests in cooperation against shocks.[954] Although this risk is less prominent than the risks motivating escape clauses, withdrawal clauses are a 'safeguard' against future changes in any of the PA members' bedrock preferences.[955] Such a change could be, for instance, a member no longer seeing its PA membership as a strategic preference.

The six month notice period is shorter than the 12 month notice period of the *Vienna Convention*, Article 56.3. Institutional entrepreneurs designed this notice time frame to deter PA members from opportunistic and sudden withdrawal. The notice period would allow other PA members to adjust to the new environment if one PA member decided to exit.

I confirm empirically and qualitatively an inverse correlation between the presence of definite duration clauses in the PA international agreements and the presence of withdrawal clauses. This design outcome means that PA members chose between one or the other adjustability device. The agreements providing for exit clauses do not feature definite duration clauses. One explanation for this institutional rule is that in the face of uncertainty about the state of the world exit clauses may preclude finite duration clauses.[956] However, a systemic review of this institutional design outcome suggests that the preference of the PA members for long-term economic regionalism makes agreements of finite duration less desirable than indefinite duration arrangements.

953 See, eg, *Framework Agreement* art 3.1 (a).
954 Koremenos, *The Continent of International Law*, above n 265, 141.
955 Ibid 141, 146.
956 Ibid 144.

Because the negotiation of the *Framework Agreement* did not represent substantial distribution problems,[957] it is no surprise that this agreement does not feature reservations.

2 *The Role of Cooperation Problems and Characteristics in the Aggregate for Monitoring, Dispute Settlement, and Punishment Design*

The absence of enforcement problems[958] at the time the *Framework Agreement* was negotiated explains informal dispute resolution through direct consultation and negotiation of differences regarding the application or implementation of the *Framework Agreement*.[959] Its negotiation did not present enforcement problems, incorporating formal dispute settlement was not necessary.

The small number of participating members favoured diplomatic approaches to dispute settlement in the *Framework Agreement*, as is the case with most of the PA's institutional agreements. Delegation to tribunals or administrative bodies to interpret, apply, implement or resolve disputes was less necessary in the PA than in other cases involving larger groups of states.

There are limited sovereignty costs when members refrain from delegating interpretation, application and implementation of tasks to third bodies. At the same time, small numbers facilitate reaching agreement on sensitive issues. Low membership aids informal or political solutions that are more cost-effective in the short-term than maintaining or setting up permanent structures to resolve disputes.

However, it is my view that the provision mandating the future negotiation of a dispute settlement regime signals a concern for the commitment problems underlying the negotiation of the *Framework Agreement* and the long-term goals. Institutional entrepreneurs addressed commitment problems by instructing PA members to negotiate formal delegated dispute resolution to preserve the optimal design of PA institutions. In my view, this provision balances institutional concerns over initial grand-design institutional approaches (eg, a permanent tribunal) that would have upfront costs against the need to provide adequate institutions for the long-term integration project. Institutional entrepreneurs saw this solution optimal when commitment problems and uncertainty about the state of the world are at play.

There is no empirical evidence to support power-based explanations for informal punishment provisions in the *Framework Agreement*, despite significant economic power asymmetries between Mexico and the rest of the PA members.[960] Power-Based explanations suggest that in international agreements, parties may deliberately leave out of the formal agreement punishment provisions so the most powerful parties can exercise more control over the actual punishment measures to apply on a case-by-case basis. Informal punishment allows powerful members more control over the outcomes and punishment in other issue areas (eg, foreign aid).[961] The rules of control — veto

957 See below Appendix C.
958 See above Ch 6, Part III A (1).
959 *Framework Agreement* art 12.
960 See above Ch 6, Part III (B) (4).
961 Koremenos, *The Continent of International Law*, above n 265, 239, 241-2.

rule — and the consensus-based system prescribed in the *Framework Agreement* refute these explanations.

Koremenos explains types of monitoring provisions (self-reporting vs delegated monitoring either to internal or external bodies or institutions) by the presence of uncertainty about behaviour problems — when noncompliance with the agreement is not readily observable. These problems are typical of environmental, disarmament and human rights agreements but not of trade and investment agreements. Koremenos proposes a theory on the design of monitoring provisions connecting the problems of uncertainty about behaviour to enforcement problems through the presence or absence of incentives to defeat.

Regarding the explanation for the presence of internally delegated hierarchical monitoring compliance, I consider two overlapping possibilities. First, following COIL on delegated monitoring compliance and enforcement problems, the *Framework Agreement* provisions on monitoring and the informal rules may be suboptimal. According to Koremenos' confirmed hypotheses, the monitoring system in the *Framework Agreement* is a false negative: an agreement characterised as not having formal monitoring provisions but having them in reality. Second, Koremenos' insights on monitoring systems may be insufficient to examine formal and informal monitoring rules in the PA and specifically in the *Framework Agreement*. This view asserts gaps in her theory.

In addressing the second possibility here, I put forward non-exclusive explanations (hypotheses) for the presence of internally delegated monitoring in the absence of enforcement problems in the *Framework Agreement*. First, I propose a systemic explanation that justifies monitoring provisions as a rational response that anticipates future enforcement problems in a long-term cooperation project with the objectives that the PA establishes.

Second, I present a relationship between uncertainty about the state of the world in the *Framework Agreement* and regular monitoring through police patrols. Thus, the *Framework Agreement*'s nature of incomplete contract with imprecise objectives or what I name process-based goals justifies this type of monitoring as a rational response. Regular internally delegated tracking of implementation and compliance helps to reassess and fine-tune priorities based on current progress.

In any case, there are gaps in Koremenos' insights in explaining design features in the PA's monitoring system. These gaps open an agenda for further research and refinements in her program. Because Koremenos' ancillary efforts are to explain the relationship between power asymmetry and formal and informal monitoring, she overlooks the effects of domestic institutional configurations in shaping informal regional rules on monitoring compliance altogether. This is a distinctive characteristic of the PA's monitoring system, which has been more relevant than the effects of the members' power asymmetries on formal and informal monitoring provisions.

Moreover, Koremenos' program needs refinements to examine causal relationships between monitoring systems and enforcement problems; this is in the absence of significant joint uncertainty about behaviour problems. Even if one argues that the PA's monitoring system is overall an internally delegated monitoring, Koremenos does not

develop insights on monitoring systems that respond to enforcement and commitment problems in the absence of uncertainty about behaviour.

The PA also provides evidence of layering of informal over formal monitoring, the former in the hands of the private and business sector through the CEAP. This layering of monitoring merits further theoretical developments. For instance, to explain why informal monitoring through NGOs could be more effective than formal monitoring in those cases where member states and their bureaucrats cannot pay the political costs of shaming breaching members.[962] Moreover, internal delegation of monitoring in intergovernmental bodies might not work as effectively as informal monitoring. This case could be when members are willing to impliedly negotiate their silence on the noncompliance of another member as a payoff to maintain its noncompliance in other issue areas (or even in the same area) overlooked. In these sub-issue areas, informal monitoring needs to complement the formal one. Formal monitoring is still relevant in those sub-issue areas where there are no incentives or no (financial or technical) capacity from NGOs to exercise informal monitoring.

I do not dismiss the possibility that PA's formal and informal monitoring also reveals suboptimal design. I will review this aspect in Chapter 8.[963]

The consensual decision-making in the *Framework Agreement* and the subsequent PA agreements seems to work in practice. It is not only a rule engraved formally in the PA institutional framework but also a practice in the day-to-day operations of the PA.[964] Thus, there is no evidence to support theoretical insights suggesting that when power asymmetries are present in cooperative endeavours, they most plausible manifest informally while formal law represents a consensus among the state parties.[965]

Overall, the PA provides anecdotal evidence that institutional design does not necessarily reflect power configurations.[966] PA's *Framework Agreement* and other international agreements are reciprocal both procedurally and substantively, despite economic power asymmetries.[967] However, this outcome does not undermine Koremenos' theory because, as she points out, one should not always expect power asymmetries to be reflected in the design dimensions of international law.[968]

Finally, As I present in Chapter 6,[969] there are not regime-type asymmetries in the PA because all the members in the aggregate are democracies. On the contrary, it is domestic regime-type symmetry — democratic status— representing shared constitutional and democratic values that explains specific requirements of membership. Article 2 of the *Framework Agreement* prescribes that it is an essential requirement to participate in the PA following: (i) the rule of law, a democratic and constitutional order; (ii) the separation of public powers; (iii) the respect, promotion and protection of human rights and fundamental freedoms.

962 Koremenos, *The Continent of International Law*, above n 265, 288.
963 See below Ch 8, Part III (C).
964 See Interview_02 (Skype, 12 August 2016); Interview_11 (Lima, Peru, 7 September 2016); interview_21 (Bogota, Colombia, 6 October, 2016); Interview_35 (Skype, 1 March 2017).
965 Koremenos, *The Continent of International Law*, above n 265, 294.
966 Ibid 295.
967 Ibid 296.
968 Ibid 295.
969 See above Ch 6, Part III (B) (2) (a).

B *The Commercial Protocol*

I examine in this Part institutional rules in the *Commercial Protocol* and provide rational explanations for their presence based on the cooperation problems underpinning this agreement. I maintain that these institutional rules evidence a deliberate design to tackle specific interstate cooperation problems — uncertainty about the state of the world, distribution, commitment, enforcement — in each of the Chapters of the Protocol that I review.

Section One explains the rationale for a withdrawal clause and associated provisions in the Protocol. Section Two studies the role of exception and escape clauses and their relationship with uncertainty about the state of the world and enforcement problems. Section Three addresses the connection between domestic distribution problems and reservations, carve-outs, NCMs, and 'customised' commitments. Section Four discusses the calibration of treaty language through several levels of (im)precision to respond to problems of coordination and domestic distribution. Section Five explicates the two-tier dispute settlement system of the Protocol and the constraining effects that these provisions carry in the face of commitment and enforcement problems. Sections Six and Seven shed light on the reasons behind punishment and monitoring provisions and briefs on theoretical gaps that I identify in Koremenos' approach.

1 *Withdrawal Clause, Notice and Wait Periods, and 'Bundle' Withdrawal*

Withdrawal from the *Commercial Protocol* is impliedly subject to a six-month notice period, which is the notice period in the *Framework Agreement* to exit. Because exiting from the *Commercial Protocol* is subject to denouncing the *Framework Agreement*, the withdrawal from the *Commercial Protocol* would take effect only six months after the denunciation of the *Framework Agreement*.

Although Koremenos does not examine 'bundle' withdrawal that entails tying the exit from a treaty to the denunciation of another international agreement; this is a significant outcome in the institutional design of the PA.[970] I argue that this institutional rule attempts not only to avoid opportunistic withdrawal but also to protect the integrity of a 'package bargain' amongst the four members. I maintain that members might be willing to make concessions in one agreement with the expectation that they will be reciprocated in future agreements. This view of a 'package bargain' rather than individualised bargains through specific agreements results from a systemic examination of the PA institutional rules. This analysis looks at the institutional rules as a whole rather than the result of independent and isolated negotiations of single agreements.

Notwithstanding the overall cooperation problem that characterises a particular agreement in the PA, there are institutional rules that can be explained only by the presence of specific cooperation problems in particular Chapters of the Protocol. The first case is the waiting period for the withdrawal from the *Commercial Protocol* regarding the Investment Chapter. This five-year waiting period provides additional

970 See below Appendix C.

protection to investors of other members against domestic commitment problems (change in domestic preferences) that might trigger the withdrawal of another PA member from the Protocol.

By providing five years from the date of denunciation in which the member's obligations shall continue to be effective for investments made at least a year before denunciation, PA members addressed the commitment problem. Members safeguard their interests and those of their investors in other PA members, allowing time for investors to reap the benefits of the agreement and their investments. Following Koremenos,[971] I claim that this rule prevents premature withdrawal, which would stop investors from receiving the protections of the investment disciplines in the agreement. This provision discourages opportunistic withdrawal of the members by raising the costs of this decision. This rule also provides investors of the non-denouncing members time to adjust to the new environment in the member that will no longer be part of the PA.

Second, I claim that the rule of tying the exit from one agreement to the exit from another international agreement is also a rational response to commitment problems. 'Bundle' withdrawal raises the costs of exiting from an international agreement, preventing (future) governments from surrendering to domestic pressures to denounce a specific agreement. This assertion warrants further empirical examination of other international agreements implementing regionalism projects. However, the *Commercial Protocol* provides anecdotal evidence for this claim.[972]

I argue that 'bundle' withdrawal, notice periods, and wait periods in the PA international agreements are optimally designed to prevent opportunistic exiting. I agree with Koremenos that withdrawal provisions in international agreements preclude opportunistic withdrawal.[973] This effect is a sign of their effectiveness rather than ineffectiveness in promoting international cooperation.

2 *Escape and Exception Clauses*

I claim that by introducing escape clauses and other adjustability devices in its institutional rules, the PA members made cooperation possible in the first place in the face of uncertainty and enforcement problems.[974] Escape clauses allow PA members to adjust to shocks. These clauses help PA members to accommodate to changes in their circumstances. Thus, escape clauses are a rational response to the conjunction of these two cooperation problems in the *Commercial Protocol*. This adjustability device made the PA PTA politically palatable.[975] The tailored design of these devices also preserves the benefits of the original bargain by avoiding opportunistic behaviour from other PA members.

971 Koremenos, *The Continent of International Law*, above n 265, 151.
972 See below Appendix C.
973 Koremenos, *The Continent of International Law*, above n 265, 156.
974 See below Appendix C.
975 Koremenos, *The Continent of International Law*, above n 265, 157.

It is the combination of uncertainty about the state of the world and enforcement problems that explains the escape clauses in the *Commercial Protocol*, confirming Koremenos' conjecture in this regard.[976]

Comparatively, it is the uncertainty about the state of the world in the absence of enforcement problems that explains the absence of escape clauses in the *Framework Agreement*. As Koremenos tested it,[977] other adjustability devices are more optimal than escape clauses in these cases.

In the institutional design of the PA, institutional entrepreneurs minimised the opportunistic use of escape clauses in the *Commercial Protocol* by requiring proving extraordinary circumstances and through ex-post controls by arbitral tribunals.

A Trade Remedies Chapter — particularly safeguard measures — providing for escape clauses on the liberalisation of goods trade, often referred to as 'the escape clause', is absent from the *Commercial Protocol*. Its absence signals that problems of uncertainty about the state of the world and enforcement regarding the rules on liberalisation of goods were satisfactorily addressed in their bilateral PTAs.[978] All bilateral agreements have escape clauses allowing implementation of bilateral safeguards on import surges that cause or threaten to cause injury to domestic industries. I maintain that the costs of negotiating a Chapter on Trade Remedies outweighed the benefits of having a 'cushioning' of this nature in the *Commercial Protocol*.

I argue that, despite the absence of discussion in COIL, exception clauses have a similar function to escape rules.[979] These exceptions in the *Commercial Protocol* are a response to uncertainty about the state of the world and enforcement problems underlying the negotiation of the Protocol. These exceptions allow PA members not only to respond to temporary exogenous shocks but also to address changes in the domestic preferences and pressures for policy adjustments. This functional analogy between escape and exception clauses in the PA is empirically supported by the same pattern in the PA's international agreements. The exception clauses are concurrent with escape clauses and vice versa. [980]

The use of adjustability devices such as exception clauses in the *Commercial Protocol* is generally subject to ex-post scrutiny by a third party (eg, arbitral tribunal) that assesses whether the member meets the conditions to rely on them. This scrutiny also prevents members from using exception clauses opportunistically. This internal delegation of dispute settlement to resolve perceived violations of the criteria for exceptions discourages members from abusing their use.

Empirically, the distinction between escape and exception clauses is not clear-cut, either in PTAs or in the *Commercial Protocol*. A few of the denominated escape clauses are labelled under the cross-cutting Chapter on exceptions of the *Commercial Protocol*.[981] When examining the use of escape clauses — safeguard measures — in

[976] See below Appendix D.
[977] Koremenos, *The Continent of International Law*, above n 265, 135-7.
[978] See above Table 6.
[979] See above Ch 6, Part II (D) (3).
[980] See Appendix C.
[981] *Commercial Protocol* ch 18.

the WTO and GATT contexts,[982] Pelc suggests that empirically states rely more often on 'appeals to exception'. He argues that states rely on the justificatory circumstances of an escape clause rather than on payments of any compensation or penalty.[983] The compensation requirement that some authors attribute in theory to escape clauses is questioned as a distinctive aspect in their optimal design because the evidence shows that compensation for the use of escape clauses happens in rare occasions (eg, expropriation clauses). Thus, the conceptual distinction between escape and exception clauses loses one of its grounds.

Both escape and exception clauses allow parties to depart from their treaty obligations, under specific situations or in compliance with defined conditions. They also aim at disciplining the abnormal circumstances that might trigger their use, not only to allow parties the flexibility to stay in the agreement but also to avoid those abnormal circumstances from being abused by members, distorting the primary purpose of the agreement or its effectiveness.[984]

3 *Reservations, Carve-Outs, NCMs, and 'Customised' Commitments*

This Part explains the prohibition on reservations in the *Commercial Protocol.* It also analyses how carve-outs, NCMs and 'customise' commitments could substitute for treaty reservations. Insights regarding the role of treaty reservations could apply analogically to these types of provisions as I develop here.

The provision prohibiting reservations in a strict sense to the *Commercial Protocol* is distinctive in the PA's institutional design. Concerns to protect the integrity of the agreement and the trade-offs of its negotiation explain this rule. The prohibition prevents unanticipated distribution problems among PA members with a redistribution of the costs and benefits of the agreement that could arise from a member's reservation from specific provisions. The expected benefits that justified concessions made by one member to another during the negotiations could be hindered when the latter member reserves a provision even when reservations have reciprocal effects.

Prohibitions on reservations are not a new institutional rule between PA members. Despite Koremenos' assertion that bans on reservations are not a common feature in international economic agreements,[985] the bilateral PTAs of Colombia-Mexico[986] and Mexico-Peru[987] include a prohibition on reservations and interpretative declarations during the ratification and incorporation process.

I claim that, since the *Commercial Protocol* does not allow for reservations in a strict sense, carve-outs excluding the application of certain obligations to an economic sector or a measure become the adjustability mechanism to solve domestic distribution problems rationally. These carve-outs also serve to gain domestic acceptance for

982 But see Patrick Messerlin, 'Need for Coherence among WTO's escape clauses' in Henry Gao and Donald Lewis, *China's Participation in the WTO* (Cameron May, 2005) 51, 52.

983 Pelc, above n 856, 366.

984 Krzysztof J Pelc, *Making and Bending of International Rules: The Design of Exceptions and Escape Clauses in Trade Law* (Cambridge University Press, 2016).

985 Koremenos, *The Continent of International Law*, above n 265, 163.

986 See, eg, *ACE 33* art 23.06

987 *Commercial Integration Agreement between Peru and Mexico* art19.9.

international agreements such as PTAs. For instance, the carve-outs of ground handling services and airport operation services from the scope of the services disciplines in the Protocol respond to domestic sensitivities in these services sectors.

I maintain that NCMs listed in the services and investment Chapters not only tackle the domestic distribution problem underlying the liberalisation of trade in services and investment protections but also secure domestic political support for the agreement. Although preferences amongst the PA members are not heterogeneous,[988] NCMs accommodate institutional and cultural differences between members. Thus, distribution problems derived from domestic institutional differences contribute to explain NCMs in the services and investment regulation within the *Commercial Protocol*.[989] Members design NCMs to tackle domestic distribution problems derived from cultural, institutional and social differences. For instance, present or future measures granting preferences or rights to minority groups, disadvantaged groups and their ethnic groups address these differences.[990] NCMs serve to accommodate diversity amongst PA members, making participation in the agreement possible.

In other instances, NCMs respond to concerns over sovereignty and national security that are common among members. For example, NCMs curtailing the acquisition of property rights or other rights over bordering land by foreigners,[991] or NCMs restricting the acquisition of state assets or state-owned enterprises by foreigners from the other members or third parties deal with sovereignty and national security sensibilities.[992] In many instances, the concerns apply regardless of the trading or investment partner, which explains why NCMs are similar from one PTA to the other.

Analogously to reservations in a strict sense,[993] NCMs, carve-outs, and 'customised' commitments allow for agreement on deeper commitments. If these devices were not part of the institutional design of the PA's Protocol (and other PTAs), members would have to resort to another mechanism. In this case, imprecision would respond to domestic distribution problems to accommodate their national constraints.

NCMs, carve-outs and 'customised' commitments also serve a similar transparency function to reservations in a strict sense. As Koremenos outlines for treaty reservations, these adjustability devices allow other members, and third parties, to identify cultural and institutional sensibilities. By this means, members subject their NCMs to international scrutiny.[994]

These devices are not identical to treaty reservations in a strict sense. Thus, they may warrant a different set of conjectures as to the way they relate to cooperation problems, mainly because, in contrast to reservations in a strict sense, NCMs, 'customised' commitments, and carve-outs are not reciprocal. The use and design of these institutional devices in international agreements merits an agenda for further research,

988 See above Ch 6, Part III (B) (3).
989 Koremenos, *The Continent of International Law*, above n 265, 180.
990 *Commercial Protocol* annex II, Chilean List: measure 4; Colombian List: measure 5; Mexican List: measure 2; Peruvian List: measure 3.
991 Ibid annex I, Chilean List: measure 1; Mexican List: measure 1.
992 Ibid annex I, Colombian List: measure 2.
993 Koremenos, *The Continent of International Law*, above n 265, 176.
994 Ibid.

although this query exceeds the scope of this thesis. Nonetheless, some of Koremenos' insights on reservations in a strict sense apply analogously to these devices. I undertake this analogical reasoning here to incrementally develop Koremenos' theory on the rational institutional design of international agreements.

Finally, the *Commercial Protocol* supports Koremenos' claim that longer agreements are more plausible to have reservations attached to them than are shorter ones when NCMs and carve-outs are treated as loose forms of reservations.[995]

4 *(Im)precision: A Wiggling Act*

Precision is necessary to solve coordination problems with or without distribution problems.[996] Coordination problems, characteristic of PTAs, explain the overall higher precision in the *Commercial Protocol* vis à vis other PA international agreements.

The Protocol deals mainly with trade and investment, matters in which the members display homogenous preferences.[997] They aligned on a liberal approach that promotes international trade and foreign investment for national development and global insertion. The lack of fundamental differences in preferences in these areas made it possible to incorporate rules with higher levels of precision and actual binding obligations than in a scenario with high preference heterogeneity.

The agreement vacillates between hard-law and soft-law provisions. This approach attempts to address the combination of several cooperation problems underlying its negotiation. Institutional designers also use precision to solve cooperation problems other than coordination.

In the particular case of the Investment Chapter, the substantive and procedural obligations are updated and clarified, adding precision. This response is intentional and rational and aims to reduce the degree of discretion to arbitral tribunals under the ISDS. Adding precision to the obligations reduces the interpretative margin of arbitrators by providing more clarity on the scope of the states' obligations concerning investors and their investments. I claim that in the same way imprecision opens the perimeter for delegation,[998] precision serves the opposite end, reducing the margin of delegation to arbitral tribunals under ISDS.

Reducing the vagueness and ambiguity of the prescribed, proscribed and authorised conduct by the PA members reacts against international arbitral decisions on ISDS mandating states to compensate investors for large amounts of money for violations of their treaty obligations. The rise in investment claims that challenge state measures intended to protect the public interest in host states has also increased the (perceived) risks of encroaching on the states' regulatory autonomy. These events have motivated further clarification on the scope of standards of investment protection, such as the protection against indirect expropriation.

995 Koremenos, *The Continent of International Law*, above n 265, 185.
996 Ibid 172, 185.
997 See above Ch 6 (III) (B) (3).
998 Ibid 189-90.

This international scenario has called for the 'recalibration' of many of these disciplines contained in investment agreements (eg, ARPPIS, Investment Chapters). There is increased visibility of the risks of having to pay large compensations for treaty breaches that have substantive domestic distributional implications. This precision attempts to ameliorate not actual but potential domestic distributional problems. The drafting of provisions in Chapter 10 of the *Commercial Protocol* evidences such concern.[999]

Since the *Commercial Protocol* combines hard-law and soft-law, it is also necessary to explain imprecise provisions. Rules that incorporate vague language such as 'best endeavours', 'to the extent possible', 'as far as its legislation allows', 'if appropriate' are common in the *Commercial Protocol* and can be explained by uncertainty about the state of the world problems and domestic distributional problems. It is rational for states to try to restrict the costs of joining international agreements to the minimum. They can do so by establishing the same set of norms codified in their domestic laws or drafting treaties in a way that does not demand changes to national regulations. In the latter case, soft-law offers leeway to states on the way they implement their international commitments, reducing the costs of reaching an international agreement in the first place.

I maintain that imprecision is a mechanism that helps states to introduce incremental innovations in their institutional rules regarding areas that they have not dealt with in previous international agreements. A problem of uncertainty about the state of the world in dealing with new issue areas causes imprecision in drafting because members are not clear about how specific provisions will be best implemented.

Moreover, soft-law avoids having to face domestic distributional costs associated with domestic regulatory changes to implement international obligations. The soft provisions on corporate social responsibility in the Investment Chapter of the PA *Commercial Protocol* and the soft rules on regulatory improvement incorporated in the *First Protocol Modifying the Commercial Protocol* provide anecdotal evidence to support my claim.

The overall higher precision in the *Commercial Protocol* than in the *Framework Agreement* supports Koremenos' prediction that over time international agreements dealing with similar sub-issues will become more precise.[1000] The Protocol concluded almost two years later than the *Framework Agreement* largely provides more precision on the extent of the commitments and obligations of the PA members.

5 *Dispute Settlement: The Shadow of the Law in the Face of Commitment Problems*

A two-tier dispute settlement system and ultimately a more legalised system through ad hoc arbitral tribunals is a rational response to enforcement and commitment problems in the negotiation of the *Commercial Protocol*.[1001] Compliance is encouraged by design when a state knows other states (and private entities) can take it to formal dispute settlement. [1002]

[999] See, eg, *Commercial Protocol* annex 10.12
[1000] See below Appendix D.
[1001] See above Ch 6, Part III (A) (2). See also below Appendix C.
[1002] Koremenos, *The Continent of International Law*, above n 265, 220.

Even if states do not use formal dispute settlement procedures often, state-to-state dispute settlement, such as the one prescribed in the *Commercial Protocol* and other PTAs, has constraining effects on the behaviour of states. Following Koremenos' insights, I maintain that if PA members anticipate the rulings of a dispute settlement mechanism and the associated punishment, they may refrain from violating the *Commercial Protocol* in the first place.[1003] Thus, internally delegated dispute settlement is a rational response to commitment problems in the negotiation of the *Commercial Protocol*.

The shadow of the law shapes the behaviour of states and avoids noncompliance, when punishment provisions are part of the institutional design, as in the *Commercial Protocol*. This perspective differs from realist accounts that read the lack of use of formal dispute settlement mechanisms as a sign of their ineffectiveness. Legalised dispute settlement makes the costs of deviating from the *Commercial Protocol* higher, reducing the domestic incentives that new governments or leaders may have in defecting from the agreement. Therefore, formal dispute settlement helps to address commitment and enforcement problems in the long-term.

Informal dispute resolution in the *Commercial Protocol*, including consultations, are a common feature of PTAs. As Koremenos makes clear, most of the agreements with formal dispute settlement explicitly encourage informal dispute settlement.[1004] These informal dispute resolution provisions do not undermine the argument on the presence of enforcement and commitment problems in the negotiation of the *Commercial Protocol*. These provisions are included because, in the presence of these cooperation problems, informal rules can work more effectively in the 'shadow of the law.' The threat of activating a formal dispute settlement mechanism puts pressure on members to solve their differences informally. States perceive the latter as having fewer reputational costs and being financially less onerous and more expedited than the former.[1005] This explanation takes into account the anticipatory behaviour of states generally and of the PA members.[1006]

The formalised, highly detailed, and externally delegated ISDS in the *Commercial Protocol* also addresses commitment problems in the negotiation of IIAs, including BITs and investment provisions in PTAs.[1007] However, recent research contests the 'established narrative' (explanations) that investment agreements have been historically negotiated to address underlying commitment problems by establishing credible commitments.[1008] I am aware of these critics but found in the *Commercial*

[1003] Ibid.
[1004] Ibid 222.
[1005] Ibid.
[1006] Ibid 248.
[1007] See, eg, Alan Sykes, 'Public vs Private Enforcement of International Economic Law: Of Standing and Remedy' (John M Olin Program in Law and Economics Working Paper No 235, 2005). See also 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (UNCTAD Series on International Investment Policies for Development, UNCTAD/DIAE/IA/2009/5, 2009) 14-26.
[1008] See, eg, Lauge N Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) 58 *International Studies Quarterly* 1-14; Lauge N Skovgaard Poulsen, 'Beyond Credible Commitments: (Investment) Treaties as Focal Points' (2019) 0 *International Studies Quarterly* 1-9.

Protocol and the governance situation of the PA members[1009] a basis for suggesting that the concept of credible commitments still carries explanatory power for the negotiation of investment obligations in the Protocol. It is my view that despite the risks of outright expropriation being low in PA members, governance challenges and institutional weaknesses mean that the dangers of creeping or indirect expropriation subsists for foreign investors from other PA members.

PA members have been investment sources and investment hosts from the other members in recent decades.[1010] Thus, investment obligations and particularly the recourse to ISDS in the Protocol address concerns about political risks. These provisions tackle expropriation and related risks underlying domestic commitment problems within PA counterparts while attempting to attract investments from other members. ISDS in IIAs are designed to signal a strong commitment from home states to honour their obligations under IIAs and tie future governments to that commitment. PA members are no exception. ISDS alters the incentives and increases the political and financial costs to future governments if they were to relinquish their investment obligations under the Protocol.

6 *Punishment Provisions: The Win of Formalism*

Only the *Commercial Protocol* incorporates punishment provisions in the PA regime.[1011] These provisions in the Protocol and no other international agreement in the PA responds to enforcement problems present in the negotiation of the Protocol and absent from other international (and trans-governmental) agreements in the PA.[1012] Punishment provisions considerably decrease the payoffs from breaching or defecting from the Protocol.

Strong punishment provisions also address commitment problems by making the commitments more credible. PA members in the aggregate have not solved the commitment problem through domestic institutions, with differences in the degree of the problem.[1013] Thus, changes in the political support of a government may make it harder to comply with trade and investment obligations and could trigger violations of the PTA. Punishment provisions in the Protocol are strong enough to offset domestic political pressures and could prevent treaty violations.

There is no evidence suggesting that informal punishment, through implicit punishment, is one of the mechanisms that PA members used in the *Commercial Protocol* to deter noncompliance. No legal provisions or informal rules establish one-sided punishment in response to economic power asymmetries.

In contrast to findings in the COIL research project,[1014] differences in economic capabilities — economic power asymmetry — did not play a role in choosing informal punishment provisions over formal ones. There is no evidence suggesting that informal

[1009] See above Ch 6, Part III (B) (2).
[1010] Ana Maria Palacio and Pierre Sauvé, 'A New Growth Paradigm?: Services Economy in the Pacific Alliance' (Inter-American Development Bank, Report, June 2017) 5-35.
[1011] See above Ch 6, Part III (B) (2).
[1012] See below Appendix C.
[1013] See above Ch 6, Part III (A) (2), (B) (2).
[1014] Koremenos, *The Continent of International Law*, above n 265, 246-7.

punishment has been used complementarily to formal punishment provisions in either the *Commercial Protocol* or other PA international agreements.[1015]

Economic power asymmetries alone did not entail the use of informal punishment — implicit punishment — complementarily or in lieu of formal punishment provisions. I claim that for economic power asymmetries to influence punishment there is also a need for substantial economic ties regarding trade and investment interdependence among the members to the agreement, which is not the case in the PA. Lack of strong economic relations made informal punishment for noncompliance with the *Commercial Protocol* less effective as an institutional design tool.

7 *Monitoring*

Formal monitoring provisions in the *Commercial Protocol* and internal delegation of monitoring in the Free Trade Commission are not easily explicable through Koremenos' framework due to the absence of significant uncertainty about behaviour in the negotiation of the *Commercial Protocol*.

However, the case study of the PA's institutional framework in the *Commercial Protocol* provides anecdotal evidence that even if uncertainty about behaviour is not a problem underlying cooperation, incentives to defeat an agreement could be enough reason for incorporating formal monitoring provisions and delegated monitoring. I argue that this problem justified adding a layer of centralisation to the monitoring tasks. A systemic approach to examining the institutional framework of the PA needs to consider that monitoring within the *Commercial Protocol* is only one instance of a broader monitoring system formally established under the umbrella of the *Framework Agreement* and informal monitoring structures.

There is no evidence that the interests of Mexico, the most economically powerful member, have influenced the overall monitoring system and monitoring provisions in the *Commercial Protocol*. There is no evidence that power asymmetries between PA members have promoted informal monitoring arrangements within the PA, such as one-sided member monitoring.

C *Agreement to Homologate Double Taxation Accords*

The *Agreement to Homologate Double Taxation Accords*, consistent with other taxation agreements of its type, involves a coordination problem without underlying distribution problems. [1016] This agreement is a meta-accord because it coordinates pre-existing bilateral taxation agreements to eliminate hurdles to regional investments for a type of institutional investor.[1017] The coordination problem explains the high precision in the agreement because the benefits of cooperation can only be reaped if the PA members 'harmonise' their respective treatment of retirement funds as fiscal residents.

[1015] Ibid 247-8.
[1016] See below Appendix C.
[1017] See above Ch 5, Part II (B) (3).

The agreement is not about who gets what (distribution), but about providing certainty on the fiscal treatment of retirement funds for income and capital taxes across the four members, allowing them to benefit from the double taxation provisions in bilateral agreements. Precision in the language and definition of the scope of critical concepts provide certainty for retirement funds that operate in more than one PA member. This agreement empirically supports Koremenos' conjecture that when there are coordination problems, imprecision is less plausible to be incorporated in the institutional design.[1018]

Withdrawal provisions also confirm the intentional design of institutional rules in the PA.[1019] Withdrawal rules stress that the modifying effects of the *Agreement to Homologate Double Taxation Accords* on the pre-existing bilateral taxation agreements are permanent. These effects will continue notwithstanding the withdrawal of either the *Framework Agreement* or the *Agreement to Homologate Double Taxation Accords*. Withdrawal rules also ratify that the interests of the parties in coordinating and regulating this topic go beyond the PA.

The absence of enforcement and commitment problems in the agreement explains the lack of not only formal dispute resolution but also punishment provisions. Moreover, the agreement does not include formal monitoring provisions. Lack of permanent monitoring could be an indication that PA members want to rely on informal monitoring by private actors through fire alarms for noncompliance rather than permanent monitoring — police patrols.[1020] The *Agreement to Homologate Double Taxation Accords* follows Koremenos' implied result, which is that in the absence of uncertainty about behaviour and enforcement problems it is possible to dispense with regular monitoring systems.[1021] Fire alarms are still present.

D *Agreement for the Establishment of the Cooperation Fund*

This agreement confirms Koremenos' prediction that over time, agreements dealing with similar sub-issue areas will become more precise. The agreement develops the financial aspects of the cooperation platform established by a government-to-government MOU dealing with non-strategic cooperation problems.[1022] In comparison to the MOU, this treaty moves further in the continuum of legalisation, adding precision to the scope of commitments and obligations. The agreement also commits to future precision by delegating to an intergovernmental body — the technical group on cooperation — the drafting of operational rules that the Council of Ministers shall approve.

The lack of a formal dispute resolution mechanism and the choice for the informal and direct resolution of differences is due to the absence of enforcement problems. The agreement also lacks formal monitoring provisions. As Koremenos points out,

[1018] Koremenos, *The Continent of International Law*, above n 265, 182.
[1019] *Agreement to Homologate Double Taxation Accords* arts 10.3 and 11.
[1020] See above Ch 6, Part II (B) (5).
[1021] See below Appendix C.
[1022] See below Appendix C.

'efficient design of international law implies that unnecessary design elements will be left out.'[1023]

This agreement does not feature exception or escape clauses, once again confirming that these clauses are not necessary in the absence of two joint problems: uncertainty about the state of the world and enforcement problems.

In contrast, the presence of uncertainty about the state of the world justifies withdrawal provisions to protect against shocks that alter the fundamental preferences of each member. The members opted for exiting arrangements rather than finite duration to address the problem of uncertainty.

As for the 'bundle' exiting, the underlying reason for the commitment problems that I highlight in the *Commercial Protocol* also applies to the *Agreement for the Establishment of the Cooperation Fund*.[1024] 'Bundle' exiting that ties the withdrawal from the agreement to the withdrawal from the *Framework Agreement* raises the costs of denouncing the agreement, discouraging opportunistic withdrawal.

E *Trans-Governmental Agreements*

The presence of withdrawal provisions in most of the inter-institutional agreements signed among public agencies of the PA members may also reveal a concern from national public agencies to avoid opportunistic withdrawal, even when no international obligations as such are established in these agreements. These clauses aim to prevent a party from gaining strategic advantage from an early exit but also allow the other party(ies) to adjust to the new cooperative environment. Even in the absence of enforcement problems, notice periods feature prominently in trans-governmental agreements in the PA.[1025]

There is no significant negative correlation between the definite duration clauses and withdrawal clauses in trans-governmental agreements in the PA. Some agreements do not follow a particular pattern in this regard. There are agreements that despite featuring definite duration also incorporate withdrawal provisions. In all cases definite duration clauses include automatic renewal.

There is no correlation between the number of members in a specific agreement and the level of precision. Trans-governmental agreements featuring only two public agencies of the PA members do not necessarily incorporate more precise commitments than trans-governmental arrangements featuring agencies from the four members.[1026]

There is no pattern showing higher precision among trans-governmental agreements dealing with similar sub-issues. However, there was only one area to test Koremenos' prediction that over time agreements dealing with similar sub-issue areas will become

[1023] Koremenos, *The Continent of International Law*, above n 265, 238.
[1024] See above Part II (B) (1).
[1025] See below Appendix C.
[1026] Ibid.

more precise:[1027] cooperation on infrastructure sharing.[1028] This is because the trans-governmental agreements that government agencies in the members have concluded are broadly cooperation agreements. These agreements deal with non-strategic cooperation problems in a broad range of sub-issues from the online management of consumer disputes, to anticorruption in public procurement, to entrepreneurial development.

III CONTRIBUTIONS AND LIMITATIONS: THEORY-TESTING AND THEORY-BUILDING

In the COIL, Koremenos was able to test 38 hypotheses from which 32 found support in the design of international agreements that were part of the COIL sample. One hypothesis was conditionally supported only in the presence of enforcement and commitment problems as well as uncertainty about behaviour.[1029]

My case study provides evidence on the causal mechanisms articulated in Koremenos' hypotheses. I test Koremenos' hypotheses on the relationship between cooperation problems, characteristics in the aggregate of the PA members, and institutional features as they present in the institutional rules of the PA.[1030] The PA's institutional framework corroborates nine of the 32 institutional design hypotheses confirmed in Koremenos' research. The PA's institutional framework does not provide factual evidence to test 18 out of the 38 hypotheses that Koremenos formulates. [1031] I dismiss seven out of the 32 hypotheses confirmed in COIL.[1032] I do not confirm hypotheses that did not find support within COIL.

Koremenos' framework is suitable to explain adjustability mechanisms in response to particular cooperation problems in each PA international agreement. The theory is well suited to explain the rationale over micro-rules such as wait periods in the withdrawal provisions, escape clauses, and several combinations of precision and imprecision tailored to address either uncertainty about the state of the world or coordination problems in each agreement. I confirm in the case of the PA, as Koremenos concludes in her research program, no empirical connection between duration clauses, precision, and enforcement problems.[1033]

The theory also offers promising insights to understand the relationship between distribution problems and provisions that even though not formal reservations in a strict sense delimit the effect of specific obligations for particular members to address domestic distributional problems. For incremental developments to the theory, I use her insights on reservations in a strict sense to test explanations for other treaty provisions such as NCMs, carve-outs, and 'customised' commitments in the presence of domestic distribution problems.

[1027] See below Appendix D.
[1028] Information restrictions prevent me from testing this prediction because framework agreements on the bilateral sharing of diplomatic infrastructure were not available in all cases.
[1029] See below Appendix D.
[1030] Ibid.
[1031] Ibid.
[1032] Ibid.
[1033] Koremenos, *The Continent of International Law*, above n 265, 323.

For theory development, I also address exception clauses and use Koremenos' insights regarding escape clauses analogically to explain the causal relationship between treaty exceptions, uncertainty about the state of the world, and enforcement problems.

Koremenos' theory on the relationship between enforcement and commitment problems and the design of dispute resolution mechanisms is illustrative to explain the combination between informal and formal dispute settlement in the PA's international agreements. Her theory also has explanatory power for the relationship of these cooperation problems and formal punishment provisions.

Since neither the *Framework Agreement* nor the *Commercial Protocol* meets the threshold to have an underlying uncertainty about behaviour problem, accounts relying on this problem to explain monitoring systems— member reporting and delegate monitoring — do not find support in the design of these PA agreements. The PA's institutional framework ultimately offers an internally delegated monitoring system, which calls on the possibility to read these institutional rules as a result of other cooperation problems, particularly enforcement, commitment, and uncertainty about the state of the world problems.

Apart from the characteristic of numbers, which is constant in the PA up to the first semester of 2019, power asymmetries have not had a significant role in explaining formal (or informal) design provisions regarding punishment, monitoring, or rules for control (eg, decision-making and voting). This result is not a flaw of the theory as such, since Koremenos also asserts, based on case studies and anecdotal evidence, that treaty design does not necessarily reflect power configurations through asymmetric control.[1034] Thus, she discards three out of four hypotheses on the relationship between asymmetric power and rules for control.[1035]

Notwithstanding her qualifications about the potential relationship between power and institutional control, it is my view that Koremenos' research program could benefit from examining the role that power asymmetries have for institutional design in agreements involving middle and small powers rather than superpowers such as the US. This analysis could contribute to refine and ultimately generalise her insights on the effects of asymmetrical power by covering the realities of agreement design and the role of power in international agreements involving members from within LA, Africa and Asia.

Overall, her insights on the effects of power asymmetries in the design of formal and informal institutional rules for control have been insufficient to explain the impact of PA's power asymmetries in institutional design. Based on empirical evidence, I venture to argue that this is because power asymmetries have not had a role in determining (formal and informal) rules for control in the PA. This result opens a new set of questions that merits an agenda for future research: Why have economic power asymmetries not impacted the design of formal rules on control and decision-making in the PA as Koremenos' theory predicts? Is it that the involvement of a middle power alters the potential effects of asymmetrical power, making its influence on formal

[1034] Ibid 318.
[1035] See below Appendix D.

institutional design less probable? Does entrenched national sovereignty inhibit the potential impacts of asymmetrical power on the rules for control?

Regarding domestic-regime type and preference heterogeneity as characteristics in the aggregate of PA members, I argue that it is the similarity of regime type — democratic with domestic institutional deficiencies — and preference homogeneity that help to explain some of the PA's institutional rules. The latter also relates to the role of ideas in institutional design — particularly open regionalism and deep integration — that I explore in Chapter 8.

Koremenos' analytical framework is insufficient to explain the institutional rules in trans-governmental agreements when their underpinning problem is what she calls non-strategic cooperation problem.[1036] These agreements constitute the bulk of the agreements signed in the PA. Koremenos' research does not cover the 'purely soft instruments' completing the PA's institutional framework.[1037]

Koremenos' analytical framework supports explanations for the rationale of treaty provisions, giving insights at the micro-level with international agreements as primary units of analysis. However, it is less apt to explain international agreements as systemic outcomes. The framework does not provide enough tools to examine international agreements as a conjunct, which is particularly useful when explaining regional institutions for long-term economic cooperation.

IV Conclusion

This Chapter supports the argument that the institutional rules of the PA's international agreements are intentionally crafted to respond to the cooperation problems of their negotiation, and the characteristics in the aggregate of the PA members. However, these two factors do not entirely explain the design features of the PA. Through a micro-level analysis of treaty provisions, I support explanations for the rational design of institutional rules in the PA, despite some theoretical gaps and limitations.

I show that institutions in the PA are relevant and have been designed in a way that changes incentives and shapes member behaviours to ensure compliance, allow members leeway to adjust to changes in circumstances and respond to sudden shocks, and make member commitments more credible.

The design of the PA through features such as decentralisation and imprecise scope is the result of the uncertainty about the state of the world when negotiating the *Framework Agreement*. External regional environments — perceived poor performance of other regional institutions — reinforced that uncertainty. These institutional features are the result of the pondering of institutional entrepreneurs between the uncertainties of the potential benefits from the cooperation vis à vis the ongoing and visible costs of formalised and permanent organisational structures.

[1036] See below Appendix C.
[1037] See above Ch 5, Table 10, Table 11 and Table 12.

These institutional arrangements would be relatively easy to abandon compared to centralised and formal arrangements if the unfolding of the agreement and its implementation did not meet the expectations of the PA members.

I provide empirical evidence — through 'customised' commitments, carve-outs, exceptions, and escape clauses — that institutional rules of PA's international agreements are an intentional and tailored choice of institutional entrepreneurs. These institutional devices are not a simple copy and paste of rules imported from other international agreements. Convergence in rule drafting could be the result of common cooperation problems underlying similar types of agreements.

I maintain that distribution, coordination, commitment, and enforcement problems in the negotiation of the *Commercial Protocol* made the combination of soft-law and hard-law the optimal solution for creating a free trade area between the members. Imprecision, carve-outs and 'customised' commitments address domestic distribution problems. In contrast, more precise drafting assists in resolving coordination problems on market access and trade liberalisation.

As I show in Appendix D, not all these cooperation problems are present in every Chapter and subject matter of the *Commercial Protocol*. Uncertainty about the state of the world explains withdrawal clauses, while the interaction of this cooperation problem and enforcement problems caused PA members to resort to escape and exception clauses. Uncertainty about the state of the world was a cooperation problem in the *Commercial Protocol*, although not as prevalent as in the negotiation of the *Framework Agreement*.

Uncertainty about behaviour and preferences did not play a significant role in shaping the institutional rules of the PA's institutional framework. Nevertheless, with more international agreements to come and increasing complexity of the issue-areas — specialisation trend — noncompliant behaviours may be more challenging to detect in the future.

On the role of the characteristics of the PA members in the aggregate, I maintain that small and constant membership facilitates less legalised agreements in the presence of uncertainty about the state of the world.

I sustain that it is regime-type similarities and preference homogeneity rather than preference heterogeneity that caused provisions such as the democratic requirements in the *Framework Agreement*. Despite regime-type symmetry, domestic institutional weakness and political instability for members such as Colombia create commitment problems. These problems contribute to more legalised and centralised dispute settlement in the *Commercial Protocol* and the mandate to negotiate a dispute settlement regime for the PA.

In contrast, I did not find that economic power asymmetries play any role in the design of formal and informal rules on dispute settlement, punishment or monitoring. There is no evidence in the PA of one-sided monitoring or punishment. Thus, for theory refinement, this result requires review of additional factors, such as actual economic dependency, to determine the role of economic power asymmetries in formal and informal institutional design.

I also maintain that the consensus rule that underpins the PA's decision-making precludes any effect, formally and in practice, of economic power asymmetries in the PA's institutional design.

Trans-governmental agreements respond to non-strategic cooperation problems. Rational institutionalism, specifically COIL, has limitations in explaining the design of informal trans-governmental agreements. COIL provides a few insights limited to imprecision and informality in agreement design. However, systematically explaining trans-governmental agreements is not an aim of Koremenos' research program, the focus of which is on explaining design features in international agreements. Despite this limitation, insights from the international agreements can be extrapolated, as I do in this Chapter, to explain the causal relationship between uncertainty about the state of the world, withdrawal, and definite duration clauses.

I corroborate nine of the 32 hypotheses confirmed in COIL on the design of international agreements, as shown in Appendix D. PA's international and trans-governmental agreements do not provide evidence to test 18 hypotheses. However, some of the hypotheses that I could not test could support predictions on the need for institutional adjustments, as I discuss in Chapter 8.

For incremental theory building, I devote attention to carve-outs, NCMs and 'customised' commitments to explain the causal relationship between distribution problems and these devices. I call on the need to address these mechanisms as additional adjustability devices available to institutional entrepreneurs to tackle domestic distribution problems in the negotiation of international agreements.

I also examine exception clauses to explain the causal relationship between joint uncertainty about the state of the world and enforcement problems. To this end, I extrapolate Koremenos' insights on escape clauses, questioning their boundaries.

Although I test these insights with the PA's *Commercial Protocol*, there is potential for future research to test these results in a broader sample of international agreements for generalisability purposes.

For incremental theory building, I claim that the 'bundle' existing in the *Framework Agreement*, the *Commercial Protocol*, and the *Agreement for the Establishment of the Cooperation Fund* is a response to commitment problems after a systemic review of this institutional rule.

I confirm that Koremenos' insights on institutional design are insufficient to explain relevant aspects of the PA's institutional framework, for instance, internally delegated monitoring in the absence of uncertainty about behaviour. Her accounts on power are also unsuitable for explaining the rules for control in the PA — veto effect for decision-making.

Chapter 8 complements and supplements the analysis of institutional design with constructivist institutionalism accounts to explore the role that four specific ideas have had in shaping institutional outcomes in the PA.

8 AN EXAMINATION FROM CONSTRUCTIVIST INSTITUTIONALISM AND INSTITUTIONAL ASSESSMENT

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I INTRODUCTION

This Chapter is explanatory and normative. It builds on Chapter 5, which provides an account of the institutional framework of the PA. I rely on the explanations in Chapter 2 about the nature and the legal status of the PA, and the rational factors that partially elucidate its institutional design in Chapters 6 and 7.

First, in the explanatory realm, this Chapter continues to address the factors that explain the features of the PA's institutional framework and how ideas cause or contribute to their design. This Chapter accounts for the ideational foundations of the PA and how four specific ideas — open regionalism, deep integration, flexibility, and pragmatism — play a role in shaping institutional features and other institutional aspects.

By examining ideational elements in the PA's institutional design, I accept that ideas affect perceptions and interpretations of rational interests and preferences. I do not attempt to establish a sequential connection between ideas and interests but more of a symbiotic relationship between the two. My presumption here is that ideas matter for institutional design outcomes even when actors behave rationally to achieve their ends.[1038]

Part II is the explanatory component of this Chapter. It discusses the scope of open regionalism and deep integration as institutional programs, and flexibility and pragmatism as institutional frames. This Part examines how these types of ideas have shaped institutional design in the PA. Following the roles of ideas in shaping institutional design in Chapter 3,[1039] I maintain that open regionalism and deep integration are programs operating at the cognitive foreground level. These programs play a critical role in defining the scope and areas of the PA. It is these two foreground ideas that define the economic regionalism approach of the PA. Thus, these ideas act as roadmaps in the PA's institutional framework.

I claim, supported by empirical analysis, that the frames of flexibility and pragmatism helped substantively to legitimise the open regionalism and deep integration programs. When decision-makers use the ideas of flexibility and pragmatism as institutional frames, these ideas also perform a legitimising role in the institutional structure of the PA, especially in relation to its decentralised and ad hoc approach to institution-building, and the preference for informal rules and soft-law.

Second, Part III of this Chapter contributes normatively to the discussion on the future institutional pathway of the PA. This Part tackles the research question about the extent to which the institutional framework supports the intended objectives of the PA, particularly deep(er) integration towards the free movement of factors. Part III addresses the shortcomings of the institutional framework to pursue this goal.

[1038] Goldstein and Keohane, above n 382, 5.
[1039] See above Ch 3, Part III (C) (1).

The criterion upon which I rely for the normative claims in this thesis is effectiveness.[1040] This criterion refers to the ability of the PA's institutional framework to assist the PA in progressing towards the free movement objective and perform the tasks that this objective demands.

Part IV concludes that the institutional framework in the PA is insufficient in the long-term to support the PA's objectives. I argue in this Chapter that the existing institutional framework will not be suitable to cope with the demands for further and deeper integration, the need for coordination and regulatory harmonisation, and the development of other regional public goods.

II IDEAS UNDERPINNING INSTITUTIONAL DESIGN: SCOPE AND ROLE

This Part delves into the scope, content, and the function that four specific ideas have had for the institutional design of the PA and its main features that I describe in Chapters 5 and 6. Part A examines the scope of the idea of open regionalism from its inception in the Asia Pacific region, through its adoption in LA and later on in the PA. This Part also explicates the role of open regionalism for the institutional outcomes. Part B studies the scope and content of the idea of deep integration and how it explains aspects of PA's institutional design. Part C sheds light into the constructed meanings of the ideas of flexibility and pragmatism and their respective role in the design of PA's institutional framework.

As I explain in Chapter 3,[1041] ideas have four potential roles, depending on their nature — normative or cognitive — and content. Ideas can be anchoring or coordination points; they could be roadmaps by shaping the solution to specific problems; ideas could be filters by constraining normatively or cognitively the rage of solutions for the institutional design that policymakers are prone to consider; and they could be symbols and concepts to help actors to construct frames to legitimise their institutional proposals.

I claim here that open regionalism and deep integration are foreground programs that have set the roadmap for the PA's economic regionalism approach. The ideas of open regionalism and deep integration have been vital in defining the scope of the PA and the range of economic issues the PA members are dealing with at the regional level. These programs have established the PA's trade and investment agenda, but more importantly, have significantly contributed to the (formal) definition of its objectives. While open regionalism helped at a higher level of abstraction, the deep integration program gave the PA a concrete focus by pointing at sub-issue areas and legal disciplines. These ideas oriented PA's instruments (strategies), basically through a PTA establishing a free trade area, and the disciplines negotiated in the *Commercial Protocol* and subsequent amendments.

The opening up of the PA's agenda to themes on productive transformation and competitiveness is not a new trait in PA's open regionalism program. These topics are part of a long-time concern of LA states to use regional integration to leverage domestic

[1040] Serving to effect the purpose; producing the intended or expected result. *Macquarie Dictionary* (7th ed, 2017) (online).

[1041] See above Ch 3, Part III (C) (1).

structural weaknesses and development models. They show a compromise at the cognitive level, with the neo-structuralist paradigm underscoring some of the regional programs in the last decades.

Flexibility and pragmatism are normative foreground frames that institutional entrepreneurs and decision-makers have used to legitimise to the public not only the open regionalism and deep integration programs in the PA members but also its institutional approach. These frames are 'means to channel' the open regionalism and deep integration programs; they helped in 'packaging' and 'marketing' these programs. In their role as legitimising tools, the ideas of flexibility and pragmatism address public sentiments of inconformity with the performance of regional institutions.

A *Open Regionalism: Something Old, Something Borrowed, Something New*

Gaps between the conceptualisations of open regionalism and the various forms of implementation have caused confusion about its scope.[1042] Section One traces the origins of the idea of open regionalism and its tenets while outlining the common grounds between open regionalism in the Asia Pacific and LA. I examine the nuances in its adoption in LA. Section Two highlights the elements that the PA borrows from the 1990s open regionalism program and the new traits it adapts to its constructed idea of open regionalism. Section Three assesses how these elements underlying the notion of open regionalism have influenced institutional outcomes in the PA.

My main claim here is that open regionalism works as a roadmap for the PA. This foreground cognitive idea contributes to the definition of the PA's goals and its original trade and investment focus. This idea operates within a broader system of beliefs that exhibits a compromise between the neo-structuralist and the neo-classical economic paradigms with pre-eminence from the latter.

1 *Scope of the Open Regionalism Idea: A Cognitive Program*

Terada traces the origins of open regionalism to 1955, when, in the context of the Colombo Plan, Japanese delegates stated at Singapore's Ministerial Meeting that:[1043]

> Asia regionalism should aim not at an exclusive bloc which existed in the prewar period, but at what is called open regionalism, which means strengthening unity among members while increasing interaction with non-members.

This statement sketches one of the critical elements of the notion of open regionalism — membership — while later refinements highlight its other key component — trade. Masayoshi Ohira, Japan's Prime Minister, described in the late 1970s a form of cooperation opened to the rest of the world, based on the principles of non-

[1042] Kuwayama, above n 521, 7.

[1043] Saburo Okita, 'Ajia Keisai Kyoryoku-no Shomondai' (1962) February *Chuo Koron* quoted in Takashi Terada, 'The Origins of Japan´s APEC Policy: Foreign Minister Takeo Miki´s Asia-Pacific policy and current implications' (1998) 11 (3) *The Asia-Pacific Review* 337, 353.

discrimination, openness, and outward orientation. This notion became a tenet for the Asia-Pacific economic cooperation in the late 1980s through PECC and APEC.[1044]

The essential elements of the concept were refined over time and also within these two fora.[1045] Investment promotion and trade facilitation became central to APEC's open regionalism program. [1046] (Unilateral) trade liberalisation, with its unconditional MFN, has also been at the core of its conceptualisations.[1047] APEC's goal was 'open and free trade and investment' in the region by 2010, with developing members extending this timeframe to 2020.

From its early refinements in the emerging Asia-Pacific policy, open regionalism resulted from seeking consistency between regionalism and globalism.[1048] Under this approach, regionalism could be a building block of multilateralism.[1049] The Final Report of the Pacific Basin Cooperation Concept stresses this compromise.[1050]

Non-discriminatory liberalisation was essential to open regionalism. This operating principle was observed in the East Asian economies through the 1970s and later in the Asia-Pacific.[1051] Transparency is also a fundamental tenet in APEC's open regionalism program.[1052]

Drysdale coined the frame of regionalism without discrimination and advocated for an Asia-Pacific regionalism based on unconditional MFN. He defended this view on the basis that most of the benefits from trade liberalisation were likely to result within the Pacific.[1053] Garnaut refers to open regionalism as including market-driven integration and also the kind of integration facilitated by government policy, as far as the latter does not involve discrimination against outsiders.[1054] According to the APEC's Osaka Action Agenda from November 1995, 'the outcome of the trade and investment liberalisation in the Asia-Pacific region will be the actual reduction of barriers not only among APEC economies but also between APEC and non-APEC economies'.[1055]

1044 Garnaut, above n 534, 273. See also C Fred Bergsten, 'Open Regionalism' (1997) 20 (5) *The World Trade* 545, 551.

1045 Terada, above n 1043, 353.

1046 Terada, above n 1043, 337.

1047 Bergsten, above n 1044, 553-4; Maurice Schiff and L Alan Winters, *Regional Integration and Development* (The International Bank for Reconstruction and Development/ The World Bank and Alfaomega, 2004) 181.

1048 Bergsten, above n 1044, 546, 562.

1049 Terada, above n 1043, 354; Kuwayama, above n 521, 9; Robert Z Lawrence, Regionalism, Multilateralism, and Deeper Integration (The Brookings Institution, 1996) 81.

1050 Terada, above n 1043, 356 quoting Kan Taiheiyou Rentai Kenkyu Group, *Houkokusho* (1980) [Kan Taiheiyou Rentai Kenkyu Group, The Final Report (1980)] [Terada trans].

1051 Garnaut, above n 534, 282; Amitav Acharya, 'Ideas, identity, and institution-building: From the 'ASEAN way' to the 'Asia-Pacific Way? (1997) 10 (3) The Pacific Review 319, 325; Schiff and Winters, above n 1047, 182.

1052 *The Osaka Action Agenda: Implementation of the Bogor Declaration*, (November 1995) APEC, Part One: Liberalization and Facilitation: General Principles, 1 < https://www.apec.org/About-Us/How-APEC-Operates/Action-Plans >.

1053 Peter Drysdale, 'APEC and WTO: Complementary or Competing?' (Paper presented at the ISEAS APEC Roundtable: APEC — Sustaining the Momentum —, New Zealand, 6 August 1997) 6.

1054 Garnaut, above n 534, 275.

1055 *The Osaka Action Agenda: Implementation of the Bogor Declaration*, above n 1052, Part One: Liberalization and Facilitation: General Principles, 1.

Notwithstanding conceptualisations of open regionalism that defend its non-discriminatory and unconditional liberalisation; PTAs, mainly North-South agreements with NAFTA at the forefront,[1056] are regularly characterised as important tools of the open regionalism program.[1057]

At the institutional level, the open regionalism program in the Asia-Pacific depicts an implementation that relies on intergovernmental structures rather than supranationalism.[1058] Consultations and consensus are the basis for the decision-making, which relies on voluntary commitments rather than binding agreements.[1059] Experts frame this approach as 'concerted unilateral action'. Institution-Building has intentionally avoided institutional grand-design approaches, focusing on 'a slow-moving' consultative process. Acharya characterises the Asia-Pacific region-building as sociological rather than legalistic or formalistic.[1060]

As I explain in Chapter 4, this notion of open regionalism with its basic tenets travelled to LA. Its adoption was part of deeper structural reforms that started in the late 1980s.[1061] ECLAC understood open regionalism in the following terms:[1062]

> *[a] process* of *growing economic interdependence* at the regional level, *promoted both by preferential integration agreements* and by other policies *in a context of liberalization and deregulation*, geared towards *enhancing the competitiveness* of the countries of the region and, in so far as possible, constituting the *building blocks* for a more *open and transparent* international economy. (Emphasis added)

In formulating the basis for open regionalism in LA and the Caribbean, ECLAC joined the original notion of open regionalism with the ideas of productive transformation, international competitiveness, and social equality.[1063] This process of blending ideas is what Campbell refers to as bricolage.[1064] Thus, ECLAC's version of open regionalism for LA underscores a compromise and a synthesis between the neo-structuralist paradigm promoted by ECLAC and neo-classical liberal ideas.

ECLAC's framing of open regionalism made an effort to connect economic openness with productive transformation. ECLAC even refers to the need to boost regional value chains in its 1994 working paper titled: Open regionalism in Latin America and the Caribbean: Economic Integration as a Contribution to Changing Production Patterns with Social Equality.[1065] Despite these aspects being part of the theoretical and conceptual discussions of open regionalism in LA, their practical implementation in

[1056] But see Drysdale, above n 1053, 6.
[1057] See, eg, German A de la Reza, 'The Open Regionalism and its Theoretical Renewal' (2013) 16 *Revista del CESLA* 207, 224. See also Carlos Alberto Chaves García, 'A Theoretical and Conceptual Approach for the Analysis of the Pacific Alliance' (2018) 30 (1) *Desafíos* 21, 26. See also Kuwayama, above n 521, 8.
[1058] De la Reza, above n 1057, 220-21.
[1059] Acharya, 'Ideas, identity, and institution-building', above n 1051, 324, 334-6. See also Kuwayama, above n 521, 13.
[1060] Acharya, 'Ideas, identity, and institution-building', above n 1051, 324, 334-6.
[1061] See above Ch 4, Part II (C). See also Chaves García, above n 1057, 23.
[1062] ECLAC, 'Open Regionalism in Latin America and the Caribbean' above n 525, 8.
[1063] Ibid.
[1064] See above Ch 3, Part III (C).
[1065] ECLAC, 'Open Regionalism in Latin America and the Caribbean' above n 525.

regional institutions in LA prioritises the liberalisation themes over the productive and industrial transformation agenda.

Regional institutions, such as CAN, show this process of bricolage in the re-formulation of its integration objectives during the 1990s. However, the connection of these ideas in practice suggests serious flaws.

2 *Open Regionalism in the PA: A Resilient Program*

The PA resumes the basic tenets of open regionalism. This approach means a focus on economic integration, particularly trade and investment. PA is also concerned with promoting and maintaining global trade while integrating with regional partners.

In the words of one of the PA's key institutional entrepreneurs:[1066]

> This is an integration initiative that goes beyond a commercial agreement. An initiative that is novel because it is an open regionalism initiative that does not compromise individual commercial policies of its members. It focuses only on establishing deeper integration with the aim of integrating to the rest of the world. Thus, [the PA] is not about assembling a common external policy, it is not about raising barriers to trade with third parties, but the complete opposite. The deeper we can integrate, the more attractive we become for the rest of the world.

PA's open regionalism has a view towards a non-excluding and non-exclusive integration, despite the tensions underpinning this aspect of open regionalism.[1067] Former General Director of International Economic Relations of Chile — Álvaro Jana Linetzky — stresses the non-exclusive nature of the PA in the following statement:[1068]

> The PA is an open process with pragmatic and flexible goals. Being a member does not implicate that it is not allowed to negotiate integration agreements with other blocs. We do not have an external common tariff regime; we have not thought of a common currency. We are proving that together we can achieve more but showing absolute respect for individual agendas and projects.

For the PA, open regionalism remains a program instrumental in achieving global insertion and increasing competitiveness. The V Presidential Declaration points to this characteristic when referring to the PA as a strategic platform, open to free trade and with competitive advantages for international businesses.[1069]

Similarly to the Asia-Pacific unfolding of open regionalism, the PA's program of open regionalism involves the business and entrepreneurial sector actively, even though the

1066 Interview_35 (Skype, 1 March 2017).

1067 Briceño Ruiz, above n 20, 78; Arroyave, above n 19, 125.

1068 Ministros de Comercio definen la Alianza del Pacífico como un "proceso único", *El Universal* (online), 9 Febrero 2014 < https://www.eluniversal.com.co/colombia/ministros-de-comercio-definen-la-alianza-del-pacifico-como-un-proceso-unico-151143-eweu242170 > [Ministries of Trade defined the Pacific Alliance as a "unique process"', *El Universal* (online), 9 February 2014 < https://www.eluniversal.com.co/colombia/ministros-de-comercio-definen-la-alianza-del-pacifico-como-un-proceso-unico-151143-eweu242170 >].

1069 V Presidential Summit, *Presidential Declaration on the Pacific Alliance* (17 November 2012) The Pacific Alliance < *http://alianzapacifico.net/documentos/*>.

PA's lies in an intergovernmental initiative. The involvement of the business sector also shows an expanding concern over productive and financial integration.

The scope of the non-discrimination feature of open regionalism remains obscure. While early developments of the idea promoted unilateral trade liberalisation in the Asia-Pacific, adaptation of the concept in LA brought it closer to the establishment of free trade areas and the negotiation of PTAs NAFTA style.[1070] The PA's notion of open regionalism embraces the free trade area as a critical instrument.[1071]

What is then new in the open regionalism program of the PA that justifies the characterisations of refurbished,[1072] renewed, [1073] reloaded,[1074] or XIX century open regionalism?[1075] There are new traits in the PA's unfolding of the open regionalism program, although those innovations are not as broad as PA governments[1076] and some academics claim them to be.[1077] I maintain that some of the productive integration agenda, claimed to be innovative, was part of the integration agenda of LA regional institutions during the 1990s, but shortcomings making the linkage between the open trade and the productive agenda made them fade along the way. [1078] Their incorporation in the regional agenda of the PA reflects a long-time concern over domestic structural economic weaknesses that most of the LA countries share. The regional space becomes another platform to address these limitations through broader economic cooperation.

A constant of the regionalism institutions in LA, regardless of their approach, is their functional connection with the idea of development.[1079] The PA is no exception and its members associate the program of open regionalism instrumentally to improve economic development.[1080]

Perhaps the most salient new trait in the PA´s program on open regionalism is the association with a shared internationalisation strategy towards closer economic ties with the Asia-Pacific region.[1081] Another trait of the PA is the absence of a paymaster, or an institutional leader. PA members balance the lack of individualised institutional

1070 ECLAC, 'Open Regionalism in Latin America and the Caribbean' above n 525, 8; Briceño Ruiz, above n 20, 67-8, 78.

1071 *Framework Agreement* art 3 (2) (a).

1072 Chaves García, above n 1057, 31.

1073 Manfred Wilhelmy, 'The Pacific Alliance: A Perspective from Chile' (Discurso Pronunciado en la 42a Sesión Ordinaria del Parlamento Andino, Santiago, Chile, 17 de Junio de 2013) 119, 123 [Manfred Wilhelmy, 'The Pacific Alliance: A Perspective from Chile' (Speech delivered at the 42nd Ordinary Session of the Andian Parliament, Santiago, Chile 17 June 2013) 119, 123].

1074 Cintia Quiliconi, 'Atlántico versus Pacífico: Las alternativas en competencia de la integración comercial en América Latina' (2014) 23 (47) *Relaciones Internacionales* 165-184 [Cintia Quiliconi, 'Atlántic versus Pacific: Competing Alternatives for Commercial Integration in Latin America' (2014) 23 (47) *Relaciones Internacionales* 165-184].

1075 Novak and Namihas, above n 16, 48.

1076 Interview_35 (Skype, 1 March 2017).

1077 See, eg, Chaves García, above n 1057, 31.

1078 See above Ch 4, Part II (C). See, eg, *Cartagena Agreement* ch 5. See, eg, Marchini, above n 10, 82-3. But see Chaves García, above n 1057, 21-45.

1079 See above Ch 4, Part V.

1080 *Framework Agreement* Preamble, art 3 (1) (a).

1081 *Framework Agreement* art 3 (1) (c). See also Chaves García, above n 1057, 27, Wilhelmy above n 1073, 122.

leadership through collective leadership,[1082] expressed also in thematic leadership. [1083] This latter type of leadership adds a layer of innovation in its institutional approach.

PA members and its institutional entrepreneurs frame the open regionalism program with the idea of sustainability that creates, at least formally, normative constraints on acceptable mechanisms to implement the program. I maintain that this is a new frame that qualifies the ends-means relationship on how to achieve PA's objectives. This frame reflects the international and domestic concerns of the last decades over natural resource exhaustion and environmental degradation.

3 *The Role of Open Regionalism in Institutional Design*

How have the above elements underpinning open regionalism influenced the PA's institutional design? I maintain that the above elements encompassing open regionalism in the PA have made of the open regionalism program a roadmap in an uncertain environment.[1084] This roadmap defines priorities, the agenda, the instruments, and targeted actions.

The influence of the open regionalism program is evident in the setting of strategic actions to implement PA's objectives.[1085] For instance, the *Framework Agreement* focuses on actions targeting trade facilitation and customs matters, liberalisation of trade in goods and services towards consolidating a free trade area, and progress towards free capital movement and investment promotion amongst its members. All these actions are based on the key tenets of open regionalism. Thus, open regionalism contributes in defining the scope of the PA and its focus on trade and investment.

Although the PA's agenda suggests that its open regionalism program (arguably) underscores a compromise between the neo-structuralist and neo-classical liberal paradigms, it has prioritised actions on trade and investment liberalisation and facilitation. Despite the PA having entered into the productive agenda, the instruments and actions in this field are less clear than those regarding trade and investment liberalisation and facilitation.

The PA exhibits closeness with APEC and the ASEAN institutional approach in consensual decision-making, informality, non-legalistic procedures, conscious avoidance of gran-design institutionalisation, the preference for ad hoc rather than permanent institutions, and the intergovernmental structure.[1086] However, the empirical evidence does not suggest direct diffusion of the institutional models.[1087] Rather than attempting to follow institutional approaches coined as 'the ASEAN way' or even the 'Asia-Pacific way',[1088] government officials and institutional entrepreneurs in the PA

[1082] Interview_02 (Skype 12 August 2016), Interview_35 (Skype, 1 March 2017).
[1083] Interview_02 (Skype 12 August 2016), Interview_33 (Skype 19 March 2017).
[1084] See above Ch 6, Part III (A) (1); Goldstein and Keohane, above n 382, 14.
[1085] *Framework Agreement* art 3 (2) (c).
[1086] Acharya, 'Ideas, identity, and institution-building', above n 1051, 329, 342; See also Marchini, above n 10, 83.
[1087] Interview_35 (Skype, 1 March 2017).
[1088] But see Acharya, 'Ideas, identity, and institution-building', above n 1051, 337, 342.

claim institutional uniqueness.[1089] Conversely, the empirical evidence confirms that the CEAP structure in the private sector takes organisational aspects from ABAC.[1090]

Although an intergovernmental institutional structure is not the exclusive result of the open regionalism program, this program has contributed by advocating for institutional flexibility. The trend towards less formalised institutional arrangements is not new or unique to the PA. Since the 1990s, open regionalism, epitomised in NAFTA and other PTAs, followed this approach, including non-permanent structures. [1091] Intergovernmentalism is the rule rather than the exception to regional institution-building according to comparative studies on regionalism.[1092]

Open regionalism, paired with the institutional frame of flexibility, allows PA members to negotiate PTAs by themselves. Members are not bound to negotiate agreements as a bloc.

The idea of openness and the tenet of open membership contribute to a flexible definition of the membership requirements. These requirements are not restricted by geographic proximity; it is more an ideational proximity, a sense of like-mindedness,[1093] shared democratic and constitutional values. Moreover, an example of the effects of the open regionalism program in the PA's institutional rules on membership is the requirement that any future member to the PA must have a previous PTA with every current PA member.[1094]

Finally, the ambiguity, of the idea of open regionalism serves PA members' aim to maintain the institution's flexibility in its approach to economic regionalism. This entails openness in the instruments and means for economic cooperation.

B *Deep Integration: A Cognitive Program*

Although some sources treat open regionalism and deep integration interchangeable,[1095] these ideas have not been interpreted as identical in LA and the PA.

Despite Lawrence having coined the concept of deep(er) integration for the first time in 1996, there is no academic consensus, let alone political, on its content. Lawrence first used the notion to distinguish between two types of PTAs: shallow integration and deep(er) integration.[1096] The shallow integration are agreements that deal with 'at the

[1089] Interview_35 (Skype, 1 March 2017).
[1090] Interview_06 (Santiago, Chile, 1 September 2016). See above Chapter 5, Part III (B) (8).
[1091] ECLAC, 'Open Regionalism in Latin America and the Caribbean' above n 525, 95-6.
[1092] Closa and Casini, above n 3, 76.
[1093] Interview_35 (Skype, 1 March 2017). See also Chaves García, above n 1057, 28.
[1094] *Guidelines for Accession to the Pacific Alliance* (unofficially Council of Ministers) (30 May 2014) < https://alianzapacifico.net/download/lineamientos-adhesion/>.
[1095] See, eg, Schiff and Winters, above n 1047, 279-84.
[1096] Lawrence, above n 1049. Cf Alberto Rocha Valencia y Daniel Efrén Morales Ruvalcaba, 'Geopolítica de la Alianza del Pacífico en América Latina, El Continente Americano y Asia Pacífico' en Isabel Rodríguez Aranda, Edgar Viera Posada (eds), Perspectivas y Oportunidades de la Alianza del Pacífico (Editorial CESA, 2015) 105, 109 [Alberto Rocha Valencia and Daniel Efrén Morales Ruvalcaba, 'Geopolitics of the Pacific Alliance in Latin America, The American Continent and Asia

border' issues — traditionally tariffs and quotas — preventing trade between two parties.

Deep(er) integration are agreements that deal with behind the border issues. They include legal disciplines on services, government procurement, intellectual property, competition, factors movement, regulatory harmonisation, [1097] investments, environmental and labour standards, and in general domestic policies that affect international competitiveness. [1098] According to Lawrence, regional dispute settlement [1099] and compliance/enforcement mechanisms are a way of deepening integration. He even considered APEC's agenda on monetary and macroeconomic policy, and technical cooperation projects on tourism, infrastructure, energy and human resources efforts towards deepening integration.[1100] This later reference may suggest that Lawrence signified by deeper integration any economic agreement going beyond tariffs and quotas, including the economic cooperation agenda.

Rather than referring to deep integration as an outcome,[1101] Lawrence conceptualised deep(er) integration pointing to the comparative-basis of this notion and the gradualism with which PTAs reduce non-tariff barriers. When occasionally, he mentioned deep integration as an outcome, he meant achieving harmonised regional policies. Still, he did not detail their nature and scope.[1102]

The first example of a deep integration agreement in the Americas was NAFTA. Academics have suggested that North-North and North-South regional PTAs tend to follow deep integration, while South-South agreements are primarily shallow integration.[1103]

Later uses refer to deep(er) integration as targeted rules in PTAs covering two types of disciplines: first, disciplines already covered under the WTO mandate that go beyond the WTO prescriptions (the so-called WTO-plus (WTO+) rules); second, those rules incorporating areas outside the WTO mandate (the so-called WTO-extra (WTO-X) disciplines).[1104] Legal enforceability of the disciplines has also gained traction as a criterion underlying deep(er) integration. [1105] Academics have tried to measure the depth of these PTAs.[1106] This means that the comparative nature of the original idea still holds in academic circles.

Pacific' in Isabel Rodríguez Aranda, Edgar Viera Posada (eds), Prospects and Opportunities of the Pacific Alliance (CESA Publishing, 2015) 105, 109].

1097 Lawrence, above n 1049, 94.

1098 Kuwayama, above n 521, 32.

1099 Lawrence, above n 1049, 93.

1100 Ibid 93-4.

1101 Ibid 17, 28, 60, 71, 88.

1102 Ibid 60.

1103 See, eg, David Evans et al, 'A Framework for Evaluating Regional Trade Agreements: Deep Integration and New Regionalism' (University of Sussex, December 2004) 14.

1104 Marchini, above n 10, 88.

1105 See, eg, Henrik Horn, Petros C Mavroidis and Andre Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential' (2010) 33 *The World Economy* 1565-1588. See also Claudia Hofmann, Alberto Osnago and Michele Ruta, 'Horizontal Depth/ A New Database on the Content of Preferential Trade Agreements' (Policy Research Working Paper No 7981, World Bank Group, February 2017) 1-36.

1106 See Horn, Mavroidis and Sapir, above n 1105, 1565-1588; Hofmann, Osnago and Ruta, above n 1105, 1-36. See also Ganeshan Wignaraja, Dorothea Ramizo and Luca Burmeister, 'Asia-Latin America Free Trade Agreements: An Instrument for Inter-Regional Liberalization and Integration?'

I maintain that the deep integration idea in the PA has contributed not only to fill the content of the trade and investment agenda but also to structure the programmatic objectives in the *Framework Agreement.* This idea has been a roadmap, and a key instrument to define the disciplines to cover in the *Commercial Protocol*. The idea of deep integration helps to prioritise specific disciplines over other fields of integration, working effectively as a roadmap.

A contextual and textual interpretation of the *Framework Agreement* suggests that the PA's decision-makers and institutional entrepreneurs did not deviate from this understanding of deep integration.[1107] This idea is an instrumental objective: a means to progressively move towards the free circulation of goods, services, capital, and persons. This programmatic idea contributes to explain the PA's commercial focus. The implementation of these rules in the *Commercial Protocol* also represents another facet of the deep integration program.

However, the intermediate objective of deep integration takes a vague and ambiguous form in treaty texts and presidential declarations. More specific framing of economic objectives in earlier regional institutions has served to characterise these institutions through the stages of the theory of Bela Balassa and to assess their success or failure. [1108] I argue that this is an intentional ambiguity that has the purpose of deviating from other regional institutions in LA, perceived as having failed in achieving their objectives of becoming customs unions and common markets within traditional categorisations of economic integration. It is in this lack of definition of a specific outcome — a customs union or a common market — that the PA also claims a sui generis nature.

Deep integration explains the type of disciplines in the *Commercial Protocol*. The *Commercial Protocol* is contentedly a 21st century PTA with rules on investment, services, public procurement, TBT measures, sanitary and phytosanitary measures, and relatively new disciplines on ecommerce, financial services, telecommunication services, maritime services, and regulatory convergence.[1109] I say contentedly because the *Commercial Protocol* does not dedicate regional disciplines on competition, intellectual property, labour and environmental standards, or temporary entry for businesspersons. The agreement does not dedicate regional rules on state-owned/state trading enterprises, which is also a criterion to assess the depth of PTAs.[1110] These policy areas are not part of the regional agenda in the PA.

(Working Paper No 382, Asian Development Bank Institute, September 2012) <www.adbi.org/working-paper/2012/09/24/5238.asia.latin.america.free.trade.agreements/>.

1107 Interview_35 (Skype, 1 March 2017). See, eg, Marchini, above n 10, 89. But see Isabel Rodríguez Aranda, 'Nuevas Configuraciones Económicas en el Asia-Pacífico y sus Consecuencias para América Latina: Desde el APEC a la Alianza del Pacífico' (2014) 57 (2) *DADOS* 553, 569 [Isabel Rodríguez Aranda, 'New Economic Configurations in the Asia-Pacific and its Consequences for Latin America: From APEC to the Pacific Alliance' (2014) 57 (2) *DADOS* 553, 569].

1108 See above Ch 3, Part II (B). See Balassa, above n 189, 1-17.

1109 Camilo Pérez Restrepo, and Alma Sofía Castro Lara, 'The Pacific Alliance: WTO+ and WTOx? in Pierre Sauvé, Rodrigo Polanco Lazo, Jose-Manuel Alvarez Zarate (eds), *The Pacific Alliance in a World of Preferential Trade Agreements: Lessons in Comparative Regionalism* (Springer, 2018) 65-82.

1110 Horn, Mavroidis and Sapir, above n 1105, 1574. See also Hofmann, Osnago and Ruta, above n 1105, 11-13.

Although existing bilateral PTAs cover some of these areas, these missing disciplines are not all extended regionally through these means. In some instances, even if extended, these disciplines have not been updated in light of recent PTA treaty practice.

The assessment above underlies an empirical question that goes beyond the scope of this Part and concerns the depth of the integration in the PA. However, I briefly address this query because it relates to the definition of the content of this program for the PA and how actors have constructed this idea in the PA.

The idea of deep(er) integration seems insufficient to explain the absence of some of these institutional rules that are somehow 'iconic' of the deep(er) integration program elsewhere. I put forward the view that other ideas and PA members' preferences and priorities aid to explain the absence of these disciplines from the PA's 'version' of the deep(er) integration program. These missing parts suggest again that within the deep integration program, PA governments prioritise the trade and investment issues over, for instance, labour or environmental concerns. This prioritisation of economic interests also suggests that specific stakeholders — business elites — have had more weight than civil society groups, labour unions, and environmental activists in constructing the deep integration program.

I maintain that the frame of pragmatism and the early harvest idea have also become substantive criteria to build a deep integration program through the *Commercial Protocol*. These ideas contribute to explain the absence of disciplines in areas where there was no pre-consensus to include them. Pragmatism and the early harvest approach also explain the absence of disciplines included in bilateral PTAs where there was no pre-consensus to go deeper in the levels of commitments to what was already committed bilaterally, for instance in competition disciplines [1111] or intellectual property.

The process-based and gradualism of the idea of deep(er) integration become clearer in later presidential declarations that regularly refer to the deepening of the integration in the PA.[1112]

Finally, it would be an incomplete account of the idea of deep integration in the PA, not to mention the contested content of the program that my empirical analysis conveys. While technocratic circles seem to opt for the technical understanding of the program, some decision-makers argue that deep integration refers to the non-economic cooperation agenda of the PA. The statement of former Peruvian President Allanta Humala captures this contested content.[1113]

> the Pacific Alliance is not only an advanced and improved free trade agreement, but a real and improved deep integration process. […] This integration implies cooperation, education, adopting preventive measures to face climate change and El Niño phenomenon.

[1111] Pérez Restrepo, and Castro Lara, above n 1109, 65-82.

[1112] XII Presidential Summit, above n 742, 1.

[1113] '*The Pacific Alliance is a 'real deep integration process,' says President Humala*' Andina (online), 4 July 2015 < https://andina.pe/ingles/noticia-the-pacific-alliance-is-a-real-deep-integration-process-says-president-humala-563903.aspx >. Citing President Humala's closing statements at the Paracas Presidential Summit in 2015.

> Likewise, it includes boosting micro and small-sized enterprises. The Alliance is one opportunity for the young people, who expect concrete measures to improve their quality of life.

This statement evidences the use of the deep integration idea for a multidimensional understanding of the PA's scope. Due to the equivocal content of deep integration, it is not unusual that some stakeholders instrumentalise it by filling it with meanings to build rapprochement with particular audiences at a point in time. However, I do not exclude that because social demands in PA members have peaked in recent times, the idea of deep integration would be reconstructed to respond better to national public sentiments.

C *Pragmatism and Flexibility: Normative Frames in the Institutional Design*

The ideas of pragmatism and flexibility have helped in legitimising the institutional choices in the PA. The two frames are also normative ideas that constrain the array of institutional options that institutional entrepreneurs and decision-makers perceive appropriate for the PA. Thus, these frames are institutional filters.

I maintain that for rule-making, the pragmatism and flexibility frames legitimise low legalisation and soft-law approaches. These soft instruments materialise the ideas of flexibility and pragmatism as I mention in Chapter 5.[1114]

At the level of rule-making, these two normative ideas also contribute to justify, at a higher level of abstraction, the broad array of adjustability mechanisms in the international arrangements comprising the PA's legal regime.[1115]

The pragmatism and flexibility frames are consistent with national public sentiments regarding the suspicions of big governmental structures and perceived ineffectiveness of regional institutions. Not only the general public but also some decision-making,[1116] technocrats, business,[1117] and academic[1118] elites hold these public sentiments in the PA members, as the empirical evidence shows in the interviews.

These public sentiments regarding the performance of regional institutions and negative attitudes about the size of national governments are normative ideas of what became socially appropriate. These public sentiments — to which the flexibility and pragmatism frames respond — constrain decision-makers and institutional entrepreneurs in their institutional choices for the PA. They generate pressures from national constituents, and when these public sentiments are also held by decision-makers and technocrats, they delimit the range of institutional options normatively acceptable.[1119]

[1114] See above Ch 5, Part II (E).
[1115] See above Ch 6, Part II (D).
[1116] Interview_11 (Lima, Peru, 7 September 2016).
[1117] Interview_13 (Lima, Perú, 9 September 2016).
[1118] Interview_ 24 (Bogota, Colombia, 12 October 2016); Interview_28 (Bogota, Colombia, 20 October 2016); Interview_32 (Skype, January 15 2017); Interview_29 (Medellin, Colombia, 11 September 2016).
[1119] Campbell, above n 394, 389-94; Campbell, *Institutional Change* above n 392, 90, 174.

These public sentiments made grand-design institutional approaches unpalatable and normatively unacceptable for the PA. The flexibility frame addresses these public sentiments when decision-makers represent its content by what the PA is not rather than what it is: for instance when these actors use expressions such as the PA being flexible meaning that it lacks 'heavy bureaucracies'.[1120] This statement implies a negative value for heavy bureaucracies that are present in other institutions, including nationally.

I did not find empirical evidence on the use of either the flexibility frame or the pragmatism frame as manipulation tools of public sentiments. [1121]

I acknowledge that academics, leaders, and decision-makers use these two same frames to refer to APEC's economic regionalism. It is plausible that these two ideas travelled from that institutional environment to the PA,[1122] considering that three out of the four PA members are also APEC members. However, this is not a point that I further investigate here. I focus on determining how the meaning of these two ideas has been adapted/constructed in the PA context. Based on this content, I shed light on the role they play in PA's institutional design. I take a slightly different approach in investigating these two ideas because their origins are not as well defined as in the previous two programs.

1 *Pragmatism*

I argue that the constructed meaning of the idea of pragmatism in the PA is associated with the PA's working style and its institutional configuration. It is also in these two facets that decision-makers praise the PA as innovative.

First, pragmatism 'packages' or presents the work on (mainly) economic areas where short, or medium-term results can be delivered and publicised.[1123] I maintain, based on the empirical evidence, that the early harvest approach coined to describe the working style of the PA derives from the idea of pragmatism. Technocrats often equate this approach with work on areas where PA members have pre-consensus on problems and specific solutions. An array of soft-law instruments from presidential declarations, principles, and guidelines to more operational documents such as MOUs gives visibility to these solutions. Being able to produce these 'goodwill agreements' becomes a metric for institutional effectiveness in the PA.

Second, regarding the institutional configuration, the normative frame outlines an institution-building that is on-demand and (perceived as) necessity-based. As one top former government official has stated, 'the process of the PA has been hyper-pragmatic running through the idea that we are not going to establish institutionality before the need requires it.' [1124] This statement means that rather than proactive institutional design, pragmatism entails reactive institution-building.

[1120] Interview_02 (Skype, 12 August 2016).
[1121] Ibid 179.
[1122] Chaves García, above n 1057, 30-1. See also Guillermo Perry, 'The Pacific Alliance: A Way Forward for Latin American Integration? (Essay, Center for Global Development, June 2014) 3.
[1123] Interview_23 (Bogota, Colombia, 10 July 2016).
[1124] Interview_35 (Skype, 1 March 2017).

This statement also underscores a negative course of action for the PA's institutional design. I claim that decision-maker and other government officials use the idea of pragmatism to refer to those institutional choices that other regional institutions made that PA members will refrain from emulating regarding PA's institutional structure. The notion of pragmatism represents the PA's institutional approach as having a learning curved from previous experiences in other regional institutions from LA.[1125]

The pragmatism frame also underscores the problem-based approach followed for institution-building in the PA.[1126] I argue that soft-law instruments are a response to its problem-based institutional approach. An example is a memorandum signed by Colombian and Mexican agencies to exchange migratory and police information in dealing with the problem of transnational organised crime.[1127] The PA also shows a problem-based institutional development in multiple agreements for the sharing of diplomatic and consular facilities. These agreements seek to strengthen the international presence of the member states in third countries while making it more cost-effective. In several instances, these types of soft arrangements are also negotiated to implement presidential mandates made during their summits.

Decision-Makers and political leaders in the PA members also use the pragmatism frame to detach the PA from 'ideologised' or 'politicised' regional institutions in LA. This frame looks to legitimise the PA before business elites by presenting it as an institution that distances itself from other regional institutions in LA that they portray as highly ideological and/or political. This use of the frame attempts to present the PA as a regional institution with no underlying ideologies.

Finally, the idea of pragmatism has contributed to the framing of the PA's objectives. Technocrats suggest that pragmatism means lower ambition in the framing of its objectives, with the implied comparator being the ongoing regional institutions in LA that have set highly ambitious and unachievable goals. This packaging presents the PA aims as achievable, realistic and programmatic.[1128]

2 *Flexibility*

Decision-Makers, academics, and institutional entrepreneurs use the flexibility frame in two instances: (i) to refer to the open regionalism program in the PA;[1129] and (ii) to refer to the institutional framework of the PA.

1125 Ibid. See also Dade and Meacham, above n 9, 1.

1126 See above Ch 5, Part III (B).

1127 *Agreement between the Government of the United Mexican States and the Government of the Republic of Colombia for the Implementation of a Mechanism for the Exchange of Migratory and Police Information* (June 2014) < https://alianzapacifico.net/download-category/acuerdos-interinstitucionales/ >.

1128 Interview_21 (Bogota, Colombia, 10 June 2016. See also Mario Torres Jarrín, 'The New Model of Regional Integration for Emerging Countries in Latin America: The Pacific Alliance' in Mario Torres Jarrín and Jonathan Violante Pica (eds), *Emerging Markets: The Pacific Alliance: Perspectives and Opportunities for Latin America* (European Institute of International Studies, 2016) 19, 40.

1129 See above Part II, (A) (3).

As I confirm empirically,[1130] this frame has been crucial for the institutional approach that the PA follows. This idea has been an acceptable normative frame for the organisational structures and the rules. Decision-Makers and other stakeholders associate the constructed meaning of the flexibility frame to the organisational structures with low formality and 'light' or minimalist structures.

This frame helps in legitimising decision-making that, although non-binding in most cases, is perceived as agile in comparison to other regional institutions in LA. Thus, the flexibility frame connects to the speed with which decisions are adopted.

Stakeholders also tie the flexibility frame to the everyday use of the word.[1131] This means the PA's ability to adapt and adjust to changes in international or national circumstances. This frame contributes to explain not only the specific content of the adjustability mechanisms available in the international agreements of the PA but also their actual presence as a feature in the PA's institutional arrangements.[1132]

Table 17 below summarises the broader set of ideas surrounding the PA's ideational underpinnings. It places the frames and programs that I discuss in this Part in the broader context of beliefs that operate as the cognitive and normative basis of their adoption in the PA. This table also illustrates the ideological foundations of the PA by placing these four ideas within an extended ideational system of beliefs.

[1130] See above Ch 3, Table 5.
[1131] Susceptible of modification or adaptation; adaptable. *Macquarie Dictionary* (online).
[1132] See above Ch 6, Part II (D).

Table 17 Ideational Underpinnings in the PA

Paradigms (Background cognitive assumptions by policy makers and experts)	Public Sentiments (Background normative assumptions by the general public)	Programs or policy prescriptions (prescribe concrete course of actions)	Institutional Frames
(National Level) Neo-classical economics Focus on supply-side economics Rational choice theory Friedrich Hayek political theory Milton Friedman's monetarism	-Market economy still supported in most LA countries even after the GFC.[1133] -Concern for levels of poverty and inequality -Sentiment of no representativeness of national congresses -Distrust in national public institutions	**Neo (liberalism)** Contents/policy instruments at the national level[1134] -Free market/free trade, trade liberalisation -De-regulation of (financial) markets and re-regulation -Lowering trade barriers -Economic openness -Public expenditure austerity and decrease -Privatisation -Property Rights -Fiscal discipline. Fiscal reform to increase revenue - Market driven exchange rates -Market driven interest rates and positive interest rates -Inward foreign direct investment liberalisation -Overall lower state intervention into economic affairs	

1133 Latinobarómetro Corporation, *Latinobarómetro 2013* above n 616, 79-0; In 2011 around 56% of the LA population's perceptions was that the market economy was the best economic system for development. Only in Chile out of the four PA members peoples' support for the market economy is lower than 50 per cent.

1134 John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Adjustment: How Much Has Happened* (Peterson Institute for International Economics, 1990) ch 2 <https://www.piie.com/commentary/speeches-papers/what-washington-means-policy-reform>.

Paradigms (Background cognitive assumptions by policy makers and experts)	Public Sentiments (Background normative assumptions by the general public)	Programs or policy prescriptions (prescribe concrete course of actions)	Institutional Frames
		-Instrument Washington Consensus	
(Regional Level) Competing ECLACs Neo-structuralism (Fernando Fajnzylber, Gert Rosenthal and others)[1135] and Neo-classical economics Synthesis and prioritisation of the second paradigm	-Economic integration of LA a necessity[1136] -Positive perception for the free circulation of goods, and services within LA, [1137] and the free movement of workers[1138] -Perceived ineffectiveness of regional institutions in LA	**-Open regionalism in LA** Contents/policy instruments at the regional level -Liberalisation trade in services and goods -Insertion into the globalised world focused on the Asia-Pacific -International competitiveness enhancement -Open membership (non-excluding; non-exclusive) -Economic development conducive to raising living standards and inequality reduction -Commitment to multilateralism -MFN compliance under GATS art V and GATT art XXIV -Productive transformation, -GVCs insertion, RVCs creation	-New frames: Sustainable (regionalism) Flexible (regionalism) Pragmatic (regionalism) Light (regionalism) [1139]

[1135] ECLAC, 'Open Regionalism in Latin America and the Caribbean' above n 525.

[1136] Latinobarómetro Corporation, *Latinobarómetro 1995-2015 Report* < http://www.latinobarometro.org/.jsp > 14.

[1137] Santiago Chelala, 'Dimensiones Objetivas y Subjetivas de la Integración Regional y Global en América Latina' (Nota Ténica, IDN-TN-966, BID, Marzo 2016) <https://publications.iadb.org/es/dimensiones-objetivas-y-subjetivas-de-la-integracion-regional-y-global-en-america-latina> 10-1; 33-4 [Santiago Chelala, 'Objetive and Subjective Dimensions of Regional and Global Integration in Latin America (Technical, IDN-TN-966, IDB, March 2016) <https://publications.iadb.org/es/dimensiones-objetivas-y-subjetivas-de-la-integracion-regional-y-global-en-america-latina> 10-1, 33-4. I acknowledge this poll dates from 2016, after the launching of the PA. I assess its information accordingly. The sample also covers a broader spectrum of LA countries.

[1138] Latinobarómetro Corporation, *Latinobarómetro 2011 Report* < http://www.latinobarometro.org/.jsp >.

[1139] Nolte, above n 583, 143.

Paradigms (Background cognitive assumptions by policy makers and experts)	Public Sentiments (Background normative assumptions by the general public)	Programs or policy prescriptions (prescribe concrete course of actions)	Institutional Frames
		Instrument: Free trade areas	
		Deep integration -Focus on behind the border barriers to trade Instrument PTAs	
(Regional Level) Institutional Neo-liberal Institutionalism		Rule for control: Consensus-Based Decentralisation Ad hoc institutionalisation Institutional informality Non-binding commitments/ Soft-Law approaches to rule-making	-Flexible Related frames: light, minimalist -Pragmatic Related frames: practical, realistic, early harvest

Source: Author's analysis

III ASSESSMENT OF THE INSTITUTIONAL FRAMEWORK

This Part addresses the shortcomings I see in the institutional framework in the PA and outlines foreseeable risks from the status quo. Because the benchmark that I use is effectiveness,[1140] I dedicate Part A to explain the broad nature of PA's economic objectives and the scope of the goal against which I evaluate the suitability of the current institutional framework — deep integration towards the free movement of factors.[1141] Part B focuses on institutional aspects that despite having worked positively to show effectiveness during the first stage of the PA, could become detrimental to its long-term consolidation. I refer particularly to the pragmatism and early harvest ideas and the proliferation of soft-law.

Part C explores the institutional demands arising from three present and foreseeable processes: the deepening of the economic regionalism project, the enlargement through new members, and the agenda expansion. Finally, Part D evaluates the situation of the trans-governmental RCNs proliferating in the PA in light of the global distribution of regulatory power and their functional roles.

Considering the process-based and instrumental nature of the PA's economic objectives, I argue that the current institutional framework requires adjustments to be able to support the demands for deeper and further integration adequately. Even though the PA does not attempt to establish a common market in the sense of Balassa's economic integration theory,[1142] the PA economic regionalism project demands strengthening the rules as well as the organisational structures to be able to cope with the demands for regulatory and policy harmonisation and coordination and the need for other regional public goods.

The current institutional structure does not provide adequate and permanent monitoring — police patrols — for the PA's agenda and accountability for the progress of its agenda. Consensual decision-making means deciding according to the lowest common denominator of all PA members.

Relying on 'goodwill agreements' amongst government officials and peer pressure alone to reduce or eliminate regulatory barriers at the national level does not provide the type of credible commitments the business sector requires for operating regionally.

Maintaining the institutional framework as of today will risk the PA overstating its goals and downgrading in practice to an entirely policy-sharing/dialogue forum,

[1140] See above n 1040.

[1141] See above Ch 1, Part (II) (C).

[1142] See, eg, Germán Camilo Prieto Corredor y Ricardo Betancur Álvarez, 'Entre la Soberanía, el Liberalismo y la Innovación: un marco conceptual para el análisis de la Alianza del Pacífico' en Eduardo Pastrana-Buelvas y Hubert Gehring (eds), *Alianza del Pacífico: mitos y realidades* (Editorial Universidad Santiago de Cali, 2014) 75, 99-100, 106 [Germán Camilo Prieto Corredor y Ricardo Betancur Álvarez, 'Between Sovereignty, Liberalism and Innovation: a conceptual framework for analysing the Pacific Alliance in Eduardo Pastrana-Buelvas and Hubert Gehring (eds), *The Pacific Alliance: myths and realities* (Editorial Universidad Santiago de Cali, 2014) 75, 99-100, 106. *Contra* Tremolada, above n 16, 234, 243. See also Arroyave Quintero, above n 19, 121, 123.

ultimately defeating PA's aspiration to differentiate itself from other regional institutions in LA.

A *The PA's Economic Objectives*

This thesis deals with the formalised objectives of the PA, although I acknowledge that regional institutions may have implicit or undeclared goals.[1143] I argue in this Part that PA's objectives are instrumental, process-based and intentionally vague.

The members state the following economic, development, and social objectives in the *Framework Agreement*:

> a. constructing in a participatory and consensual manner a deep integration area to advance progressively towards the free circulation of goods, services, capital and persons;
> b. boosting growth, development and competitiveness of the member states' economies to improve welfare, reduce socioeconomic inequality, and enhance social inclusion; and
> c. becoming a platform for political articulation, economic and commercial integration, and projection to the world with an emphasis on the Asia Pacific region.

As I explain in Chapter 7, the free movement of factors focuses on the process by using the guiding verb 'advance' rather than other verbs such as 'achieve' or 'complete'. I note that the word 'progressively' stresses the process-based nature of this goal: its gradual and programmatic nature. No time frames or deadlines are set to reach a specific outcome.

This drafting originates in the I Presidential Summit informally establishing the PA in 2011.[1144] Institutional entrepreneurs and decision-makers replicate this scope in the Preamble and Article 3 of the *Framework Agreement*. The *Commercial Protocol* again uses the same language to refer to the free movement of goods, services, capitals, and people, where the aim is 'to advance progressively towards'.

From the textual and contextual analysis of the PA's international agreements, it is evident that the lack of reference to becoming a common market is intentional and carefully crafted. The reason for this was avoiding the institutional path towards a common market set by the EU's experience and implied in other regional institutions in LA. I argue that the drafting of the objectives is intentionally vague and reacts against more formalised objectives in other regional institutions in LA, including timeframes that are commonly unfulfilled or postponed.

Given the number of PTAs that PA members have concluded and want to pursue in the future, under the open regionalism program, it is not feasible for the PA to gradually become a customs union and a common market in Balassa's stages of economic integration. Empirical evidence also demonstrates that PA members want to maintain independent commercial policies, and a common external tariff amongst the four members is out of the question.

[1143] Closa and Casini, above n 3, 11.
[1144] I Presidential Summit, above n 568, 1.

Members opted to add a layer of clarity to this objective through the 2030 Vision for the PA.[1145] This soft instrument states a focus for working on four strategic pillars to achieve the free movement of goods, services, capitals, and persons by 2030. This 2030 Vision does not create international obligations and reinstates the aspirational/programmatic nature of this goal. Although the 2030 Vision is not binding, it is the first public and informal reference of PA members to an outcome-oriented goal with a time frame.

I argue that legal and empirical[1146] analyses suggest that PA's has no aspiration to establish a customs union or a common market in the foreseeable future. I claim, based on these two analyses, that the ambition is promoting trade and investment with a combination of policies for regional trade liberalisation, trade and investment facilitation, and economic cooperation. This cooperation also stretches to other fields, including financial cooperation, value chains, SMEs promotion, and infrastructure.

Even though the aim is not establishing a common market, the goals of the economic regionalism project in the PA require regular interstate collaboration, coordination of national regulations, and developing other regional public goods to support the movement of factors. [1147]

Following other regional integration institutions in LA and around the globe, the PA's economic objectives are instrumental, not ends in themselves but means towards achieving other social goals such as reducing the socioeconomic gap and enhancing the welfare and social inclusion.

B *The Double-Edged Swords*

Section One assesses two institutional ideas — pragmatism and the early harvest — while Section Two discusses the risks from the prevalence of soft-law in advancing the PA's objectives. I argue that although the ideas of pragmatism and the early harvest, and the use of guidelines, principles, declarations, and trans-governmental MOUs, have worked well in building a reputation for effectiveness; they are not sufficient for the PA's long-term consolidation.

These institutional ideas and the soft-law instruments are double-edged swords because their past and present success in packaging PA's effectiveness disguise institutional deficiencies. These ideas and instruments prevent PA members and decision-makers

[1145] Visión Estratégica de la Alianza del Pacífico al Año 2030 (24 de Julio de 2018) < https://alianzapacifico.net/download-category/alianza-del-pacifico-proyeccion-2030/> [*Strategic Vision of the Pacific Alliance for 2030*] (24 July 2018) < https://alianzapacifico.net/download-category/alianza-del-pacifico-proyeccion-2030/>].

[1146] Interview_21 (Bogota, Colombia, 10 June 2016); Interview_35 (Skype, 1 March 2017).

[1147] The IDB understands that regional public good is 'any good, commodity, service, system of rules or policy regime that is public in nature and that generates shared benefits for the participating countries and whose production is a result of collective action by the participating countries.' See Kea Wollrad, 'Conceptual Framework of the PRG Program: An Abstract'(IDB, 18-20 June 2007) 2 <https://www.hrk.de/fileadmin/redaktion/hrk/02-Dokumente/02-07-Internationales/02-07-11-Dies/02-07-11-02-Enhancing_Quality_Across_Borders/WG-2-Wollrad-Paper.pdf>.

from anticipating institutional demands derived from the need for regulatory coordination, and technical and administrative support to cope with the agenda.

Pragmatism and the early harvest entail a focus on 'light' non-economic and economic areas where results can be visible in short periods. These two ideas work counterproductively to overshadow the need to address topics towards the free movement of factors that are complex and demand long-term negotiations.

Soft-Law instruments cannot replace regional public goods such as an economic regime for trade and investment, and the movement of people. These instruments do not provide the level of credible commitments that could 'lock-in' PA members in their promises and legal obligations towards the free flow of factors across the region combining soft-law and hard-law. Economic operators require this type of commitments to invest and operate regionally with confidence and legal certainty.[1148]

1 *Pragmatism and the Early Harvest Approach: 'A Quick Shopping Basket'*

The frame of pragmatism has positively worked in that it packages the institutional approach in the PA as novel and distant from other regional institutions in LA. It is this frame that has helped the PA to gain international attention, with almost 60 observer states, and negotiations with four candidates to associated members.

However, this frame has contributed to the expansion of the economic and non-economic cooperation topics, making the PA agenda a 'quick shopping basket'[1149] for early results. The pressure on government officials to deliver results, particularly freely appointed and removed decision-makers in the members, creates incentives for focusing on less sensitive or complex areas. Even if these subjects do not have a clear connection to the overarching objectives when these actors target their regional works on these topics, they are able to present cooperation results in a short time.

Topics, where results can only be delivered in the long-term, become unattractive, although several of the policy integration topics to advance in the free movement of factors require long-term planning and execution. For instance, reducing regulatory differences for trade in goods and services such as technical requirements, conformity assessment procedures, licensing and qualification measures demand intense coordination and in some instances years of negotiations to conclude mutual recognition agreements or harmonised regimes. Thus, 'lighter' topics where the 'early harvest can be realised' displace in the PA's agenda critical barriers to trade and investment that demand extended negotiations. It is this facet of the pragmatism idea that could become detrimental to achieving the long-term goal in the PA.

2 *Proliferation of Soft-Law and Trans-Governmental Instruments*

I maintain that soft-law has worked for the PA in three instances. First, soft-law enhances the PA's international visibility, symbolic commitment, and domestic

[1148] Interview_28 (Bogota, Colombia, 20 October 2016).
[1149] Interview_23 (Bogota, Colombia, 7 October 2016).

legitimacy among constituents in the PA by reinforcing the ideas and values that its members share (eg, parliamentary declarations or declaration on climate change).

Second, these instruments have been 'branding tools' to show effectiveness. Soft-Law instruments have lower sovereignty costs and lower contracting costs for reaching an agreement than hard-law. This benefit from soft-law suits well the PA's early-harvest approach and helps to respond to pressures to demonstrate results.

Third, soft-law is an interim step to move towards harder legalisation. The *Commercial Protocol* or the *Agreement for the Establishment of the Cooperation Fund of the Pacific Alliance* derived from soft-law mandates in presidential declarations. However, PA members have followed this path only in these two cases.

The preferred recourse to soft-law of PA members comes with significant dangers. PA members may not take the commitments made in these soft instruments as seriously as treaty undertakings because they carry only political weight.[1150] The lack of monitoring mechanisms in several of these instruments exacerbates this concern.[1151] This argument can be extended to the multiple trans-governmental agreements concluded between government agencies of the PA members rather than the member states. Accountability for their implementation is almost inexistent; their implementation relies on the goodwill, personal leadership, and priority that the officials in charge of the government agencies concluding these agreements give to them.

As there are no formal international obligations to register or publish MOUs and other soft-law instruments, there is less public transparency regarding the extent of the commitments made in these instruments when compared to treaties.

As I describe in Chapter 5, the PA institutional rules are far from being a comprehensive trade and economic regime among the PA members, increasing the need to negotiate hard-law in strategic areas such as domestic regulations for the supply of services, technical regulations on labelling and substantive requirements for the production, import, and the sale of goods. Since the conclusion of the *Commercial Protocol* and its amendments, the PA members have made little or no progress in maturing the PA's economic regime.

In the search for the free movement of factors, economic operators demand and benefit from precision in the legal rules that could also bring certainty to encourage economic transactions and investments.[1152] As Koremenos argues, precision is necessary to solve coordination problems with or without distribution problems.[1153]

[1150] Aust, above n 694, 45.
[1151] See below Appendix C.
[1152] Interview_28 (Bogota, Colombia, 20 October 2016).
[1153] Koremenos, *The Continent of International Law*, above n 265, 172.

C *Institutional Demands: Deepening, Enlargement, and Growing Non-Economic and Economic Cooperation*

This Part assesses the factors pressuring the institutional structures in the PA, demonstrating that these organisational setting are inadequate to support processes of enlargement, deepening and agenda expansion.

As interactions amongst the PA members have become more stable in the last nine years, I foreshadow that coordination problems will be the most prevalent cooperation problem if the PA is to meaningfully advance on the free circulation of goods, services, capital, and people. This goal also implicates an evolution in the presence and combination of the cooperation problems.

Enforcement problems tied with the need to develop a legal regime for the PA will gain relevance. Commitment problems and uncertainty about members' commitment also claim attention for the future consolidation of the PA. As I describe in Chapter 5, the PA is an institution driven by presidential leadership. Thus, it is probable that tensions and uncertainty about other members' commitment arise from periodic turnovers in political leadership. The risk that the domestic agenda set by new heads of state may be inconsistent with the commitments and approaches taken by predecessors in the regional arena increases in the current regional and international environment.

With tariff barriers almost overcome, addressing non-tariff barriers becomes more compelling. This priority places regulatory restrictions and regulatory differences at the centre of any effective agenda to target the progressive goal for the free movement of factors. Regulatory cooperation (collaboration and coordination) in areas such as technical standards, sanitary and phytosanitary measures, and domestic regulations have inherent and significant combinations of distribution and coordination problems in achieving regional cooperation.[1154]

As I confirm in Chapter 5, the perception that the PA works with a light structure is misleading.[1155] The PA's institutional framework has expanded rapidly through informal ad hoc groups to cope with the demands from the yearly presidential mandates and the progress towards the free movement of factors. The simplicity and agility of the PA's institutional framework as portrayed by technocrats and leaders contrasts with the informal complexity on the ground, which makes it hard to coordinate crosscutting areas.[1156]

The transaction costs of establishing these groups are low. Thus, some of these groups respond to the demands made by specific stakeholders to address the issue at the regional level, with no clarity on the scope and aims to achieve within the group and its instrumental relationship with the PA's economic and non-economic objectives. Rather than plans and agendas to make them accountable, many of these groups are based on overly broad mandates that rely on personal leadership of the technocrats coordinating the group to progress.

[1154] Koremenos, *The Continent of International Law*, above n 265, 36, 166.
[1155] Interview_07 (Santiago, Chile, 3 September 2016); Interview_11 (Lima, Peru, 7 September 2016).
[1156] See above Figure 4.

The PA members announced the possibility for four associate members to join, and Ecuador has formally presented its interest to become a full member. Koremenos and other institutional insights are robust in supporting that large(r) numbers always lead to centralisation.[1157] The implication of these prospects is that if the PA in the medium-term is to increase its full membership and incorporate associate membership, it will definitely need to introduce centralisation and delegation of tasks (eg, information management, monitoring, administration).

Thus, moving forward towards the free movement of factors, the reality of expanding cooperation on economic and non-economic topics, and the potential for enlargement with associate members pressure the current institutional framework. This institutional setting needs to support regular interstate cooperation by providing adequate planning, structures for permanent coordination, effective and transparent management of information, and proper technical and policy advice on how to move forward. It needs to ensure that enforcement/punishment arrangements are strong enough to (formally or informally) deter members from noncompliance. It needs to deliver more objective and impartial monitoring on the progress of the groups and the works of individual members. At the moment, a few pieces of the puzzle are missing or incomplete within the PA's institutional structure.

D *Regulatory Collaboration Networks in the PA*

RCNs in the PA have limitations due to their size and regulatory power. These limitations arise in two instances that are intertwined. First, the (global) distribution of regulatory power in a particular field, and second, the size of the PA networks compared to other regional and international networks dealing with the subject matters.

Raustiala argues that the global distribution of regulatory power affects the role of regulatory cooperation networks in international cooperation.[1158] The significance of RCNs is conditioned upon how concentrated the regulatory power is for a particular subject. Raustiala claims that when regulatory power is diffused, regulatory networks operate alongside pre-existing treaties and organisations to support treaty compliance.[1159] Raustiala maintains that in subjects where regulatory power is concentrated, treaties are a less probable outcome from cooperation. Thus, when regulatory power is concentrated, RCNs have a gap-filling role in cooperation.[1160]

The focus of my argument here builds upon Raustiala's observation of the global distribution of regulatory power. I claim that global allocation of regulatory power affects the effectiveness of RCNs at this (sub)regional level. The more concentrated the regulatory power at the international level, the less effective the PA networked structures would be in influencing the domestic regulation and policies of the PA members.

I suggest that in those areas where there are clear dominant regulatory powers in the international context (ie, networks of securities and financial regulators) it is more

[1157] Koremenos, *The Continent of International Law*, above n 265, 323.
[1158] Raustiala, above n 766, 8, 72.
[1159] Ibid 28, 72.
[1160] Ibid 6, 88-9.

probable to see no international treaty regulating/harmonising the treatment of the subject. In these cases, broader networks of regulators sponsored by dominant regulatory powers are often seen in an effort to export their regulatory models. In the absence of treaties, subtle forms of regulatory convergence/harmonisation often emerge from these international networks through 'standards', 'principles', 'guidelines', or good practices.

If substantive regulatory principles, standards and good practices are discussed and agreed at broader and existing international (ie, networks of securities regulators, networks of financial regulators, networks of competition authorities, OECD) or other regional fora, (sub)regional cooperation networks such as the ones in the PA have limited scope for effective regulatory harmonisation/convergence at the substantive level.

Convergence on substantive rules would result from the membership/participation of national authorities in the works of other international or regional fora rather than the result of the works of PA's regional regulatory (sub)networks.

IV CONCLUSION

This Chapter explains the role of four specific ideas in crafting the institutional framework of the PA. It also problematises some of the institutional features that I characterise in Chapters 5 and 6, in light of the PA's objectives and institutional processes of enlargement, deepening and agenda expansion.

I maintain that while open regionalism and deep integration are cognitive foreground programs, flexibility and pragmatism are normative foreground frames. Open regionalism and deep integration are roadmaps for the PA; these ideas contribute to explain the type of economic objectives that the PA pursues, and its original scope focused on trade and investment. Flexibility and pragmatism have a double legitimising role. These ideas legitimise before the public the PA's programs on open regionalism and deep integration, and the institutional arrangements.

This Chapter also supports my proposition that, contrary to what some stakeholders and academics claim, the PA has strong ideational underpinnings within a broader ideological system of beliefs.[1161] At the cognitive level this system entails an uneasy synthesis and a compromise between ECLAC's neo-structuralism paradigm and neo-classical economics, prioritising the latter. At the regional level, open regionalism and deep integration represent an amplification of the neoliberal program. Open regionalism contributes to explain intergovernmentalism and consensual decision-making.

I claim that most of the innovations attributed to the PA's approach to economic regionalism and its program of open regionalism were present in the conceptualisations of the open regionalism program of many regional institutions in LA. Thus, I provide evidence to challenge views about the sui generis nature of the PA.

[1161] See above Table 17.

By placing open regionalism, deep integration, flexibility and pragmatism within the broader context of cognitive and normative ideas underpinning institutional design in the PA, my argument contributes to a more general understanding of the effects of ideas in institutional design outcomes.

My theoretical contribution in this Chapter is using institutionalist insights on the role of ideas to explain policy outcomes, extrapolate these potential explanatory roles and use them in the PA's institutional context. I draw causal and contributing relationships between ideas and institutional design outcomes. Although my findings are not generalisable because they concern one case study, I suggest that this literature on ideas has explanatory power not only to explain policy outcomes but also to shed light on institutional design.

My assessment of the PA's institutional architecture shows that the current framework of organisational structures and rules is insufficient to support processes of deepening, membership enlargement, and agenda expansion. I argue that the PA's institutional framework needs adjustments to support the PA in delivering regulatory collaboration, policy coordination through harmonisation and mutual recognition, and other regional public goods.

The current institutional structures are unsuitable to continue advancing towards the free movement of factors. The PA's organisational architecture is not only more complex than what decision-makers and other stakeholders claim it to be but also lacks adequate and independent monitoring. Decentralised administrative structures make coordination difficult and accountability for the progress of the agenda almost non-existent. This architecture is not appropriate to foster regular interstate cooperation. If the PA maintains the institutional status quo it jeopardises its long-term effectiveness or ability to achieve its economic goals. This institutional status quo threatens to lead the PA's agenda to stagnation.

The PA lacks a comprehensive regional regime, which is an enabling factor for intra-regional trade and investment. The institutional preference towards soft-law such as principles, declarations, guidelines, and trans-governmental MOUs does not provide the kind of credible commitments and legal certainty that economic operators need to operate regionally. The elimination/reduction of regulatory barriers could not be achieved through soft-law mechanisms alone.

Chapter 9 presents concrete proposals on the organisational structures and the legal regime that could contribute to strengthening the PA's institutional framework.

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I INTRODUCTION

This Chapter is normative and explanatory. It questions whether the institutional framework of the PA requires changes to support the PA's objectives, and what challenges exist to implement changes. These questions underline a normative concern for the value of effectiveness. This means concern over the need to have an institutional framework suitable for the PA to achieve its objectives.

Part II is normative in offering avenues to develop the legal regime and enhance organisational structures in the PA. I propose adjustments that respond to the need to perform key tasks for regular interstate cooperation. The proposals move around six tasks: (i) decision-making; (ii) administration; (iii) monitoring; (iv) information production and management; (v) dispute resolution; and (vi) enforcement/punishment. I maintain that premature institutionalisation through grand-design institutional models could be just as damaging for the PA as the lack of adequate institutions to perform the tasks for regular interstate cooperation.

Part III is explanatory and normative. It discusses the potential effects of endogenous and exogenous institutional factors to constrain or promote institutional change in the PA, according to institutionalist literature. I examine the role of endogenous institutional factors — current institutional features and underlying ideas — and exogenous factors — political and economic environments and the actors (eg, decision-making elites, national constituents). I normatively propose ways to facilitate these changes.

Part IV outlines the contributions of this Chapter. I maintain that the PA needs to introduce aspects of centralisation and delegation to adequately perform some of the tasks outlined above, mainly through a centralised Administrative and Technical Secretariat. Revisiting the composition of the Council of Ministers will also contribute to better management of spillover effects and crosscutting subjects. A dynamic configuration of the Council will aid the PA to meaningfully decide in policy areas that have been incorporated within its agenda.

At the level of the legal regime, I argue that to advance towards the free movement of factors there is a need to work on policy integration by way of harmonisation or mutual recognition of national regimes, towards the reduction or elimination of regulatory barriers. This coordination is critical to facilitate trade, reduce transaction costs,[1162] and increase the flows of goods, services, and capital amongst the members.

The trade and investment facilitation agenda also demands a comprehensive strategy that has been limited to initiatives on trade facilitation in goods and customs cooperation with explorations on investment facilitation.

I maintain that institutional change in the PA will happen incrementally rather than in a revolutionary way. The features of decentralisation and consensual decision-making will constrain the changes I propose. These features promote institutional inertia in the PA. Flexibility and pragmatism could support institutional change, provided that new

[1162] Schiff and Winters, above n 1047, 156-7.

frames such as dynamism help to ease the tension between pre-existing frames and my proposals for higher centralisation.

The recent coronavirus response from national governments in the PA determines an (external) economic environment unfavourable to institutional changes representing budget contributions from the PA members. These budgetary constraints make the implementation of an independent Secretariat difficult in the short-term.

II PROPOSALS FOR INSTITUTIONAL ADJUSTMENTS

As rational institutionalism suggests, institutional frameworks facilitate regional interstate cooperation by enhancing stability and durability; reducing uncertainty;[1163] increasing efficiency by reducing transaction costs of ad hoc negotiation;[1164] and addressing problems of coordination, distribution, and enforcement.[1165]

I propose adjustments that could enhance the PA's institutional framework based on the key task of regular interstate cooperation: (i) decision-making; (ii) administration; (iii) monitoring; (iv) information production and management; (v) dispute resolution; and (vi) enforcement/punishment. The PA needs to introduce aspects of centralisation and delegation to perform better these tasks.

The underlying value of these proposals is effectiveness. This value means the ability of the PA to successfully deliver on the economic objectives that the PA pursues. I focus on deep integration towards the free movement of factors. I propose institutional changes in the PA based on the current (external and internal) institutional environment, and the underlying factors of its institutional design. The proposals contemplate the progress-based character of this objective.

Part A suggests a way to deal more effectively with the consensus-rule through variable geometry. The flexibility of variable geometry would allow advancing on topics bilaterally or plurilaterally opening up the option for members to join the works in sensitive areas at a later stage.

Part B discusses proposals to improve the intergovernmental structures, including a Technical Secretariat; changes in the representation of the Council of Ministers; and becoming an international organisation with international legal personality. This Part reviews ways to focus the multiple RCNs within the intergovernmental framework.

I argue that the PA requires a permanent body that will introduce higher centralisation by delegating to it administrative roles, tasks related to the production, collation and management of technical and organisational information, and more independent monitoring, although not wholly detached from the PA members. I maintain that a separate budget will not only bring more financial transparency but will also demand more accountability for progress in the PA's agenda.

1163 North, above n 5, 6.

1164 Koremenos, 'Institutionalism and International Law' above n 290, 60. See also Slaughter, above n 1 [12].

1165 Koremenos, Lipson and Snidal, above n 254, 764-6.

The proposals revolve around the intergovernmental institutional model. It is clear to me that proposing supranational institutions for the PA, as some academics suggest, far from being realistic, would ignore the institutional environment and empirical circumstances in which the PA was conceived. These proposals would overlook the ideational and rational factors underlying PA's institutional framework. I agree with Hoekman and Nelson that positive integration in the 21st Century 'is likely to remain intergovernmental.'[1166]

Part C addresses the facilitation agenda proposing an across-the-board view on the actions for facilitating trade, investment, and the movement of people. The PA needs a strategy that attends to these components in a comprehensive way rather than through individualised approaches. An early regional dimension to the domestic initiatives underway for trade and investment facilitation will easy the interoperability of technological systems, single windows and other facilitation instruments.

Part D presents options for maturing the PA's legal regime. Proposals to enhance a regional legal regime for the PA start with the need to clarify the status of the Council of Ministers' decisions and its relationship with the national legal systems of the members. PA members should have periodic rounds of negotiations that could build momentum for package deals and issue-area trade-offs when distributional problems arise. Periodic rounds could help to deepen the disciplines and commitments of the *Commercial Protocol* and to conclude umbrella agreements on prioritised economic sectors or areas. Simplified agreements complement and develop framework agreements. PA members should work towards policy integration by harmonising regulations or the mutual recognition of national regimes.

A *How to Work with the Consensus Rule: Using the Flexibility Frame to Advance*

The consensus is embedded in the operation of the PA, and members' representatives take pride in it, outlining the relevance of interpersonal relationships and like-mindedness to make it work. It is improbable that the PA will renounce the intergovernmental model that it has followed since its inception.

In decision-making and agenda-setting, the PA members should work with the understanding that consensus does not require total agreement among them. The Consensus is not unanimity, as I clarify in Chapter 6.[1167] This flexible consensus means that not all of the PA members need to take part in all the strategies towards the free movement of goods, people, capital, and persons. PA members should introduce variable geometry to the participation in the liberalisation program. The flexibility frame fits well with the use of variable geometry to be able to advance on topics when not all members are ready to work on sensitive areas.

Provided that members who are not ready to participate are neither impaired by non-participation nor excluded from future participation, the veto power underlying the

[1166] Bernard Hoekman and Douglas Nelson, '21st Century Agreements and the Owl of Minerva' (EUI Working Paper RSCAS 2018/04, European University Institute/ Robert Schuman Centre for Advanced Studies**,** January 2018) 9.

[1167] See above Ch 6, Part II (C).

consensus rule does not need to be displayed. Introducing variable geometry will be crucial if the PA members agree to the incorporation of new members, such as Ecuador.

For instance, it is clear that for Mexico advancing towards the free movement of people triggers sensibilities with other neighbours. Colombia, Peru, and Chile could progress on this objective, leaving the door open for Mexico to participate partially or to join in later. Introducing variable geometry to the interpretation of the consensus would help to not always decide according to the lowest common denominator. This approach could be a way to push collective goals rather than stagnating in the hope of having everyone's agreement in the future.

B *Institutional Structures*

I discuss in this Part ways to enhance the intergovernmental structures to make them more effective for the progressive free movement of factors. The proposals include establishing a Secretariat, recomposing the Council of Ministers, focalising the current RCNs, and incorporating external monitoring. I dismiss suggesting a permanent dispute settlement instance by way of a permanent tribunal or court, despite theoretical insights that claim the need for it. The reasons are the current institutional environment; ideational constraints; material conditions, meaning low levels of economic interdependence; and the lack of a mature or even significant legal regime of the PA. These conditions make a permanent dispute settlement system unnecessary under a needs-based approach for incremental institutional adjustments.

1 *Institutional Attributes: Centralisation and Independence*

Abbott and Snidal point to the centralisation, which refers to a concrete and stable arrangement and a supportive administrative apparatus managing collective activities.[1168] The authors claim that centralisation and independence are organisational attributes helping states to achieve goals that decentralised cooperation does not allow.[1169] According to Abbott and Snidal, centralisation in international organisations offers a stable negotiation forum, making state interactions iterative, reducing transaction costs, and making collective activities more efficient in the long-term.[1170]

Centralisation aids in developing stable procedures for rule creation and coordination that ultimately facilitate and balance asymmetrical powers by subjecting powerful states to rules and procedures.[1171] Centralisation supports international organisations in pooling resources, activities and risks, with fewer transaction costs.[1172] Centralisation and consequently, the operational centralisation have distributional consequences.[1173] Koremenos, Lipson, and Snidal apart from pointing to the role of centralisation in

[1168] Kenneth W Abbott and Duncan Snidal, 'Why States Act Through Formal International Organizations' (1998) 42 (1) *The Journal of Conflict Resolution* 3, 9, 10.
[1169] Ibid 3, 9.
[1170] Ibid 3, 10.
[1171] Ibid 3, 10, 15.
[1172] Ibid 13-4.
[1173] Ibid 3, 12.

disseminating information and reducing bargaining and transaction costs refer to its role in enhancing enforcement.[1174]

Abbott and Snidal understand independence as 'the ability to act with a degree of autonomy within defined spheres.'[1175] The authors stress the neutrality that is part of the independence because it allows the organisation to better managing conflicts and resolving disputes.[1176] Although the authors do not provide a conceptualisation on neutrality, they refer to it as adding impartiality to the independence attribute and shielding the institution from the direct pressure of the states.[1177] Neutrality also brings legitimacy for collective and individual action.[1178] Neutrality is a constitutive element of independence[1179] that gives substantial value to international organisations for the production, verification, and management of information.[1180] Neutrality makes the organisation a more reliable information source when compared to the information that members provide directly. National biases and interests could affect members' produced information.[1181] If the institution is capable of generating information, it can compare and verify the veracity and quality of the information that members deliver. Management and control of information avoid undesirable manipulation by the members according to changing political circumstances.

A more centralised organisational structure with some degree of operative independence would be a suitable institutional arrangement for the PA to deal with the production, management, and control of information in the long-term. It would allow the PA to produce its data and not to rely exclusively on the information that members supply, promoting transparency and collective control. Autonomous information production of a technical nature would inform the decision and policy-making in a way that looks at the interests of the organisation more holistically, rather than aggregating individual states' interests when the members are the primary source of information.

Centralisation with a degree of operative independence is also a functional outcome to ensure adequate monitoring of members' compliance with commitments, because the information would have greater neutrality, preventing conflicts in assessing compliance. Abbott and Snidal highlight the role of independence in the implementation of norms and rules. Independent monitoring within an organisation allows determining noncompliance.[1182]

I discuss proposals to implement these attributes in literals b and h of this Part. However, my stand here is that rather than binaries — centralised vs decentralised —, — independent vs dependent — these attributes move along spectrums, where institutional characteristics could contribute to walking through the continuums of centralisation and independence.

1174 Koremenos, Lipson and Snidal, above n 254, 771.
1175 Abbott and Snidal, 'Why States Act Through Formal International Organizations', above n 1168, 5.
1176 Ibid 3, 5, 19.
1177 Ibid 3, 19.
1178 Ibid 3, 16.
1179 See, eg, Haftel and Thompson, above n 170, 253-275.
1180 Abbott and Snidal, 'Why States Act Through Formal International Organizations', above n 1168, 20. But see Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations, (1999) 53 (4) *International Organization* 699, 709.
1181 Abbott and Snidal, 'Why States Act Through Formal International Organizations', above n 1168, 20.
1182 Ibid 6-8.

2 *Discussing a 'Flexible' Secretariat*

As I examine in Chapter 5, the Pro-tempore Presidency and the four national coordinations share clerical and secretarial tasks.[1183] Technical roles, which Secretariats often perform in other regional institutions, are patchily executed through the ad hoc groups and outsourced in multilateral agencies. This decentralised model makes coordination of crosscutting themes poor. Monitoring for implementation and follow-up relies on peer-to-peer pressure that has limitations.

A Secretariat with a degree of independence will support policy integration,[1184] key to progress on the free movement of factors. Having a Secretariat with standardised processes for the collection and management of information could increase transparency and public accountability within the PA. The Secretariat could also support the Cooperation Council in managing the relationships, and cooperation with observer and associate states.[1185]

A centralised Secretariat will be the 'organisational glue'[1186] with technical and administrative tasks. A Secretariat should bring cohesion within the formal and informal structures. I advocate for an empowered, well-resourced Secretariat that could bring the needed institutional leadership and capacity to envision the PA as more than the aggregation of its parts. If PA members are not willing to establish a Secretariat under these conditions, I argue that current institutional arrangements may perform better than a Secretariat limited to administrative and logistic roles with no policy-shaping capacity.

Current national coordinations could be considered expressions of nodular Secretariats under a decentralised structure — NAFTA style — I argue two main limitations for this model. First, difficulties for comprehensive coordination arise from nodular Secretariats, particularly because PA individual members hold parallel coordinations on financial matters and general matters.[1187] This organisational configuration makes it hard to obtain an overview of the PA and to identify opportunities for cross-fertilisation. This structure creates a risk of duplication within the ad hoc working groups.

Second, national civil servants from the PA members fill in the positions of national coordinations. In the national coordinations model, the public servants receive instructions from their national governments, and their loyalties are ultimately with their employers rather than with the PA. Being employed externally through a Secretariat will detach the human resources from individual members' preferences and interests while helping the staff to prioritise PA's regional objectives. Thus, the staff would not see themselves as representing the individual PA members. Some

[1183] See above Ch 5, Part III (A) (3), (B) (3).

[1184] See below Part II (D) (4).

[1185] Omri Sender, 'Lead, follow or get out of the way? International secretariats in comparative perspective' in Carlos Closa and Lorenzo Casini, *Comparative Regional Integration: Governance and Legal Models*, (Cambridge University Press, 2016) 247-464.

[1186] Ibid, 247.

[1187] See above Figure 4.

independence of the staff could benefit progress on the PA's objectives when distributional problems come into play.[1188]

Members should consider delegating to the permanent Secretariat the tasks that I outline in Table 18.

Table 18 PA's Secretariat Proposed Delegated Tasks

Specific Task	Scope
Legal representation of the PA[1189]	Acting on behalf of the PA in the relationships with observer states, third states and international organisations
Financial administration	Managing a budget and preparing a performance plan to be approved by the Council of Ministers and the CMF in a joint meeting
Administrative duties	Attending and keeping minutes of meetings of the PA bodies, organising meeting, [1190] and giving support to PA bodies Keeping official records of the Council's decisions and other PA's bodies agreements Issuing guidelines to harmonise practices on the operation of working groups
Internal administration	Adopting its own operational rules and procedures Adopting Secretariat staff rules (eg, disciplinary)
Decision-Shaping: (Internal) agenda initiative	Recommending topics to deepen integration and an agenda of activities to develop the topics[1191]
Decision-Shaping: Agenda initiative with third parties	Proposing topics and a program of activities with associate and observer states Proposing measures and activities to advance in the convergence agenda with MERCOSUR and other regional groupings Providing support to the works of the Cooperation Council and handling of the cooperation programs Liaison with the private and business sector to discuss avenues to implement recommendations from the CEAP and other private actors
Decision-Shaping: Advising the Council of Ministers, the Council of Ministers of Finance, the working groups and other PA bodies	Issuing of technical opinions when requested Issuing or outsourcing concept papers and other research to support PA's decisions and policy choices

[1188] See, eg, Sender, above n 1185, 304.
[1189] Performed by the Pro-tempore Presidency.
[1190] Ibid.
[1191] Ibid.

Decision-Shaping: Proposing draft decisions for the Council of Ministers to take (with a regional view).	Initiative to propose decisions to implement the PA's objectives and presidential mandates
Decision-Shaping: Proposing draft umbrella/framework agreements for PA members to discuss	
Collection of information	Gathering of reports from members, working groups, scientific or technical data from other sources
Collation of information	Maintaining the PA's archives and a public registry of documents Centralised administration of the PA's website Bringing together different reports or sources of information such as technical studies to make a centralised database or compendium of information
Analysis of information	Analysing statistical information, or processing, interpreting and/or comparing data, reports or other information for its advisory role Producing concept and technical notes on regional policy integration Producing trade statistics and economic analysis to support regional planning
Dissemination of information	Eg, through the PA's website, PA periodic (electronic) bulletins, podcasts, annual reports, or other means
Monitoring implementation and compliance	Designing a system to monitor treaty disciplines and presidential mandates that require actions for implementation Evaluating implementation measures by PA members Facilitating the dispute resolution procedures of ad hoc tribunals under Chapter 17 and Chapter 10, Section B of the *Commercial Protocol*.
Measuring the impacts of regional programs, measures and activities	Based on the impact assessments proposing adjustments, advising to maintain or withdraw regional programs
Exercising soft procedures to encourage compliance	Eg, reviewing meetings of PA bodies
Overseeing and supporting the works of RCNs comprised of national agencies of PA members, and other public-private networks established in the context of the PA.	
Following up and administering the implementation of recognition schemes for policy integration	
Following up and overseeing the implementation of PTAs concluded with associate members and the potential regulatory cooperation agenda with associate states	

Following up and overseeing the works of ad hoc technical groups and give an opinion on the establishment of new groups	
Reporting to the Council of Ministers on its duties and responsibilities	This body will be accountable to the Council of Ministers for the execution of its financial budget and activities plan
Umbrella function: Other tasks that the Council of Ministers assigns to it.	

Source: Author's analysis based on Koremenos[1192] and Sender[1193]

Discussing a centralised Secretariat raises practical and political questions such as a headquarters location, the appointment of a secretary/executive director, and ways to fill the permanent staff for a Secretariat. Questions on financial independence and a dedicated budget for the PA with members' contributions, would also need debate. Members would need to agree whether contributions would be equally distributed or differential, according to the economic capacity of each member. Informal power control is more attuned to differential contributions.

Having a Secretariat would also make redundant some of the ad hoc working groups such as the Group on Institutional Affairs, Communications Strategy, and Cooperation. Although there is still a need for national focal points in the PA members, the informal national coordinators will need restructuring to avoid duplicating work with the Secretariat.

Proposing a flexible Secretariat fits with the gradualist approach for institution-building that the PA follows. A Secretariat with centralised administrative and technical roles is arguably the institutional structure that the PA needs most urgently.[1194] Following this gradualist approach, the scope and size of the Secretariat incrementally change based on the evolving nature of the objectives of the PA, the expansion of tasks, and potential membership enlargements.

I am aware that proposing a Secretariat does not resolve the democratic deficit that regional intergovernmental institutions such as the PA have by design.[1195] However, a Secretariat may contribute to reducing this deficit by enhancing transparency on decision-making and information management. A Secretariat could also support national consultations and discussions for measures to take regionally.

3 *Discussing the Composition of the Council of Ministers: Flexible Configuration*

As I discuss in Chapter 5,[1196] the ministers responsible for foreign trade and the ministers of foreign affairs comprise the Council of Ministers. I argue that this composition worked well to progress the open regionalism program focused on trade and investment in the early days. However, because the deepening process entails spillovers into the productive agenda and value chains, education, SMEs, innovation,

[1192] Koremenos, *The Continent of International Law/ Files*, above n 308, 3.
[1193] Sender, above n 1185, 247-464.
[1194] Torres Jarrín, above n 1128, 40-1.
[1195] See, eg, Jorge Grandi, 'Deficit democrático y social en los procesos de integración' (1997) 30 (119/120) Estudios Internacionales 423, 446-49. See also above n 615.
[1196] See above Ch 5, Part III (A) (1).

tourism, and digital agenda, this composition may limit the decision-making capacity of the Council on these policy areas. Other agenda topics include environmental sustainability, social inclusion and the reduction of poverty.

These topics are spread across other national ministries and agencies, making it hard to strike a balance between meaningful representation to decide on them and overly broad participation that would make it difficult even to gather them all. Thus, I propose incorporating flexible membership within the Council of Ministers. Depending on the policy areas for discussion, along with the representatives from the ministers of foreign affairs, national ministers or secretaries with powers to regulate on the specific area will need to attend the Council of Ministers' meeting. Rather than a fixed membership, I propose a flexible configuration with the national ministers of foreign affairs acting as the backbone of the Council. Configurations should depend on the PA's objectives and the presidential mandates.

I foresee at least the following configurations: general affairs; education and cultural affairs; trade and investment; financial affairs, economic productivity and competitivity affairs; labour affairs; migration affairs; environmental affairs; transport and infrastructure. I argue that only in this way can the PA ensure adequate participation for meaningful policy coordination. I clarify that policy coordination does not necessarily entail unified policies in every single policy sphere. It is up to each configuration of the Council to decide how they will approach this coordination. If the different configurations of the Council maintain the consensual decision-making, I advise applying variable geometry, as I discuss above in Part II (A) of this Chapter.

The general affairs configuration of the Council could comprise the national ministers or secretaries of foreign affairs and could discuss and oversee the implementation of the PA objectives, the presidential mandates and other PA agreements. It will also coordinate the agenda for the presidential summits, with the aid of the Pro-tempore Presidency and the Secretariat.

I also advise that instead of having a parallel structure for the CMF, this informal body would be subsumed in one of the configurations of the Council of Ministers. A permanent Secretariat would support in preparing and developing the meetings while ensuring standard procedures on how to conduct them, and how to manage the information.

4 *Dispute Resolution and Enforcement*

Institutional[1197] and economic[1198] theories suggest that in the long-term integration efforts will require permanent dispute settlement and enforcement structures as a regional public good. Except for the *Commercial Protocol*, the other international agreements in the PA rely on direct negotiations and political settlements. These

[1197] See, eg, Barbara Koremenos, 'If Only Half of International Agreements have Dispute Resolution Provisions, which half needs explaining? (2007) 36 (1) *Journal of Legal Studies* 189-212; Barbara Koremenos and Timm Betz, 'The Design of Dispute Settlement Procedures in International Agreements' in Jeffrey L Dunoff and Mark A Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012) 371. See also Koremenos, *The Continent of International Law*, above n 265, 211, 214-16.

[1198] Garnaut, above n 534, 283-4.

arrangements may not be sustainable in the long-term. When economic and social interactions become more prominent, the risks of frictions will increase.

However, current material conditions in the PA and institutional ideas prevent this adjustment. At the material level, intra-regional trade in goods is substantively low, and trade in services, although higher than goods, continues to be small. Intra-regional investments are more significant than trade, although this area benefits from strong dispute settlement through the ad hoc ISDS arbitration, giving the right to action to private investors. This situation means that the perceived costs of establishing a permanent tribunal or court outweigh the benefits. Prevailing public sentiments on the performance of permanent regional tribunals and ideas of institutional lightness constrain this institutional change from further consideration.

International agreements concluded in the PA are low, let alone the decisions of treaty bodies such as the Council of Ministers or the Free Trade Commission. As it stands today, the PA's legal regime does not merit an independent tribunal/court to guard its compliance and interpretation. This practical consideration is relevant because it connects to the idea of pragmatism and the needs-based approach to institution-building, driving institutional development in the PA.

5 *Free Trade Commission: A Wake-Up Call*

In Chapter 5, I discuss the modest role of the Free Trade Commission up today.[1199] This Commission has acted akin to a typical PTA commission rather than a Free Trade Commission for the PA. The difference is not of degree but in leadership. A Free Trade Commission for the PA should lead the process of dismantling unnecessary barriers to regional trade and have an active role in following up the matters in the *Commercial Protocol* that require implementation. A Free Trade Commission for the PA should lead the agenda for progressive liberalisation, including leading periodic rounds of future trade negotiations and play a vital role in the trade and investment facilitation component of the economic regionalism project.[1200] The Free Trade Commission for the PA could be in charge of proposing (policy) instruments to boost intra-regional trade and investment.

Annex 16.1 of the *Commercial Protocol* prescribes that economic or foreign trade ministerial-level representatives or the persons they delegate comprise the Commission. This structure not only creates partial duplication with the configuration of the Council of Ministers but also makes it more difficult for representatives of this rank to oversee the implementation of the *Commercial Protocol* permanently.

The GAN has de facto and partially taken this role. However, it shares broader responsibilities in implementing the presidential mandates, managing negotiations of PTAs with potential associate members and overseeing of the cooperation agenda with observer states.

[1199] See above n Chapter 5, Part III (A) (2).
[1200] See below Part III (I) (D) 1.

6 *Avenues to Enhance Monitoring Structures*

I argue that one of the bottlenecks of the institutional framework is the lack of independent monitoring because all instances of police patrol monitoring are inter-governmental.[1201] PA's combination of formal and informal inter-governmental bodies mimics national executive structures, making hierarchical monitoring the prevalent monitoring.

Exclusive hierarchical and internal monitoring that relies on self-reports does not ensure adequate supervision on the progress of the objectives; implementation of disciplines and the 2030 Vision; and compliance. I propose to enhance the monitoring structures in two ways.

First, police patrol monitoring should be delegated firstly to the Secretariat.[1202] In performing this task, the Secretariat would rely on the reports that PA members produce — self-reporting — and will have the capacity to issue its reports based on its enquiries and information gathering, collation, and analysis. The Secretariat will be the focal point; it will be in charge of raising the alarms for problems on implementation and compliance. Although the Secretariat's oversight is not entirely independent, the staffing of this body will bring (some) impartiality to its assessments on implementation and compliance. The Secretariat could recommend ways to improve these two when its assessments show deficiencies. Nonetheless, this system will continue to rely on the hierarchical monitoring of the Council of Ministers and ultimately the Presidential Summit. This is a feature hard to abandon in integration institutions, such as the PA, that rely on intergovernmentalism and presidential leadership as part of their DNA. Fire-alarm monitoring will remain the same because I dismiss the feasibility of an independent tribunal/ court in the medium-term.

Second, the PA could introduce external audits on the execution of the PA's work plan, outsourced to NGOs such as consultancy firms. These audits are usual in regional organisations, especially when receiving financial aid from external donors to execute regional programs. However, I call on the need to review not only financial aspects but also the implementation of disciplines and compliance more broadly.

Explicit targets and indicators should accompany internal and external monitoring for the PA to be able to strengthen this task of interstate cooperation adequately.[1203]

7 *Regulatory Collaboration Networks*

I propose ways for RCNs in the PA to work more effectively, according to the roles they perform in the international arena.[1204] I acknowledge normative critiques of RCNs, for example, their lack of accountability, democratic and transparency deficit. However, I do not attempt to challenge neither RCNs as a feature of the PA's organisational structure nor their presence in regular international cooperation. Instead,

[1201] See above Ch 6, Part II (5).
[1202] See above Part II (B) (2) and Table 18.
[1203] See, eg, Philippe De Lombaerde, Renato Flores, Lelio Iapadre, Michael Schulz (eds), *Regional Integration Manual: Quantitative and Qualitative Methods* (Routledge, 2011).
[1204] See above Chapter 5, Part III (B) (9).

I propose avenues to help RCNs to perform their role in achieving regulatory convergence and strengthening enforcement by recognising their limitations in the PA.

I propose that in areas where there are dominant regulatory powers in the international arena, PA's RCNs would be a more effective tool if they focus on unifying negotiating positions of the four PA members —coalition building. This approach will leverage PA members' regulatory power in other international fora where those 'standards' are ultimately decided. For instance, PA parties could settle common views regarding the 'standards,' guidelines, and principles discussed, and the works in the OECD. National authorities comprising these PA (sub)networks could pool financial, technical and human resources to enhance their participation at broader and widespread international networks for regulatory collaboration. This approach would mean that some of the PA subregional networks should prioritise their agenda accordingly towards joint and more effective participation in broader international networks.

Moreover, PA regulatory (sub)networks could be effective at promoting convergence in the implementation, and procedural rules of internationally agreed standards, principles, and good practices. I refer to implementation and procedural rules to encompass methodologies, technologies, systems, and protocols. There is room for capacity building and technical assistance as seen already in the inter-institutional agreement amongst sanitary agencies of the four members. The agreement provided for technical support to the Peruvian sanitary agency by the other national regulatory agencies with level IV certification from the Pan-American Health Organisation to meet that standard.

However, regardless of the concentration of regulatory power at the international level, these networks could still contribute to enhancing regulatory enforcement in those areas where PA member states have asymmetric capabilities.

Networks distinctively promote convergence through a process of interaction and emulation rather than formalised negotiations for harmonised rules and mutual recognition systems.[1205] PA regulatory (sub)networks could work to build mutual trust in each other's regulatory and surveillance systems offering an alternative path to formal harmonisation or mutual recognition. This incremental approach of regulatory networks based on regulatory emulation would allow economic operators to work on a regional scale by having to comply with similar sets of regulations rather than different rules for each member.

However, nothing prevents network approaches for regulatory convergence becoming a pathway towards the negotiation of harmonised rules or mutual recognition systems. Networks could narrow down the substantial differences that have precluded these agreements in crucial economic areas towards the free movement of factors. It is significant in those areas where economic operators require predictability and legal certainty. The limited membership is a positive feature to conclude agreements on harmonised rules or mutual recognition schemes. Trans-governmental RCNs in the PA also have the potential to benefit PA members and economic operators through work-sharing agreements.[1206]

[1205] Raustiala, above n 766, 52.
[1206] See below Part II (D) (4) (b).

A significant downside for the effectiveness of the PA's RCNs is their size because it limits network effects. In economics, network effects mean that the utility of consuming a service or good increases with the number of agents consuming that good or service.[1207] A typical example is the telephone system and virtual networks such as Twitter. In the regulatory context, the more regulatory agencies participate in the activities of a regulatory network, the better off any one jurisdiction is at performing their functions. The narrow participation in the PA regulatory networks means that there are weak network effects for the jurisdictions that comprise them.

The benefits that regulatory networks represent for information sharing, coordinated enforcement or joint policymaking are currently limited to the regulatory agencies of the four PA members. This situation does not mean RCNs have no value, although the benefits of participating in them would grow if membership expands.

In tackling regional problems or managing transnational risks such as money laundering, fiscal transparency, or counterfeit goods, broader membership in the RCNs is critical to benefit the members. Network effects are expected to expand if RCNs in the PA extend their membership/participation to associate members and at a later stage observer states. In turn, this move will potentially create additional administrative costs for managing broader networks. Even in the case of networked approaches, focal points may enhance their operation and aid public transparency by centralising and sharing information on their progress works.

Finally, the guiding factors in the RCNs of the PA should be the distribution of regulatory power in a specific field, the objectives of the PA, and the 2030 Vision for the PA. These criteria mean that networks should focus on those areas that the PA has prioritised; they should be encouraged in those areas that are aligned with the aims of the institution. Considerations on global power distribution would help to tailor the activities of the regulatory network. These factors would also help to rationalise their establishment, considering the hidden costs for states in using these decentralised structures.

8 *International Legal Personality and Organisation-Hood*

I propose that the PA becomes an international organisation with an international personality. This change will require formal institutional adjustments and changes to the practices of PA members that could deliver capacity on paper and in reality. Formal institutional adjustments would require to develop a body to look after the common interests and aims of the regional organisation independently from the individual interests of the members. This body is not an institutional structure that is in place in the current institutional framework of the PA. A Secretariat with the powers I propose could contribute to the degree of independence required from an international organisation with international personality.[1208]

[1207] See Michael L Katz and Carl Shapiro, 'Network Externalities, Competition, and Compatibility' (1985) 75 (3) *The American Economic Review* 424, 424. See also Raustiala, above n 766, 9, 63.

[1208] See above Part II (B) (2).

The PA also requires changes to its rules to provide for a more autonomous capacity of the regional institution from the members. Formal adjustments could include the express attribution of international personality in subsequent treaties. These instruments, as I mention in Chapter 2, are not constitutive of its personality but could give clarity to non-members (eg, third states and international organisations) on the PA's legal status.[1209] These formal changes need to conform to the institutionalised practices of the PA.

I do not suggest that evolving towards an international organisation with legal personality for the PA would define the success of the institution and effectiveness in achieving its objectives. However, it represents a step in its long-term consolidation; it would empower the PA to achieve its goals. A change in the institutional practices of its members will need to accompany these formal adjustments because they finally determine the ability of the PA to act as a single entity.

Institutionalist approaches indicate that in the long-term a more centralised model through the establishment of an international organisation will be more efficient in managing transaction costs because the density of interactions will undoubtedly increase with the demands for deeper integration.[1210] Centralisation supports international organisations in pooling resources, activities and risks, with fewer transaction costs.

International legal personality will help to clarify the legal status of the PA, facilitating external and inter-regional relations. As I mentioned in Chapter 2,[1211] international legal personality would give the PA the capacity to legally enter into international relations with third states and international organisations in a legal sense. It would be the PA entering into international agreements rather than its members. The obligations and rights arising from these agreements would be that of the PA and not its members. This aspect is important in practice since one of the objectives of the PA is developing inter-regional relations with the Asia Pacific. This outcome would allow interactions with regional organisations such as ASEAN, which have already international legal personality.[1212]

The PA members also have an interest in entering into relations with integration institutions in LA that have an international and domestic legal personality such as MERCOSUR.[1213] Not having international personality in the case of an eventual agreement with regional organisations that have it puts the PA at a practical disadvantage. The PA members directly would be the parties to the agreement rather than the PA; each member would have to agree on every procedural and substantive aspect of the negotiations, making actual agreements challenging to achieve and more time-consuming.

[1209] White, above n 94, 33.
[1210] See above n 1164.
[1211] See above Chapter 2, Part IV.
[1212] See *Charter of the Association of Southeast Asian Nations*, for signature 20 November 2007, 2624 UNTS 223 (entered into force 15 December 2008) art 3. See, eg, Eric C Ip, 'The Power of International Legal Personality in Regional Integration' (UNU-CRIS W-2010/4, United Nations University Comparative Regional Integration Studies, 2010) 18, 21.
[1213] But see Pennetta, above n 87, 111-2.

C *Facilitation Agenda on Trade, Investment, and Mobility*

Since tariff barriers amongst PA members are already low, trade and investment facilitation has become one of the essential tools for members to promote intra-regional trade and investment in light of the PA's 2030 Vision. Customs clearance delays and other administrative procedures cause economic operators high frictional costs that work effectively as a tax to the import of goods.[1214] Administrative streamlining and simplification measures, digitalisation and the use of technological platforms could reduce times considerably for customs clearance.[1215]

Members have already implemented single windows for foreign trade that nationally centralise all 'the red tape' for the import and export of goods. They have also advanced in the interoperability of their single windows.[1216] Sanitary, phytosanitary, and origin certifications are exchanged electronically nowadays thanks to this interoperability. However, there is a long road ahead for the full interoperability and electronic transmission of import and export certifications and other documents between the four single windows.

I suggest that the PA could move towards a more comprehensive facilitation strategy on trade, investment and people's mobility. The members have progressed on the facilitation strategy for goods[1217] and have explored investment facilitation through the IFIAP, under the aegis of the ad hoc group on Services and Capital.[1218] However, regional investment activities have a focus on promotion rather than facilitation. The IFIAP has mapped regulatory barriers and governmental measures that hinder investments or their expansion within the region.[1219]

Equally, single windows and their interoperability at the regional level are significant for investments. Single windows are a relatively new initiative, and some PA members have started national projects to implement their systems. Having a regional layer from the beginning in the domestic projects may contribute to faster regional interoperability.[1220]

Other investment facilitation tools include: (i) online business registrations for investors; (ii) websites detailing and disseminating regulations and procedures on investment registrations, acquisition and registration of property rights, insolvency regimes, construction permits, payment of taxes, transfer of capitals and payments; public incentives available to investors (iii) and aftercare services for current and new

1214 Schiff and Winters, above n 1047, 157-8.

1215 UNCTAD, 'Trade Facilitation Handbook Part II: Technical Notes on Essential Trade Facilitation Measures' (UNCTAD/SDTE/TLB/2005/2, 2006) 39-71.

1216 *Trade Facilitation and Customs Cooperation*, The Pacific Alliance < https://alianzapacifico.net/en/technical-group-trade-facilitation-and-customs-cooperation/ >.

1217 Ibid.

1218 *Mobility of People*, The Pacific Alliance < https://alianzapacifico.net/en/technical-group-movement-of-people/ >.

1219 XII Presidential Summit, above n 742746, 6; XIII Presidential Summit, *Presidential Declaration on the Pacific Alliance* (24 July 2018) The Pacific Alliance, 1 < https://alianzapacifico.net/download-category/declaraciones-presidenciales/>.

1220 Ana Novik and Alexandre de Crombrugghe, 'Towards an International Framework for Investment Facilitation' (Investment Insights, OECD, April 2018).

investors. Useful aftercare measures include an ombudsperson to act as a focal point and mediator.[1221]

A regional strategy on investment facilitation that builds on existing and developing national investment facilitation is necessary if the PA wants to consolidate as an FDI hub in LA. The strategy would help boost intra-regional investments. Building on the linkage between investment facilitation and good regulatory practices/regulatory improvement/regulatory coherence will benefit investments in the PA by increasing transparency and predictability.

At the inter-governmental level, IFIAP could become an instance for coordinated action and participation of PA members in the international and multilateral discussions for disciplines and commitments on investment facilitation for development underway in the WTO.[1222]

Services trade facilitation and productive mobility facilitation do not feature in the current discussions as such. With the rise of online services such as telemedicine and the demand for online consultancy on professional services, questions on how to facilitate services trade become more relevant despite the limited attention they have received.

A trade facilitation strategy on services has undoubtedly crosscutting issues with investment facilitation, mainly when services are provided through commercial presence, but it also needs to be tailored to specificities on services supply. A facilitation strategy should consider issues such as 'one-stop-shop' online information on professional qualifications, diplomas, licensing and temporary licensing, professional development, disciplinary regimes, certifications, authorisations for the supply of services and their territorial application, applications' fees, payments and transfers regulations, and taxation regimes to mention a few. Prioritising economic sectors with potential for intra-regional trade and investment will make the work more manageable than trying to cover all services.

Transit facilitation for persons has had a limited scope on enabling the exchange of migratory information in real time between migratory agencies. A people's mobility facilitation strategy presupposes the resolution of fundamental questions on how far the PA wants to go on the free movement of people. Would it include labour mobility? This area remains underexplored in the PA, and lack of clear direction has resulted in isolated initiatives typical of an early harvest approach.

D *Maturing the Legal Regime*

This Part discusses legal avenues that PA members could use to mature a legal regime for the PA. A comprehensive legal corpus would be more coherent with the long-term

[1221] Ibid 6.

[1222] *WTO Structured Discussions on Investment Facilitation for Development* (INF/IFD/RD/46) 25 February 2020 (*EU Proposal for WTO disciplines and commitments relating to investment facilitation for development*) < https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158673.pdf >. See also above Part II (B) (7).

aim of deep integration towards the free movement of factors and the 2030 Vision for the PA. The proposals include having periodic and programmatic rounds of treaty negotiations, including the possibility to negotiate sectoral or area-based framework agreements that serve as roadmaps for future works in that particular area. PA members could also advance on implementation through simplified international agreements, although this option is restricted and relies on having framework agreements for it to work effectively. I also discuss two policy integration modes that could contribute to reduce regulatory divergences and lessen transaction costs of regulatory compliance for economic operators. These modes are harmonisation of rules and mutual recognition agreements (MRAs).

1 *Periodic Rounds of Negotiations*

I suggest that members launch periodic rounds of negotiations to deepen the integration. The rounds of negotiations could deliver two types of non-exclusive international agreements. First, PA members could negotiate sectoral framework agreements and complementary agreements to the *Commercial Protocol* covering trade and investment topics. The launch of periodic rounds of negotiations could build momentum for bundled negotiations and potential package deals where trade-offs on issue-areas could facilitate outcomes. This proposal does not imply single-undertaking agreements.

This approach could benefit progress under the intergovernmental model. A package of international agreements could be subject to domestic legal incorporation by congressional approval more expeditiously than stand-alone agreements. The process of incorporating the PA international treaties into the internal legal systems of the PA members has proved slow, with the two amending protocols to the Commercial Protocol taking close to five years for entry into force.

The PA members have not concluded any substantial international agreement to deepen their integration process since 2017 when they concluded the *Agreement to Homologate Double Taxation Accords*, which has a modest and precise scope.

Negotiation of framework agreements on economic sectors and issue-areas could be specific roadmaps of the works in economic sectors such as professional services, ICTs, air transport, movement of natural persons, or labour mobility.

There is potential to broaden the depth and breadth of trade and investment commitments established in the *Commercial Protocol*. Negotiations could add new disciplines not covered in the Protocol, such as state-owned enterprises and designated monopolies and the facilitation of the mobility of businesspersons for paid activities. Members could establish disciplines and commitments in sectors not covered in the *Commercial Protocol* such as courier/express delivery services.

Members could strengthen disciplines where commitments limited to soft-law, such as maritime services or small and medium-sized enterprises. Reinforcing these disciplines could take place in various ways: adding more precision on the commitments; including binding obligations, when possible; making the commitments enforceable under the dispute settlement mechanism in those cases where the Protocol's Dispute Settlement Chapter excludes them; subjecting these commitments to more stringent rules for the

monitoring and implementation. Additionally, PA members could remove limitations to the full scope of an obligation for a PA member when that adjustability mechanism is no longer required.[1223]

In the services area, PA members could review the NCMs to eliminate those NCMs that do not have a direct relation to the protection of legitimate public objectives such as health, the environment, the protection of minorities and vulnerable populations, defence and security. For instance, members could eliminate the NCM on MFN, and articles 9.4 and 10.5 regarding multilateral and bilateral international agreements preceding the entry into force of the *Commercial Protocol*. Members could also review their NCMs for services trade and investment to remove them unilaterally, or multilaterally based on sector-specific or mode-specific formulae.

PA members could also add depth to their legal commitments in the *Commercial Protocol* by introducing new measures to be covered in current disciplines. For instance, article 18.5 does not include digital products in the non-discrimination rule applicable to taxation measures.[1224] A way to deepen commitments would be to include in the non-discriminatory treatment of digital products taxation measures for this mode of delivering products.

When PA members have established positive lists for the supply of specific services under a mode of supply, PA members could consider extending the scope of the list of services to allow for the supply of that service through that mode (eg, annex 11.6 Financial Services).

2 *Simplified Agreements*

The purpose of these agreements is to execute or develop substantive clauses of international treaties, including framework agreements that have exhausted incorporation into domestic laws.[1225] The presidents also have the powers to conclude executive agreements on matters regarding their function as heads of international relations, or on subjects under its reglamentation powers.[1226]

The Peruvian Constitution provides a positive list of topics that need Congressional approval.[1227] This listing approach means that matters outside the list are considered under the powers of the president to conclude simplified agreements. The executive is still accountable to the Peruvian Congress for the conclusion of these accords.[1228] In Chile, the rule is that simplified agreements can only refer to matters under the usual

1223 *Commercial Protocol* art 14.5 nns 3, 4.

1224 Ibid art 18.5 (a), (b). See also *First Protocol Modifying the Commercial Protocol* art 13.4

1225 Corte Constitucional de Colombia [Constitutional Court of Colombia], Sentencia C-363/2000, sin reporte < https://www.corteconstitucional.gov.co/Relatoria/2000/C-363-00.htm>;

1226 Constitución Política de la República de Chile, 1980, art 32 (8), 54 (1) [Political Constitution of the Republic of Chile, 1980, art 32 (8), 54 (1)]. But see Rodrigo Correa G, 'Los Acuerdos en Forma Simplificada en una Constitución Democrática: Comentario al Fallo del Tribunal Constitucional' (1999) 75 *Estudios Públicos* 68, 80-85 [Rodrigo Correa G, 'Symplified Agreements under a Democratic Constitution: Commentary on the Constitutional Tribunal Decision' (1999) 75 *Estudios Públicos* 68, 80-85].

1227 Constitución de la República de Perú, 1993, art 56 [Constitution of the Republic of Peru, 1993, art 56].

1228 Constitution of the Republic of Peru, 1993, art 57.

powers of the executive branch and subjects not reserved to law.[1229] In Colombia, the president cannot conclude executive agreements on matters reserved to law or issues where the Constitution prescribes a specific procedure for its domestic approval.[1230] In Mexico's case, there is also a list of subjects that need to be dealt with through international treaties. This list includes matters under the powers of the Federal legislative; involving the national territory; modifying existing laws; affecting the individuals' legal sphere, and committing the national budget through financial obligations.[1231]

The Political Constitution of Chile expressly recognises these agreements — arts 32 (8) (17), and 54 (1). Colombia interprets articles 9, 150-16, 189-2, 241 of the Political Constitution to allow simplified agreements, and Peru takes a similar approach through the application of articles 56 and 57 of its Constitution. In Mexico, inter-institutional agreements are recognised in the Law for the Conclusion of International Agreements and via interpretation of arts 76-I, 89-X, 133 of the Constitution. [1232]

In the case of Mexico, the Law for the Conclusion of International Agreements attempts to formalise a regular State practice[1233] confusedly referring to executive agreements as inter-institutional agreements. [1234] These agreements enter into force upon signature without the need for approval from the Senate. Decentralised bodies or units from the Federal Administration, the states or the municipal level could conclude this type of agreements. According to the Law for the Conclusion of International Agreements, public international law governs these accords. For Mexico, these agreements do not need to derive from a previous international treaty.

Simplified agreements could be an avenue to mature the legal regime of the PA, mainly if they derive from the negotiation of framework agreements on specific areas. Being derived from sectoral or issue-area framework agreements adds another layer of credibility to the commitments made in the executive agreements in a context where there are commitment or time-inconsistency problems.

However, simplified agreements are not an optimal pathway to regulate every topic of regional policy integration. The margin of manoeuvre of governments is low and varies

[1229] Political Constitution of the Republic of Chile, 1980, art 54 (1).

[1230] Corte Constitucional de Colombia [Constitutional Court of Colombia], Auto 288/10, sin reporte, 3 <https://www.corteconstitucional.gov.co/relatoria/autos/2010/a288-10.HTM>.

[1231] *Guía para la Conclusión de Tratados y Acuerdos Interinstitutionales en el ámbito Internacional según la Ley sobre la Celebración de Tratados*, Secretaría de Relaciones Exteriores (México) 3 < https://aplicaciones.sre.gob.mx/tratados/guia.pdf > [*Guidelines for the Conclusion of treaties and Inter-Institutional Agreements in the International Context according to the Law for the Conclusion of Treaties*, Foreing Affairs Secretariat, (Mexico) 3 < https://aplicaciones.sre.gob.mx/tratados/guia.pdf >].

[1232] See also Nueva Ley DOF-02-01-1992, *Ley Sobre la Celebración de Tratados Internacionales*, art 2-I, 2-II [New Law DOF-02-01-1992, *Regarding the Conclusion of International Treaties*]; Ley DOF-02-09-2004, *Sobre Aprobación de Tratados en Materia Económica*, (México) [Law DOF-02-09-2004, *Regarding the Approval of International Treaties on Economic Matters*, (México)].

[1233] Nueva Ley DOF-02-01-1992, *Ley Sobre la Celebración de Tratados Internacionales*, art 2-I, 2-II [New Law DOF-02-01-1992, *Regarding the Conclusion of International Treaties*]. Antonio Cassese, *International law* (Oxford University Press, 2nd ed, 2005) 172. *Contra* Luis Ernesto Orozco Torres, *Nature and Scope of Interinstitutional Agreements in the Mexican Legal System*, (2016) January-June *Cuestiones Constitucionales* 27, 28.

[1234] Orozco Torres, above n 1233, 35.

from one PA member to another thanks to constitutional jurisprudence on simplified agreements.

The Colombian Constitutional Court has repeatedly stated that executive agreements, also called complementary agreements in the case of Colombia, should be within the purpose and objectives of the principal agreement.[1235] They can only regulate obligations derived from the principal agreement clearly and directly. These agreements cannot create new, different, or additional international obligations or go beyond the scope of the obligations they develop. Simplified agreements are valid only when they are materially an execution agreement and not a new international treaty. International agreements, such as simplified agreements are still subject to ex post constitutional control of the Colombian Constitutional Court through the unconstitutionality action. The Colombia Court also emphasises that these agreements are tools to boost international relations, especially on matters regarding technical and economic cooperation.[1236]

The Constitutional Tribunal of Peru has stated that international executive treaties could not contain rules that entail the modification or derogation of constitutional provisions, rules that have the status of law, or agreements demanding the issuance of laws for compliance.[1237] The Tribunal also states a non-exhaustive list of accords that fall under the scope of simplified agreements because they regulate matters within the executive powers. These are arrangements on customs and customs preferences; commercial matters; investment; services; free circulation of people, goods, and services between countries; or international technical cooperation, provided they do not modify national laws.[1238]

In the case of Mexico, the opposite reason causes restrictions on the use of inter-institutional agreements. There is no Constitutional jurisprudence to develop and 'clarify' the scope of this type of agreements, its international legal status, and applicability in the domestic legal system. One of the most problematic features of the Mexican 'executive agreements' is that they do not need to be concluded by the president: decentralised bodies and units can sign these agreements. Thus, the inter-institutional agreements of the Law for the Conclusion of International Agreements would be closer to the non-binding political instruments signed by government agencies of different states than to international treaties.[1239]

In contrast, Guerrero argues that inter-institutional agreements concluded under the Law for the Conclusion of International Agreements are an entirely new type of international instrument that commits decentralised bodies and units of the public administration; these institutions are directly the subject of rights and obligations.[1240] These instruments are binding on the entities that conclude them but not the Mexican

1235 Corte Constitucional de Colombia [Constitutional Court of Colombia], Auto 288/10, sin reporte 3 <https://www.corteconstitucional.gov.co/relatoria/autos/2010/a288-10.HTM>.

1236 Ibid.

1237 *40 Congresistas v Poder Ejecutivo, Tribunal Constitucional de Perú* [Constitutional Tribunal of Peru], EXP. N.º 00002-2009-PI/TC, sin reporte < https://www.tc.gob.pe/jurisprudencia/2010/00002-2009-AI.html>.

1238 Ibid [76] -[77].

1239 Orozco Torres, above n 1233, 37-8.

1240 Gerardo Guerrero Gómez, 'International Treaties and Executive Agreements, Law and Practice in Mexico and the United States' (2017) 109 *Revista Mexicana de Politica Exterior* 45, 56.

State as a whole. If one follows this latter approach, executive agreements are still present in the treaty practice of the Mexican state. The president could conclude these agreements as developments of previous international agreements or as autonomous agreements that fall within its powers as director of international relations of the Mexican state. This legal uncertainty of inter-institutional agreements definitively complicates its use as a binding legal instrument to mature the legal regime in the PA.

3 *Legal Effects of the Council of Minister Decisions: Solving the Lacuna*

I mention in Chapter 5 that in nine years since the establishment of the PA and almost five since the entry into force of the *Framework Agreement*, the Council of Ministers has issued one decision. This situation is troublesome considering that, according to the *Framework Agreement*, the Council is in charge of developing the legal regime of the PA.

The practice of goodwill commitments to enact, modify, or derogate national regulations has compensated the passiveness of the Council of Ministers to establish legal rules. However, this practice is not sufficient for the long-term consolidation of the PA.

The PA requires clearness and transparency on the legal status of the decisions of the Council of Ministers. Its decisions will not comprise a supranational regime because the *Framework Agreement* or other international treaty should have prescribed this effect. However, I argue that lack of certainty on the effects and relationship with the national legal systems of the members prevents the Council from issuing formal decisions to build a regional legal regime and promotes informal agreements that most of the time are not public.

The powers to issue mandatory decisions on the members derive from the *Framework Agreement* art 6, providing that these decisions will become part of the PA's legal regime. Because the decisions of the Council of Ministers do not comprise supranational rules, they lack direct application, in the sense of establishing rights and obligations for the people in the PA members, and primacy over national laws of the members.

The Council has the powers to issue its own operational rules and procedures[1241] and this action has become pressing for the adequate progress of the PA objectives. The *Framework Agreement* provides enough flexibility for the Council to issue different types of decisions.

The operational rules could define the scope of mandatory decisions on the members and the effects of guidelines and recommendations on the members.[1242] Because the Council has no powers to issue supranational regulations, specific mandatory decisions should establish, according to the matter being regulated, when they require incorporation into the domestic legal systems of the members. A compulsory term for the incorporation into the domestic legal system of the Councils' decisions is recommended.

[1241] *Framework Agreement* art 4.3
[1242] Ibid art 5.

Transparency in the decision-making of the Council could be enhanced if the operational rules regulate a procedure for keeping minutes of the meetings that could be available through the institutions' website. In this way, constituents in the PA members could not only keep track of the Councils' activities and its monitoring of the integration process but also could have direct oversight.

4 *'Modes' of Policy Integration: Collaboration, Harmonisation, and Recognition for Regulatory Cooperation*

Regulatory collaboration, harmonisation, and recognition are instances of regulatory cooperation. These modes of policy integration reduce regulatory differences that hinder trade in goods and services by increasing transaction costs in regulatory compliance.[1243] Other positive effects of policy integration include a greater choice for consumers and increased competition, which in turn could enhance the competitiveness of domestic industries.[1244] Policy integration may reduce the risk of opportunistic or nationalistic use of domestic policy instruments by PTA partners.[1245] Although policy integration offers potential for gains, I do not address the collaboration 'mode' because it refers to regulatory cooperation through RCNs.[1246]

(a)Harmonisation of Technical Requirements and Domestic Regulations

Harmonisation entails that different countries adopt the same, or substantially the same, mandatory requirements for the production and sale of a good or the supply of a service. Harmonisation amongst PA members could be facilitated in those areas where technical regulations and other domestic regulations are based on international standards, guidelines and recommendations in accordance with the TBT Agreement[1247] and the SPS Agreement.[1248]

The PA can benefit and build upon the harmonisation that Colombia and Peru have already in the CAN. There are Andean technical regulations that cover products such as cosmetics and personal care. CAN also harmonised labelling requirements for footwear and apparel.[1249] It is my intuition that this harmonisation could ease the process in the PA. However, I do not disregard that it may complicate PA harmonisation as it limits the negotiation leeway of these two PA members. This harmonisation could

[1243] Schiff and Winters, above n 1047, 155-58.
[1244] Ibid.
[1245] Schiff and Winters, above n 1047, 169.
[1246] See above Part II (B) (7).
[1247] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('Agreement on Technical Barriers to Trade') ('TBT Agreement').
[1248] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('Agreement on the Application of Sanitary and Phytosanitary Measures') ('SPS Agreement').
[1249] See, eg, Comunidad Andina, Resolución 2109 de 2019, *Reglamento Técnico Andino para el Etiquetado de Confecciones* < http://www.comunidadandina.org/Normativa.aspx> [Andean Community, Resolution 2109 from 2019, *Andean Technical Regulation for the Labeling of Apparel* < http://www.comunidadandina.org/Normativa.aspx>.

raise norm exportation problems,[1250] with Colombia and Peru pushing to adopt the requirements already in place for the CAN.

Although the economic operators and the integration process will benefit the most if all PA members pursue harmonisation, I acknowledge that this is not achievable in all cases. Thus, harmonisation could be an area where the consensus rule could apply variable geometry, agreeing on negotiations for harmonised rules between two or three members. Allowing for gradual implementation of commitments for members that have technological or technical challenges for immediate implementation will also facilitate the conclusion of these agreements. However, members must strike a balance to avoid that variable geometry, and the inclusion of adjustability mechanisms erodes the overall value of policy integration through harmonisation.

The PA members could start by negotiating a harmonisation workplan prioritising economic sectors with a current and potential trade. The members have progressed through the establishment of a Sub-Group on Technical Barriers to Trade/Regulatory Cooperation and the definition of a critical roadmap regarding the broader field of regulatory cooperation. Through this critical roadmap, PA members defined a procedure to build biannual workplans for regulatory cooperation, including a methodology for the selection of proposals.[1251] This first stage covered regulatory cooperation for cosmetics, organic products, medicines, medical devices, domestic hygiene products, and dietary supplements.[1252] The plan includes harmonisation for the labelling of cosmetic products and good manufacturing practices for cosmetics with a market surveillance approach.[1253] Regulatory agencies signed in 2013 an inter-institutional agreement to facilitate sanitary registrations and good manufacturing practices certifications for medicines with chemical synthesis. PA members concluded a few annexes to the TBT Chapter in the *Commercial Protocol* with the commitment to work towards regulatory harmonisation for the products mentioned above.

The outcomes of this regulatory cooperation are yet to be seen, and there is not enough public information to assess the implementation of the 2012-2014 workplan or successive plans. The hope is that with the entry into force of Chapter 15bis — Regulatory Improvement — of the *Commercial Protocol* in April 2020 regulatory cooperation gains momentum. The implementation of these annexes with the corresponding harmonised requirements could become a reality for economic operators in the four members with the entry into force of the *Second Protocol Modifying the Commercial Protocol*. With this amending protocol, the negotiation of annexes to deepen the disciplines of the TBT Chapter will become more expeditious, as this amendment clarifies that these agreements only require the approval of the Free Trade Commission. PA members need to ensure adequate implementation of the annexes because this is as significant as their conclusion.

1250 See above Ch 3, Part III (B).

1251 Alianza del Pacífico, *Anexo: 3 Ruta Crítica en Materia de Cooperación Regulatoria* (23-4 Agosto 2012) < https://alianzapacifico.net/wp-content/uploads/Anexo-3-Ruta-cr%C3%ADtica.pdf > [The Pacific Alliance, *Annex: 3 Critical Road Map for Regulatory Cooperation* (23-4 August 2012) < https://alianzapacifico.net/wp-content/uploads/Anexo-3-Ruta-cr%C3%ADtica.pdf >].

1252 XIV Presidential Summit, *Presidential Declaration on the Pacific Alliance* (6 July 2019) 17 < https://alianzapacifico.net/en/documents-and-studies/ >.

1253 *First Protocol Modifying the Commercial Protocol* annex 1.

The focus of these regulatory cooperation seems to be on manufactured goods. There is no mention of regulatory cooperation and specific harmonisation works for sanitary and phytosanitary measures or domestic regulations in the services sectors.

The PA needs more robust administrative and coordination structures that could assist the harmonisation of regulatory regimes more generally. This area is an example where an administrative body/Technical Secretariat could play a key role.

The experience of Australia and New Zealand in building a single market illustrates potential avenues to establish support bodies for regulatory harmonisation. In the context of their CER Agreement, these countries concluded the Australia New Zealand Agreement on Joint Food Standards in 1995.[1254] They created a statutory authority named the Australia-New Zealand Food Authority in 1996, and after legislative changes, the Food Standards Australia-New Zealand was established in 2000.[1255] This agency made the food standards code applicable to the production and sell of food in both countries, in force since 2002.[1256] An intergovernmental structure called the Australia and New Zealand Ministerial Forum on Food Regulation is in charge of developing policy guidelines that Food Standards Australia-New Zealand has to take into account when setting food standards.[1257]

Although I referred primarily to harmonisation regimes in goods, PA members' harmonisation program should assess other areas where regulatory differences hinder cross-border trade and the operation of businesses, such as insolvency, data protection regimes or corporations' regimes.

Finally, because harmonisation of regulations is time-consuming, PA members could ease this process through principles-based harmonisation or substantive requirements harmonisation.

(b)MRAs: The Elusive Jewel in the Crown

MRAs are accords to recognise quality requirements, qualification requirements or other aspects of the regulatory regime of other parties on a reciprocal basis. They usually operate under the principle of substantial equivalence.[1258] This principle entails

[1254] *History of FSANZ*, Australia-New Zealand Food Standards <https://www.foodstandards.gov.au/>. See also Commonwealth of Australia, *A User's Guide to the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA)* (2006) 29 < https://www.mbie.govt.nz/dmsdocument/1513-users-guide-to-the-trans-tasman-mutual-recognition-arrangement-pdf>.

[1255] *History of FSANZ*, Australia-New Zealand Food Standards <https://www.foodstandards.gov.au/>; *Food law, treaties and agreements*, Australia-New Zealand Food Standards <https://www.foodstandards.gov.au/>. See also Productivity Commission, 'Mutual Recognition Schemes' (Research Report, September 2015) 46 < https://www.pc.gov.au/inquiries/completed/mutual-recognition-schemes/report>.

[1256] Productivity Commission, 'Mutual Recognition Schemes' (Research Report, September 2015) 46, 80 < https://www.pc.gov.au/inquiries/completed/mutual-recognition-schemes/report>

[1257] *Australia and New Zealand Ministerial Forum on Food Regulation*, Australia-New Zealand Food Standards <https://www.foodstandards.gov.au/>.

[1258] See, eg, James H Mathis, 'Mutual Recognition Agreements: Transatlantic Parties and the Limits to Non-Tariff Barrier Regionalism in the WTO' (1998) 32 (6) *Journal of World Trade* 5, 19. See also

that even when regulations may differ from one another, parties are satisfied that the regulations of the other party adequately fulfil the objectives of their own regulations. MRAs work to reduce the negative impact of regulatory differences when these disparities are the result of national, historical or institutional arrangements rather than the outcome of objective assessments of risks to health, safety, or the environment.

The principle of substantial equivalence applies similarly to CAPs. CAPs are procedures such as laboratory testing, auditing, or inspections to ensure products, processes, services, persons, systems, and bodies meet specified requirements.[1259] MRAs could cover only substantive requirements, or could also cover the CAPs conducted in the territory of another party by private bodies (conformity assessment bodies) or public agencies. However, differences in testing and certification systems could make the negotiation difficult. PA members need to work towards mutual understanding of each other's basis for conformity assessment and the operation of national quality systems more broadly.

MRAs could cover only CAPs or some activities within the conformity assessment process. For instance, relevant bodies within the members could work towards the mutual recognition of accreditation systems or the recognition of the accreditation received by conformity assessment bodies (eg, testing laboratories) in the territory of the other PA members. NAFTA parties have international treaties for the mutual recognition of conformity assessment results in several products such as telecommunications equipment.[1260] NAFTA parties also have a MRA amongst their food inspection agencies.[1261] Within the framework of the PTA between Chile and South Korea, their national telecommunications agencies concluded a MRA for conformity assessment in telecommunications equipment in 2008. Thus, Mexico and Chile could capitalise on the experience they already have in negotiating and implementing MRAs.

The most far-reaching agreements are those that allow for the recognition of substantive requirements and the CAPs, as economic operators would benefit the most from having to conduct and pay for only one set of CAPs. In MRAs covering only substantive requirements, economic operators would need to undertake and pay for CAPs in the territory of the party where they want to export goods or supply services. I suggest that PA members cover both aspects in the MRAs they negotiate.

In those areas where the level of trust in the other members' regulatory and surveillance regimes is high, PA members could work towards the conclusion and implementation of MRAs. These agreements could positively reduce regulatory barriers for the trade of goods and services by flattening regulatory differences. MRAs \u87could substantially

Kalypso Nicolaïdis, *Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services* [4] <http://users.ox.ac.uk/~ssfc0041/managemr.htm>.

1259 ISO/IEC Guide 2: 2004 'Standardization and related activities — General vocabulary'.

1260 See, eg, *Mutual Recognition Agreement Between the Government of Canada and the Government of the United Mexican States for Conformity Assessment of Telecommunications Equipment*, signed 12 November 2011, CTS 2012/13 (entered into force 1 June 2012) < https://www.treaty-accord.gc.ca/text-texte.aspx?id=105334&Lang=eng >. See also *Mutual Recognition Agreement Between the Government of the United States of America and the Government of the United Mexican States for Conformity Assessment of Telecommunications Equipment*, signed 26 May 2011, TIAS 11-610 (entered into force 10 June 2011) < https://www.state.gov/11-610>

1261 OECD, *Review of International Regulatory Cooperation of Mexico* (OECD, 2018) 105.

reduce transaction costs for economic operators by having to comply with only one set of requirements (usually country of origin) to be able to sell products or supply services in the territory of another country.[1262]

The potential areas for these agreements are extensive, including mutual recognition for medical devices, electrical equipment (in related goods to the electrical industry), ago-industrial products, pharmaceutical products, cosmetics, personal care products, auto-parts, to mention a few areas. MRAs on data protection regimes are also relevant to facilitate the flow of personal data across the PA countries. PA members could discuss and work on an action plan to negotiate MRAs in industries and services where there is current trade or where PA members would want to boost trade flows. This proposal aligns with the 2030 Vision for the PA, which envisions doubling intra-regional trade by 2030.

These agreements could benefit the trade of financial services, telemedicine, and business process outsourcing amongst many sectors. Other areas to reap the benefits of mutual recognition include prudential regulations for financial services and professional services regarding requirements and procedures for occupational licensing/registration. Members could work towards the recognition of good manufacturing practices in key industries where members have high volumes of trade in goods or where they would want to promote intra-regional trade.

Customs authorities of the PA have already timidly dabbled in the world of MRAs through the conclusion of an agreement to recognise authorised economic operators programs of another PA member.[1263]

Australia and New Zealand are an excellent example of policy integration through regional integration agreements. Productive lessons can be drawn from taking notice of their policy integration pathway, particularly the TTMRA. This arrangement is a non-treaty level accord between the Commonwealth of Australia, the Australian states and territories, and New Zealand, implemented through mirror legislation in each of the parties.[1264] TTMRA principles allow for the sale of goods in New Zealand that are legally sold in Australia and vice versa. It also means that a person registered to practise an occupation in Australia is entitled to practise an equivalent occupation in New Zealand without the need for additional testing or examination and vice versa.[1265]

The TTMRA approach responds to the specific situation of Australia having a federal system of government and builds on its internal MRA amongst the states and territories. This approach is interesting because it represents a framework mutual recognition arrangement. Rather than negotiating sectoral or product based MRAs, the parties committed to basic principles on recognition and equivalence from where to work through mirror legislations. These mirror legislations ensure consistency in the legal

[1262] Ibid 40.

[1263] See above Ch 6, Part III (A) (5).

[1264] Ministry of Economic Development, *Trans-Tasman Mutual Recognition Arrangement* < https://www.mfat.govt.nz>; Commonwealth of Australia, *A User's Guide to the Mutual Recognition Agreement (MRA) and the Trans-Tasman Mutual Recognition Arrangement (TTMRA)* (2006) 10-12 < https://www.mbie.govt.nz/dmsdocument/1513-users-guide-to-the-trans-tasman-mutual-recognition-arrangement-pdf>.

[1265] Productivity Commission, 'Mutual Recognition Schemes' (Research Report, September 2015) 39 < https://www.pc.gov.au/inquiries/completed/mutual-recognition-schemes/report >.

regimes across the jurisdictions to ensure the operation of the recognition in practice.[1266] The TTMRA evidences that policy integration in intergovernmental regional integration institutions could work when rather than having to negotiate international treaties parties commit to enacting the relevant legislation, provided these commitments receive adequate monitoring.

The downside of the TTMRA's approach comes when parties to a regional integration institution face commitment or time-inconsistency problems.[1267] In this context, international treaties could provide more credible commitments at the expense of slowing down the policy integration process.

Another avenue towards the reduction of regulatory barriers entails not the full recognition of the other PA members' regulatory regimes, but regulatory collaboration through work-sharing agreements. These are accords amongst government agencies of the PA to share and use evaluations, tests, searches on the state-of-the-art, or assessments conducted by government agencies in the territory of another PA member. The regulatory agency of one PA member could use this information to autonomously decide on requests for registration or other applications of similar scope made by the same applicant in its territory. This approach could speed up processes such as sanitary registrations for food and medicines while maintaining the discretion of the regulatory authority to decide on the basis of its national laws, applicable standards and procedures. Intellectual Property agencies in the PA have implemented this mechanism of regulatory collaboration — the PPH — to assess patent applications.[1268]

III LIMITATIONS AND CHALLENGES FOR INSTITUTIONAL CHANGES

Following institutionalist insights, I foresee that implementing the changes I propose in Part II represents challenges for institutional reformers and decision-makers. I also consider constructivist institutionalism to foreshadow hurdles in implementing these changes. In doing so, I acknowledge that just as original institutional choices are the result of rational and ideational factors, institutional changes would also be limited or enabled by these factors.

In this Part, I take into account endogenous and exogenous institutional factors that could limit or promote institutional change, based on the theoretical framework in Chapter 3.[1269] The endogenous factors I examine are current institutional features and traits of the PA's framework and underlying institutional ideas. The exogenous factors I study for institutional change in the PA are the role of actors such as decision-makers, and political and economic environments.

[1266] Ministry of Economic Development, *Trans-Tasman Mutual Recognition Arrangement*, 10 < https://www.mfat.govt.nz>.

[1267] See above Ch 6, Part III (A) (1) (2).

[1268] Camilo Perez Restrepo and María del Carmen Vásquez-Callo Müller, 'Patent Cooperation Mechanisms in the Pacific Alliance: An Initial Assessment of the Effectiveness of the Patent Prosecution Highway for Intra-Regional Trade Integration' (Academic Cooperation Project Working Paper Series 2016/16, SECO/WTI, December 2016).

[1269] See above Ch 3, Part III (C) (2).

I follow the view that prior (internal) institutional arrangements create incentives and constraints that have an effect on the establishment and the evolution of later ones.[1270] As Koremenos, Lipson, and Snidal point out, institutional development frequently depends on prior outcomes — path dependency — and evolutionary forces. [1271] Thus, pre-existing features such as the consensus rule in decision-making, and the overall decentralised architecture will constrain the implementation of most of the proposals. The effects of these features are twofold. First, specific institutional choices rigidify as they become more stable over time, preventing future adjustments. [1272] This is the case of the consensus rule that will not only hinder a voting system in decision-making but will also complicate agreement on future institutional changes. Thus, the consensus rule promotes inertia and institutional continuity instead of change. Second, the choices for decentralised structures condition their revision. In particular, the original choice for decentralised structures influences decision-makers and the institutional reformers' calculations on the costs and benefits for a more centralised architecture than the current one.[1273]

I claim that institutional change in the PA will happen through incremental adaptation by evolution, rather than institutional revolution or replacement. Following constructivist institutionalism and its views on ideational path dependency, [1274] I maintain that ideas on pragmatism entailing gradualism, a needs-based and a demand-based institutional development enable this type of change in the PA. However, tensions may arise between proposals that advocate for a higher centralisation and the existing frames of flexibility and pragmatism. To tackle these tensions, institutional reform should be framed as a means to infusing dynamism in the regional economic program.

The intergovernmental institutional paradigm and public sentiments on the performance of regional institutions may reinforce institutional inertia instead of change in the PA.[1275]

Following Streeck and Thelen's taxonomy of modes for institutional change,[1276] the most probable mode for incremental change in the PA will be a layering of structures and rules. New rules and structures will be added alongside existing rules and bodies, changing how old rules and structures influence the behaviour of the members. These formal changes will happen through treaty additions and amendments.

I cannot ignore the material constraints and the juncture that the recent Coronavirus crisis creates for institutional change in the PA. These conditions are part of the external economic environment surrounding the proposals and affecting their potential implementation. The Coronavirus response has affected national institutions of the PA members, hampering prospective institutional changes in the PA.

[1270] Keohane, 'International Institutions', above n 25, 390.
[1271] Koremenos, Lipson and Snidal, above n 254, 767.
[1272] See above Ch 3, Part III (C) (2).
[1273] See, eg, Interview_30 (Bogota, Colombia, 18 November 2016).
[1274] See above Ch 3, Part III (C) (2) (a) (b).
[1275] See above Table 17.
[1276] See above Ch 3, Part III (C) (2).

The most compelling constraint is the deficit on national budgets that tackling the current health crisis has created for PA members in the short and medium-term. National budgets are under enormous pressure for strengthening PA members' health systems and addressing the adverse side effects of the Coronavirus response on the national economies. This external economic environment makes it improbable that in the short-term PA members can commit to financial contributions to enlarge the PA's institutional structures through an independent Secretariat.

From a normative perspective, because the frames are also significant in raising stakeholders' support for change, I maintain that institutional adjustments should be proposed under the frames of gradualism and the existing frames of flexibility and pragmatism. These frames could be instrumental in enabling change through the implementation of the proposals.

Finally, I maintain that until now the institutional dimension has not been prioritised in the consolidation of the PA.[1277] This place has been taken by the need to show early results capitalising on pre-existing topics of consensus. As long as the institutional dimension continues to be relegated, changes to the current institutional structure will not happen because they lack political commitment from the decision-makers. Thus, for these institutional changes to happen, the PA needs leadership from decision-makers in driving these institutional reforms. Business elites need to see these changes as instrumental to their interests, which in turn places a burden on institutional reformers (eg, intellectuals and creative government officials) and their framing skills.

IV CONCLUSION

This Chapter builds on the argument in Chapter 8 about the need for institutional changes in the PA. I put forward proposals for adjustments to the current institutional framework and ways in which these changes could take place to strengthen the PA. These proposals contemplate the current (external and internal) institutional environments, rational factors, and also ideational elements underpinning institutional design.

The most urgent change to the organisational structure that the PA requires is an Administrative and Technical Secretariat. This body will give the PA a degree of independence in the pursuit of deeper integration. This Secretariat will provide technical and policy advice to advance towards the free movement of factors progressively. I maintain that this Secretariat needs to have a decision-shaping role in supporting the PA.

The Council of Ministers needs a reconfiguration to allow for flexible membership of the relevant national ministers/Secretariats and agencies. This change will help the PA in making more meaningful policy decisions on economic and non-economic areas than what the current configuration allows. A flexible membership will entail multiple configurations of the Council of Ministers, including subsuming in it the current Council of Ministers of Finance. Different configurations will depend on the topics to be discussed at a given time. According to the current agenda and presidential mandates I foresee at least the following configurations: general affairs; education and cultural

[1277] Interview_35 (Skype, 1 March 2017).

affairs; trade and investment; financial affairs, economic productivity and competitivity affairs; labour affairs; migration affairs; environmental affairs; transport and infrastructure.

Current material and ideational conditions constrain the feasibility and appropriateness of a proposal for a permanent tribunal for dispute resolution in the PA, despite theoretical insights supporting a more centralised dispute settlement system. Provided that the legal corpus of the PA matures towards a more comprehensive economic regime amongst the PA members, a permanent court could become an instrumental tool to ensure compliance/ enforcement in the long-term.

I propose focalising the numerous trans-governmental collaboration networks created on the outskirts of the PA's institutional framework. These RCNs deliver soft regulatory collaboration and convergence, but the actual subject matter and international distribution of power in the field impact their effectiveness. I propose that in those areas where there are clear dominant regulatory powers in the global context, the PA's RCNs could work more effectively if they focus on unifying negotiating positions. This work approach will leverage PA members' regulatory power in broader international/regional fora where the subject is being discussed (eg, OECD, WTO). I propose three guiding considerations for the establishment of RCNs in the PA: (i) global distribution of regulatory power in the subject; (ii) direct relationship between the subject and the PA's objectives — relevance; and (iii) instrumentality of the network in achieving the 2030 Vision of the PA — functionality.

I also highlight the need to reinforce the role of the Free Trade Commission to make it an active agent in the trade and investment agenda of the PA. Redefining the representatives to the Commission will facilitate regular and more frequent actions for meaningful results on the implementation of disciplines of the *Commercial Protocol*. It will also avoid partial duplication with the current membership of the Council of Ministers.

Migrating to an international organisation with international and domestic legal personality will aid in achieving the PA's objectives. A Secretariat will help the PA in attaining these attributes not only on paper but also in practice. Legal personality and international organisation-hood will facilitate relationships with third parties.

I propose that current isolated works on trade facilitation for goods and customs cooperation be part of a comprehensive trade and investment facilitation strategy. This facilitation should consider tools, processes and policies. The members should provide for centralised 'one-stop-shop' windows to deal with all administrative procedures and red tape. The interoperability of these windows is central to ensure regional facilitation of investment and trade. An integrated facilitation strategy on trade and investment demands more attention to services trade facilitation and the productive mobility of people. The attention that PA members have paid to these areas has been limited until now.

The consensus rule in decision-making will require the institutionalisation of adjustability mechanisms in the agreements through variable geometry. Variable geometry will allow for some of the members to make progressive commitments on

liberalisation, facilitation, and regulatory coordination in sensitive areas while allowing other members to join in agreements at a later stage.

Tackling the limitations of the PA's legal regime demands actions for establishing regional rules. Although intergovernmentalism makes this process cumbersome, I propose the following avenues to develop PA's legal regime. First, I suggest the PA members launch periodic rounds of negotiations to deepening the *Commercial Protocol* disciplines and commitments. Negotiating sectoral or issue-specific framework agreements, complemented and developed through simplified agreements, could also aid in strengthening the legal regime of the PA. PA members should also work on policy integration to reduce regulatory differences through harmonisation or mutual recognition of national regimes.

Moving forward, I maintain that intergovernmentalism will continue to be the pillar of the PA's institutional framework. Proposing to enlarge the PA's institutional structures through supranational bodies will ignore not only the historical background but also the current international and regional institutional environment. Supranational proposals will overlook the institutional effects of negative perceptions about the performance of supranational institutions in LA.

Considering the role that ideas have played in setting the current institutional framework and the weight that existing structures have in limiting future institutional adjustments, the changes I propose are incremental rather than revolutionary. I argue, based on institutionalist literature, that these changes need to build on present structures and should be framed and 'packaged' from within the existing flexibility and pragmatism frames. Complementary frames such as gradualism and dynamism could help institutional reformers in getting their message across with less resistance from actors benefitting from the institutional status quo. These 'new' frames also help to alleviate inherent tensions between centralisation steps and the existing frames of flexibility and pragmatism.

10 CONCLUSIONS OF THE THESIS: OF BLIND PEOPLE, ELEPHANTS, AND THE PA

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I INTRODUCTION

Puchala pointed in his seminal article 'Of Blind Men, Elephants and International Integration' from 1971[1278] that conceptualisations of a phenomenon depend on the parts and dimensions being examined. Similarly to the parable of the visually impaired people and the elephant, each person conceptualised and described the elephant as the single part of the animal each one felt and touched.

My aim here was not to paint the whole elephant, but to picture one specific part of it — the PA's institutional framework— and I made this clear from the beginning when I outlined the scope of the thesis and its case study basis.[1279] In sketching the skeleton of the elephant, I did not claim it to be the most important part but one that deserves attention because of the supporting role it has for the PA to be able to achieve deep(er) integration towards the free movement of factors.

I undertook this research to offer one account of what this part of the elephant looks like, why it looks like this and what it should look like if the PA is to progress the goal of deep(er) integration towards the free movement of factors. My account employed eclectically rational and constructivist institutionalisms. I also considered the insights of the comparative regionalism program on institutional design. I used their analytical tools through legal lenses based on my professional background in law. When appropriate, international institutional law also aided my analysis of the PA's institutional framework.

My account of the skeleton of the elephant represents the descriptive, explanatory and normative contributions of this thesis. I paid particular attention to present an image of what the PA's institutional framework is here and now before asking what it could or should be. In looking into the skeleton of the elephant, I may have been able to provide a rough approximation of the shape of the elephant at times, but one that by no means attempts to be holistic.

II THE ARGUMENT AND THE FINDINGS

In brief, I argued here that the PA is an institution for economic regionalism that follows a consensus-based intergovernmental design. The PA presents organisational and task-related decentralisation, and it approaches institution-building informally. The PA's institutional design results from underlying cooperation problems, including uncertainty and commitment problems. Ideational underpinnings, such as open regionalism, deep integration, flexibility, and pragmatism also contribute to explain its design. External institutional environments have also contributed to its institutional design outcomes. The current institutional framework does not equip the PA in the long-term to produce the necessary policy coordination and other regional public goods associated with its goals. This framework is insufficient to support processes of deepening, membership enlargement, and agenda expansion. The PA governments

[1278] Puchala, above n 227, 267-84.
[1279] See above Ch 1, Part II (C).

should incorporate incremental institutional adjustments such as higher centralisation and delegation of tasks through a Secretariat.

I will now elaborate on the descriptive, explanatory, and normative scope of this argument and my research findings.

A *Descriptive Elements of the Thesis*

From a descriptive stand, I maintained that the PA represents an IIGI. From a legal perspective, this means that the PA does not comprise an international organisation. The lack of an autonomous and independent will from that of the members means that the PA is not an international organisation. The PA does not have any functional, financial or operational independence to pursue its aims. Thus, the PA has no international or domestic legal personality. Treaty documents, subsequent agreements, and the practices of PA members show no intention to grant that independence to date.

I found that the PA is an intergovernmental, consensus-based, and decentralised institution. The PA's institutional framework shows a hierarchical, top-down structure that is non-permanent and non-dedicated. Decentralised structures include treaty bodies and ad hoc informal committees and working groups. PA's intergovernmental design also relies on presidential leadership; it is flexible enough to accommodate trans-governmental collaboration networks in several fields such as intellectual property, consumer protection, and innovation.

Decentralisation extends not only to the organisational structure but also to the tasks of information production and management, administration, and decision-making. These tasks are spread across formal and informal intergovernmental bodies. Dispute settlement, monitoring, and punishment show characteristics of higher centralisation than other interstate cooperation tasks.

Practices of institution-building in the PA suggest a preference for ad hoc informal structures that respond to problem-based or demand-based approaches. The problem-based approach means that decision-makers establish organisational structures to address problems that have a regional base or to tackle bottlenecks that have national origin but represent concerns that the four members share. The demand-based approach means that decision-makers build PA institutions under the perceived need of specific interest groups such as business elites. These approaches do not exclude one another.

The development of organisational structures in the PA also results from a pattern of specialisation and horizontal expansion. The scope of the PA is dynamically growing to cover not only trade and investment issues but also productive transformation, financial integration, innovation, GVCs, and others. Non-economic cooperation also expands to cover topics such as transnational organised crime, climate change, and integrated management of plastic waste.

The legal regime in the PA comprises pre-existing bilateral accords and plurilateral international agreements that entail international legal obligations on trade and investment, taxation, and cooperation. Plurilateral soft-law instruments, including trans-governmental agreements across public agencies of the members, complement

these international agreements. The PA's regime is far from being a comprehensive economic regime among the PA members. Instead, it regulates targeted aspects of interstate relations.

PA's legal regime presents low legalisation through arrangements (guidelines, memoranda, guiding principles, and declarations) that deliberately use imprecise language and non-binding rules. The absence of delegated authority to third parties for the interpretation or resolution of disputes also shows the low legalisation.

International agreements in the PA also incorporate an array of adjustability mechanisms such as 'bundle' withdrawal clauses, escape and exception clauses, and deliberate imprecision in treaty drafting. These mechanisms allow room to respond to unforeseeable circumstances and flexibility to reach agreements in the first place.

B *Explanatory Elements of the Thesis*

From an explanatory stand, I argued that institutional design outcomes on organisational structures and rules in the PA are the result of the interplay of three factors: (i) rational; (ii) ideational; and (iii) external environmental.

In the first realm, cooperation problems and characteristics of the PA members in the aggregate rationally explain at the micro-level the PA members' choice for specific treaty rules in PA's international agreements.

I maintained that at the time of launching the PA, the dominant cooperation problem was economic and political uncertainty about the state of the world. This uncertainty triggered the choice for an umbrella agreement in the *Framework Agreement*. This incomplete contract sets the basis of the institution to be further developed. At the micro-level, uncertainty about how the agreement could work and how far members were willing to integrate explains the high imprecision in treaty drafting: its open and vague language. Initial commitment problems led to the clause mandating the negotiation of a dispute settlement regime.

Uncertainty about the state of the world when establishing the PA contributes to explain overall decentralisation in the *Framework Agreement*. I maintained that rational ponderations of uncertain future benefits from the cooperation vis à vis the ongoing and visible costs of formalised and permanent organisational structures prevented these institutional arrangements. I claimed that the perceived poor performance of other regional institutions, including ARCO, created an external regional environment that contributed to that initial uncertainty.

The *Commercial Protocol* presents cooperation problems of commitment, enforcement, distribution, and coordination. Uncertainty about the state of the world was also present in the negotiation of the *Commercial Protocol* but to a lesser degree than in the *Framework Agreement.* Legalised rules on dispute settlement and punishment in conjunction with informal means for dispute settlement are a response to the combination of enforcement and commitment problems in the areas and aims of this PTA.

I argued that institutional rules such as NCMs, carve-outs, and 'customised' commitments perform a similar function to reservations in a strict sense in PA's international agreements. These rules addressed domestic distributional problems of PA members in negotiating a free trade area. They replaced treaty reservations to tackle national sensibilities.

Several cooperation problems in the *Commercial Protocol* explain the combination of hard-law and soft-law disciplines within the Protocol. Precise drafting, such as definitional clauses, helped in addressing coordination problems present in specific areas with which the Protocol deals, such as TBT and SPS. Adjustability mechanisms such as imprecision and soft-law helped to address distributional concerns when the issue areas did not have a combined coordination problem.

Uncertainty about the state of the world explains withdrawal clauses in the *Framework Agreement* and the *Commercial Protocol,* allowing members to respond to shocks that change their fundamental preferences. In contrast, escape and exception clauses were a better response to combinations of this uncertainty and enforcement problems.

Except for the *Agreement to Homologate Double Taxation Accords,* all international agreements in the PA present commitment problems. A systemic analysis of 'bundle' exiting in PA's international agreements showed that commitment problems caused these clauses by creating negative incentives and raising the costs of withdrawal from these agreements.

The *Agreement to Homologate Double Taxation Accords* has coordination problems and non-strategic cooperation problems. Trans-governmental agreements in the PA depict non-strategic cooperation problems primarily. However, the COIL research program does not provide comprehensive analytical tools to explain trans-governmental agreements and their rules.

Aggregated characteristics such as regime-type similarities and (foreign policy) preference homogeneity contribute to explain democratic requirements for membership to the PA. The reduced membership of four members combined with the uncertainty problem favoured less legalised agreements within the continuum of legalisation, including the proliferation of trans-governmental agreements. I did not find a basis to claim any informal or formal effects of economic power asymmetries in the institutional design of the PA. I argued that this is because, despite the asymmetry, there is no economic dependence of Chile, Colombia, or Peru on Mexico.

Ideational factors complement and supplement explanations of the underlying reasons for the institutional design in the PA. Based on empirical analysis, I claimed that the ideas of open regionalism, deep integration, flexibility, and pragmatism helped in shaping design features and other institutional aspects.

Open regionalism and deep integration worked as cognitive programs determining the initial focus on trade and investment. They were roadmaps defining the scope and issue areas to address regionally. Open regionalism and deep integration were vital for the definition of PA's (formal) economic objectives, its instruments, and agenda.

By placing these programs within a broader ideological system of beliefs, I found that PA's 'version' of open regionalism underlies a synthesis of ECLAC's neo-structuralism paradigm and the neoclassical economics paradigm. Although institutional entrepreneurs prioritise the latter, there is an expanding agenda on GVCs, productive linkages, and productive transformation whose emergence could only be explained as the result of that paradigm compromise. I argued that these ideas are not new to PA's regionalism program. They were present in previous regionalism programs in LA, but failed implementation made them fade along the way.

The frames of flexibility and pragmatism played a double legitimising role, according to the empirical evidence. These normative foreground ideas legitimise not only the programs of open regional and deep integration but also PA's institutional architecture as a whole. Decisions-makers, institutional entrepreneurs, and brokers regularly legitimise to the public PA's decentralisation, ad hoc approach to institution-building, and its preference towards soft-law through these frames.

C *Normative Elements of the Thesis*

From a normative stand, I stated that the PA needs to make institutional changes in its organisational structures and decision-making. The institutional framework does not support the PA for effectively achieving its economic objectives, particularly deeper integration towards the free movement of goods, services, capital, and people. This framework does not adequately sustain the processes of deepening, membership enlargement, and agenda expansion. The current density of the economic and non-economic cooperation agenda and the pathway towards the free movement of factors demand higher institutional coordination than what can be achieved through the current organisational structures. The framework is also insufficient to develop other regional public goods necessary to fulfil this objective.

I firmly maintained that intergovernmentalism will continue to be an underlying attribute of the PA's institutional framework and based my proposals for institutional change on this claim. Proposing supranational structures to perform tasks of decision-making, information management, monitoring, administration, dispute settlement, and enforcement will overlook the crucial role of the ideas underpinning the current institutional framework. Fundamental institutional ideas strongly constrain, at the normative and cognitive levels, supranationalism as an institutional program for the PA. It will also disregard rationalist considerations on the ongoing costs of setting and maintaining these structures vis à vis the potential (but uncertain) economic benefits of economic regionalism.

I proposed a permanent Secretariat with administrative and technical tasks and a policy-shaping role. This Secretariat will be regularly delegated with production, collation, analysis, and management of information; monitoring of the agenda; and support in the informal and formal dispute resolution process. Its advisory role will be key to assess projects, activities and results while proposing instruments (ie, regulatory, technical and technological) and projects for the PA to fulfil its objectives. Presuming that the intergovernmental architecture remains in place, the Secretariat should have the necessary degree of functional, financial and operational independence to allow it to pursue the PA's goals as a whole rather than as the aggregation of the individual

interests of the members. I recommended that granting legal personality to the PA would facilitate achieving the PA's aims.

I suggested revisiting the composition of the Council of Ministers to allow for flexible configuration with representatives of the relevant national ministers and agencies, according to the subject under discussion. A variable composition will help the PA in deciding with a policy impact beyond general cooperation for the exchange of information and good practices. Based on the objectives, presidential mandates and current agenda, I foresaw nine potential configurations. Those configurations include subsuming within the Council of Ministers the current Council of Ministers of Finance. I envisioned no formal hierarchy between configurations.

Maintaining consensual decision-making will demand variable geometry in the functioning of the PA that institutional reformers could frame within the idea of flexibility. Variable geometry would allow for some of the PA members to progress on topics for the deepening of the integration. The four members would not need to reach consensus to participate provided that members that decide not to take part in some of the initiatives could join when their domestic conditions and preferences allow for it.

I called for a more active role of the Free Trade Commission than the limited procedural tasks it has performed until now. The Free Commission should lead the implementation and deepening of the commercial disciplines provided in the *Commercial Protocol*. I did not find the material and ideational conditions to suggest a permanent court or tribunal in the medium-term in charge of ensuring compliance/enforcement and dealing with the interpretation of PA's slim legal regime.

I maintained that the PA needs to mature its legal regime for two reasons. First, it needs a regional legal regime to provide economic operators with the legal certainty that would allow them to operate regionally. Second, a legal regime will enable cross-border flows of goods, people, services, and capital by reducing regulatory barriers and differences.

Avenues to develop PA's legal regime include launching a strategy for periodic rounds of treaty negotiations that will build momentum for package deals and trade-offs between issue areas when distributional problems arise. Negotiating issue-specific or sectoral framework agreements that could be implemented through simplified agreements could ease the consolidation of a legal regime for the PA. Moving forward, the PA needs to work on policy integration through either mutual recognition of national regimes or regulatory harmonisation. I also proposed the design of a comprehensive strategy on trade and investment facilitation. The strategy should go beyond the agenda on trade facilitation for goods, and the exploratory works on investment facilitation.

Premature institutionalisation through grand-design institutional models could be just as damaging for the PA as the lack of adequate institutions to support the processes of deepening, enlargement and agenda expansion. Failing to implement the institutional changes I proposed threatens to lead the PA into stagnation.

I argued here that future changes or new ideas for institutional reform should be framed around the ideas of open regionalism, deep integration, pragmatism, and flexibility

which are already institutionalised in the PA. Frames on gradualism and dynamism could ease the tensions arising from existing frames and proposals for centralisation and delegation. Changes to the PA's institutional framework are more likely to occur in the future through incremental developments that build upon the existing institutions than through sweeping reforms producing total reinvention unless some critical juncture takes place.

III Challenging Generalised Claims about the PA

Based on new institutionalisms (rational and constructivist), comparative institutional design, and legal analysis, I was able to contest four generalised claims about the PA: its apolitical and non-ideological nature; its sui generis or innovative institutional design; and the limited scope attributed to it as a trade bloc. In challenging these views, this thesis contributed to the academic debates on the nature of the PA with sound theoretical and empirical grounds.

Considering the weight that presidential leadership has for the progress of the PA goals, I maintained that the PA has strong political grounds. The PA's substantial reliance on 'goodwill agreements' and soft instruments that carry no legal or binding force supports its political configuration. The PA's regular resort to informal and direct negotiations to solve differences rather than legalised dispute settlement also points to the PA's political character. In this respect, I agree with Puchala's claim that '[t]here are simply no non-political issues in relations among states!'[1280]

I had the opportunity in Chapter 8 to unveil the ideational underpinnings of the PA and place them into a broader system of beliefs. This exercise allowed me to highlight that the PA has significant ideological foundations that sit within the neoliberal institutionalised program. At the cognitive level, this system entails an uneasy synthesis and a compromise between ECLAC's neo-structuralism paradigm and neo-classical economics, prioritising the latter. Thus, claims about the non-ideological nature of the PA misrepresent its foundations.

PA's ideological basis helped me to contest the claim that the PA is exclusively a trade bloc. The PA has prioritised trade and investment, particularly in its early days. However, painting a more comprehensive picture of this elephant that looks not only at its trunk but also at its ears, body, legs and tail requires looking carefully into the PA's economic agenda and non-economic cooperation works. This economic agenda tackles a wide array of topics from SMEs, to government procurement, innovation, tourism, and value chains. These areas reflect a concern for productive transformation, competitiveness, and problems that go well beyond trade and investment. This agenda also underlies the subtle compromise of its economic paradigms.

Contrasting with generalised claims, I argued that the institutional design of the PA is neither sui generis nor innovative. Although these two frames serve to generate momentum for the PA, they find no basis in the PA's institutional framework. Intergovernmentalism, consensual decision-making, organisational and task-related decentralisation are, on the contrary, common characteristics within regional institutions around the globe. The PA's institutional structure also shows signs of trans-

[1280] Puchala, above n 227, 274.

governmental collaboration; however, these RCNs amongst national regulatory agencies have been around for decades. RCNs are not PA innovations.

IV THESIS CONTRIBUTIONS

This thesis provided strong evidence and views that are not only theoretically informed but also empirically supported. The theoretical contributions of this thesis were manifold. First, the thesis incrementally contributed to rational institutionalism and constructivist institutionalisms by using an eclectic approach that combines these research programs. I offered evidence through a case study — the PA's institutional framework — that these two research programs could be complementary and supplementary to grasp better what is happening at the empirical level. I built on the strengths of each research program to address the research questions.

I incrementally contributed to institutionalist insights on institutional change. To this end, I used constructivist institutionalism understandings on the endogenous and exogenous factors that limit and promote policy outcomes. I extrapolated these explanations to institutional design outcomes and applied them to explain institutional changes in the PA's institutional framework.

In setting and implementing my analytical framework to answer the research questions, I genuinely shared Goldstein and Keohane's view that rationalist approaches are a valuable starting point for analysis. However, their explanatory power is challenged by empirical anomalies that can only be resolved when ideas are taken into account.[1281] I had the opportunity to identify these anomalies in my case study — the institutional framework of the PA — and I analytically addressed them through an eclectic approach.

Second, this thesis was also theory testing, in that I took the insights of the COIL rational institutionalism program, and I used its explanatory factors to shed light on the rational factors that underpin the PA's institutional design. I evaluated how these rational factors — cooperation problems and characteristics of the members in the aggregate — helped me to explain institutional features in the PA design satisfactorily. I concluded that COIL is suitable for a micro-level analysis of PA's international agreements. However, the research program has shortcomings in explaining overall monitoring and the consensus rule of the PA. The COIL program does not fully capture the formal and informal effects of economic power in the institutional design and practices of the PA. This research program does not deal with trans-governmental agreements, making it unsuitable for explaining the proliferation of these agreements in the PA's institutional architecture.

Third, the thesis made a contribution to the literature on international institutional law and the academic discussions around the requirements that an entity needs to satisfy to be endowed with international legal personality. The proposed integrative guidelines of Chapter 3 to assess international personality considered not only institutional features but also practices of member states and the potential international organisation. These guidelines could be used as a toolbox to assess the legal status of other interstate fora for cooperation that are currently proliferating.

[1281] Goldstein and Keohane, above n 382, 3, 6.

Fourth, in 2007 Amitav Acharya and Alastair Iain Johnston wrote:

> With the exception of European Institutions, regional institutions have occupied a small and insignificant part of the overall theoretical literature on international institutions and in this literature, considerations of institutional design have played a minimal part. [1282]

More than a decade later, although the comparative regionalism program has contributed to filling some of these gaps, their claim is still relevant for the institutional design of regional institutions. I spoke and contributed to this literature through the present thesis, with the limitations of a case study for generalisability purposes.

I also contributed to policy space with this thesis by putting forward several proposals to strengthen the PA's institutional framework to better support the deep integration objective towards the free movement of factors. These proposals attended to the rational, ideational, and environmental factors that have played a role in the definition of the current institutional design of the PA. These recommendations put forward institutional adjustments that are more suitable to PA's conditions than other institutional proposals in the PA literature.

V AGENDA FOR FUTURE RESEARCH

Building on the findings and arguments of this thesis, future research about the institutional framework of the PA could be enriched in several ways. The options include exploring in greater detail the working of informal institutions such as routines and practices through which the PA operates. A more in-depth empirical enquiry into these practices and routines would strengthen the understanding about the operation of this institutional framework and shed light on the extent to which they conform to formal institutions, supplement them or overturn them. The thesis has provided a limited account of them, but additional work is required.

A better understanding of the PA's institutional dimension could benefit from testing empirically the conjectures put forward in this thesis regarding the effectiveness of regulatory cooperation networks in the PA in Chapters 8 and 9.

Future research could continue exploring institutional demands arising from membership enlargement and the objective of fostering economic and political relations with the Asia Pacific. I did not address in detail institutional needs that result from these two factors.

Since the focus of this thesis has been the economic dimension of the PA, I did not assess the institutional framework in light of the PA's social dimension, let alone institutional demands from attending to this dimension. The 2030 Vision for the PA shows a growing concern from decision-makers for this dimension. Research on institutional demands in this pillar could benefit from the findings in this thesis about the ideational, rational, and environmental factors that explain the PA's current institutional design. By taking into account these factors, this research could make feasible proposals to address PA's democratic deficit.

[1282] Acharya and Johnston, above n 5, 2.

I hope that I undertook a more comprehensive examination of the PA's institutional framework than existed in academic research up to this point. This research should serve to provide more accurate descriptions and explanations of the skeleton of the elephant, although I recognise it is only one account at the end of the day.

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