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# In the Judicial Steps of Bolívar and Morazán?

## Supranational Court Conversations Between Europe and Latin America

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**Abstract**

*This paper explores the issues of judicial dialogue and constitutional migrations between the European Court of Justice ('ECJ') and Latin American regional courts. It considers the impact of the ECJ's 'constitutional' case-law regarding supremacy and direct effect on the decisions of the Central American Court of Justice ('CCJ') and the Court of Justice of the Andean Community ('ACCJ'). The study proceeds from a brief exposition of the legal aspects of the EU model of integration, before moving to identify the main factors which led to the selection of Latin American courts and to outline the background to integration in the two sub-regions. In addressing the CCJ and ACCJ, a short history and sketch of their jurisdiction is given before examining the impact of the migration of the integrationist activism of the ECJ on these regional judicial institutions.*

**Keywords:** courts, dialogue, integration, regionalism, case-law.

### A. Introduction

The issue of judicial dialogue and constitutional migrations is as much a part of processes between courts of regional organizations as it is between national courts or national and regional courts.[1] This paper will explore such issues between the European Court of Justice (ECJ) and Latin American regional courts from the perspectives both of institutions and case-law. In this research, the judicial frameworks of regional organizations in Latin America are particularly relevant since they tend to follow (to varying degrees) those provided for (now) in the Treaties on European Union and on the Foundations of the European Union. Indeed, institutional and trade links have existed for several decades between the EU and Latin American regional organizations.[2]

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1 As observed by Bryde: "Constitutional law is no longer a parochial subject but has become an international one": B.O. Bryde, 'Internationalization of Constitutional Law', *in* T. Groß (Ed.), *Legal Scholarship in International and Comparative Law*, Peter Lang, Frankfurt am Main 2003, p. 191, at 191.

2 On EU relations with Latin America, *see, e.g.*, C. Piening, *Global Europe. The European Union in World Affairs*, L. Rienner, Boulder, CO and London 1997, Chap. 6, 119-138.

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This paper will consider the impact of the 'constitutional' case-law of the ECJ on EU law supremacy and direct effect on the decisions of the Central American Court of Justice (CCJ) and the Court of Justice of the Andean Community (ACCJ). However, any optimism of complete emulation clearly needs to be tempered with consideration of the local conditions that may make Latin America less receptive to supranational judicial activism in regional integration than Europe.[3]

The study proceeds by setting out in brief the legal aspects of the EU model of integration, before moving to identify the main factors which led to the selection of these two Latin American regional courts. The background to integration in the two sub-regions is then outlined, mindful of the fact that this has occurred and continues to occur within the overall framework of Latin American integration.[4] In addressing the CCJ and ACCJ, a short history and sketch of their jurisdiction is given before examining the impact of the migration of the integrationist activism of the ECJ on regional judicial institutions in Latin America.

## B. Legal Aspects of the EU Model of Integration

It is almost otiose to observe that the Union method of integration has used law as a prominent tool to achieve its aims.[5] This has been done in a combination of three ways. First, the type of secondary legislation used by the Union to harmonize the different laws of the Member States – regulations, directives and decisions – are different from those of classical international treaties. These EU legal instruments, especially directives, have been designed to attempt to combine homogeneity in rules in the Union with flexibility in their implementation. Next, there is the creation of the ECJ, an independent judicial body charged with ensuring the proper interpretation as well as the validity of EU law: although, like classical international courts, Member States may bring actions before it, the Court is also accessible by Union institutions such as the European Commission and European Parliament and even, where they are the ultimate addressees of EU rules and decisions, companies and individuals.

Lastly but perhaps most importantly, national courts may engage in a judicial dialogue with the ECJ through the preliminary reference procedure. In this process national courts, seized of a case with an EU legal element, may (or, if a last instance court, must) refer questions to the ECJ on the interpretation of EU law,

3 For a discussion on the success or otherwise of legal transplants and migrations in Latin America, *see* Y. Dezalay & B. Garth, 'The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars', in D. Nelken & J. Feest (Eds.), *Adapting Legal Cultures*, Hart Publishing, Oxford and Portland 2001, Chap. 11, 241.

4 The 1960 Latin American Free Trade Association (ALALC), transformed in 1980 into the Latin American Integration Association (ALADI); in 1991, Mercosur/Mercosul, the Common Market of the Southern Cone, was established; and in 2004, the now-named Union of South American Nations, bringing together the Mercosur States and the Andean Community, was inaugurated.

5 J. Ziller, 'The Challenges of Governance in Regional Integration. Key Experiences from Europe', Second Annual Conference of the Euro-Latin Study Network on Integration and Trade (ELSNIT), Florence, 29-30 October 2004, *EUI Law Working Paper* No. 2005/11, at 44.

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the answers to which they are bound to apply in the case before them. This mechanism has allowed the ECJ to develop, over the years, many of the basic principles of the EU legal order: e.g., the autonomous nature of that legal order; the supremacy of EU law; direct effect; indirect effect; general principles of law (including human rights, absent the present Charter on Fundamental Rights); and state liability for breach of EU law.[6]

The model of the ECJ is itself a vital piece of the EU model of integration whose success has been based on inter alia a developed system of independent national and EU courts; an expert, active legal profession; the proper implementation and enforcement of ECJ rulings before national courts by their agreement or acquiescence (since no Union power exists to compel domestic judges to obey ECJ rulings); and the development in legal processes and, in fact, in the various legal cultures in the Union whether based on the common law or civil law and their different permutations.[7] It is the absence or weakness of the dialogue between the national and regional courts in Latin America, as will be noted in the Conclusion, which have had a serious impact on the 'spread' of judicial integrationist ideology within the two sub-regions under discussion.

### C. Factors Influencing the Import of the ECJ Model

Despite the many setbacks over the decades, the overall success of the EU integration model is nevertheless viewed externally as a model for 'import' or 'emulation' by various regional organizations. Part of this success is expressed institutionally by the ECJ and legally by the different instruments provided for integration and the principles developed by the ECJ. From a sociological perspective,[8] one of the most frequently offered explanations as to why migrations occur and, to some extent, when they tend to succeed is the prestige of the foreign model,[9] here the ECJ and its foundational constitutional case-law. Evidently, this ECJ model offers to each regional community judicial elite the advantage of generating a legitimacy that it might otherwise lack.

Beyond this sociological justification for such migrations, it is equally necessary to address the factors that facilitate or encourage migration of institutions, laws and legal principles, by considering: (a) historic, linguistic and legal cultural affinities; (b) prevalence of the concept of regional integration; (c) integrational aims of the relevant regional economic community treaty; and (d) jurisdiction of the regional economic community courts. Taken together, these will form the legal matrix for analysing the migration of principles from the ECJ to other simi-

6 *See generally*, A.F. Tatham, *EC Law in Practice: A Case-Study Approach*, HVG-ORAC, Budapest 2006, Chap. 1, pp.1-43; Chap. 2, pp. 44-95; and Chap. 3, pp. 96-147.

7 Ziller (2005), at pp. 44-49.

8 J.S. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 *AJCL* p. 838, at p. 854.

9 R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *AJCL* p. 343, at pp. 398-399; and A. Watson, 'Aspects of Reception of Law' (1996) 44 *AJCL* p. 335, at p. 346 and pp. 350-351.

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lar courts and their resultant influences on judicial practice at the regional court level in Africa and Latin America.

*I. History, Language, Law, and Legal Culture*

Historically Latin America was mostly subject to colonial dominance by Spain and Portugal, achieving independence from the Iberian States in the nineteenth century. However, the colonial powers left their marks on the legal and linguistic landscape of their former possessions.[10] As a result, Latin America (apart from Brazil) is largely Spanish speaking, and drew its inspiration at the time of independence from Napoleonic France and its codes, and then in the twentieth century from Germany and Italy, and lately in constitutional matters from Spain.[11] This linguistic connection – Spanish and Portuguese are both EU official languages in which all Union official publications (including ECJ rulings) are made available – is further enhanced by educational connections since a number of judges sitting on the benches in the supreme, constitutional and regional courts in Latin America have either attended universities in Europe, or conducted research at institutes there. Moreover, having studied their domestic laws in Spanish or Portuguese, they are fully conversant with the (direct and indirect) European influences on their legal systems. Thus a benign atmosphere for cross-fertilization or migration of legal ideas already exists.[12]

This is further emphasized by the existence of links between the two continents from the perspective of migration of legal ideas and transjudicial communication that have been apparent for decades in the field of human rights. The 1950 European Convention on Human Rights and the model and case-law of the European Court of Human Rights have played a pivotal role in the drafting and creation of similar conventions, courts and jurisprudence in Latin America with the Inter-American Court of Human Rights enforcing and interpreting the 1969 American Convention on Human Rights.[13] In this field, the European Convention and Court have directly impacted on their American counterparts[14] in institutional set-up and jurisprudential development. Interestingly for the future, this interaction or migration of ideas has not been a one-way process, the European Court of Human Rights citing to its American counterpart in its judgments.[15]

10 D.S. Clark, 'Judicial Protection of the Constitution in Latin America' (1975) 2 *Hastings Constitutional Law Quarterly* p. 405, at pp. 407-413.

11 *See generally*, M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin 2004, especially Parts II and III.

12 The proximity of European and Latin America from a legal perspective can be seen, *e.g.*, in J.H. Merryman & R. Pérez-Perdomo (Eds.), *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, Stanford University Press, Stanford 2007.

13 J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge 2003.

14 H. Gros Espiell, 'La Convention Américaine et la Convention Européenne des Droits de l'Homme. Analyse Comparative', *Recueil des Cours de l'Académie de Droit International*, The Hague (1989), Vol. 218, at 220ff.

15 *See*, *e.g.*, E.A. Bertoni, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards' (2009) *EHRLR* 332.

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*II. Regional Integration in Latin America: In the Footsteps of Bolívar and Morazán*

Regional integration in Latin America itself has a long progeny, going back to the immediate post-colonial period of the 1820s. In brief reference to the title of this presentation, Simón Bolívar (1783-1830)[16] played one of the key roles in liberating Latin America from colonial rule. Following liberation from the Spain, Bolívar was instrumental in setting up the first union of independent nations in South America, known as *Gran Colombia* (1819-1831), comprising present day Colombia, Panama, Ecuador and Venezuela, and was its President from 1819 to 1830. He also led Bolivia (named after him) and Peru to independence. In a similar vein, Francisco Morazán (1792-1842)[17] attempted to transform the Federal Republic of Central America (1823-1838/40) into one nation, comprising Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador. In each case,[18] regional integration efforts eventually foundered on the rocks of political, military and social divisions.

Largely unsuccessful attempts were made throughout the rest of the nineteenth and into the twentieth century to reinvigorate the integration process. After the Second World War, regional integration organizations bloomed again in Latin America.

*III. Relevant Integration Schemes*

Time and space do not afford the opportunity to present a detailed description of the organizations which have been established in modern times.[19] Since the focus will remain on Central America and the Andean region, the success of Mercosur/Mercosul, the Common Market of the Southern Cone (of South America), is beyond the present discussion.[20]

*1. Central America*

In 1951, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua signed a treaty creating the Organization of Central American States (*Organización de Estados Centroamericanos*, or ODECA) to promote regional co-operation, integration and unity in Central America.[21] Later in 1960 the Central American Common Market, the Central American Bank for Economic Integration, and the Secretariat

16 J. Lynch, *Simón Bolívar: A Life*, Yale University Press, New Haven 2006.

17 R. Stoner Chamberlain, *Francisco Morazán, Champion of Central American Federation*, University of Miami Press, Coral Gables 1950.

18 For the failures in Central America, *see generally*, T.L. Karnes, *The Failure of Union: Central America, 1824-1960*, University of North Carolina Press, Chapel Hill 1961.

19 *See* A. Linares, *Aspectos Juridicos de los Sistemas de Integracion Economica*, Facultad de Derecho, Universidad Central de Venezuela, Caracas 1969 and J.M. Alvarez Zárate, *ALCA y TLC con Estados Unidos: La Agenda de Negociación, sus Costos y Beneficios Frente a los Intereses Nacionales*, Universidad Externado de Colombia, Bogotá 2004.

20 For which *see, e.g.*: R.A. Porrata-Doria, *MERCOSUR: The Common Market of the Southern Cone*, Carolina Academic Press, Durham 2005; and J. Guira, *Mercosur: Trade and Investment Amid Financial Crisis*, Kluwer Law International, The Hague 2003.

21 Charter of the Organization of Central American States (San Salvador Charter), 14 October 1951: 122 UNTS 3.

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for Central American Economic Integration (SIECA) were created.[22] The ODECA was re-established in 1962, this time with the participation of Panama.[23]

In the early 1990s, the organization was revived through the signing of the 1991 Tegucigalpa Protocol[24] which extended and deepened previous integration efforts and established the Central American Integration System (*Sistema de la Integración Centroamericana* or SICA) as the economic, cultural and political organization for the region, this time with Panamanian participation. SICA welcomed Belize as a full member in 2000 and the Dominican Republic as an associate member in 2004.

Among the Central American institutions and bodies are the Meeting of the Presidents which acts as the supreme organ of SICA; the Council of Ministers, charged with providing the necessary follow-up to ensure the implementation of decisions of the Meeting of the Presidents; the Executive Committee, a permanent body (with one representative from each Member State, nominated by the national government) responsible for the implementation of decisions by the inter-governmental organs; and the Secretariat General, under a Secretary General, responsible for the smooth running of integration affairs. In addition, the SIECA remains responsible for economic integration while a regional parliament, the PARLACEN, has been established but has few real powers.

*2. Andean Region*

In 1969 the Cartagena Agreement[25] (also known as the Andean Pact) was signed by Chile, Bolivia, Peru, Ecuador and Colombia. Venezuela joined in 1973 but announced its withdrawal in 2006, while Chile left in 1976 but rejoined as an associate member in 2006. Regarded as the 'phoenix' of Latin American regional integration, having been recreated three times since its original creation, the Andean region has so far even failed to attain the level of a customs union.[26]

In the mid 1990s, the Member States agreed to a strategic re-organization and in 1996, the Trujillo Protocol[27] changed the Pact into the Andean Community of Nations (*Comunidad Andina* or CAN), thereby giving the integration process a political direction. The CAN comprises the bodies and institutions of the Andean Integration System (SIA). As with Central American integration, the CAN's supreme organ is the Andean Council of Presidents which is responsible for issu-

22 General Treaty on Central American Integration (Treaty of Managua), 13 December 1960: M. Halperín (Ed.), *Instrumentos Básicos de Integración Económica en América Latina y el Caribe*, 2nd ed., BID-INTAL, Buenos Aires 1992, pp. 233-252.

23 Charter of the Organization of Central American States (San Salvador Charter), 12 December 1962: 552 *UNTS* 15.

24 Tegucigalpa Protocol to the Charter of the Organization of Central American States, 13 December 1991: 1695 *UNTS 382*.

25 Andean Sub-regional Integration Agreement (Cartagena Agreement), 26 May 1969: (1969) 8 *ILM* 910.

26 K. Nyman Metcalf & I. Papageorgiu, *Regional Integration and Courts of Justice*, Intersentia, Mortsel 2005, at p. 21.

27 Trujillo Protocol to the Cartagena Agreement, 10 March 1996: <www.comunidadandina.org/normativa/tratprot/trujillo.htm>. Visited 4 June 2010.

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ing Guidelines about different spheres of Andean sub-regional integration, which are then implemented by the bodies and institutions of the SIA.

In addition, there is the Council of Foreign Affairs made up of the foreign ministers of the Member States, responsible for ensuring that the objectives of SIA are attained and for making and carrying out the CAN's foreign policy by issuing non-binding Declarations and legally binding Decisions; the Commission, the main policy-making body and now sharing the making of Decisions with the Council of Foreign Affairs; and the General Secretariat, under a Secretary General, the executive body of CAN, with the capacity to compose and propose legislation to the Council and Commission. Like SICA, the CAN also has its own Parliament though likewise with few powers.

### *IV Relevant Regional Courts*

Having set out the general background to the regional groups of Central America and the Andean region, it is now necessary to look at their courts.

#### *1. Central American Court of Justice*

*History:* The most important progenitor of the present-day Court[28] was the original 1907 Central American Court of Justice[29] whose purpose was to maintain peace and harmony between the five signatory states[30] without resort to the use of force.[31] The Court, strongly promoted by the USA and Mexico, was intended not as a mere commission of arbitration but a real judicial tribunal according to principles of international law.[32] In this sense, it was one of the first international courts of this nature in the world and included in its jurisdiction the arbitration and last-instance judgment on disputes between states whenever their resort to diplomatic settlement had failed.[33] It was importantly the first international court that allowed individuals, after exhaustion of local remedies, to make appeals against their own state in the last instance.[34] Despite the optimism, the Court was short-lived (1908-1918), its life terminated as a result of US opposition and discord in Central America.[35] While the 1962 ODECA Charter included a Court, it only had authority to judge disputes between Member States and only met occasionally in the 1960s without needing to resolve any important questions of regional integration, thus eventually falling into desuetude.[36]

28 *See generally* S. Maldonado Jordison, 'The Central American Court of Justice: Yesterday, Today and Tomorrow?' (2009) 25 *Conn. J. Intl. L.*, p. 183.
29 Convention for the Establishment of a Central American Court of Justice, 1907 *Papers Relating to Foreign Rel. U.S.* 697 (1910).
30 Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.
31 Karnes (1961), p. 191.
32 Karnes (1961), p. 192.
33 Nyman Metcalf & Papageorgiu (2005), p. 29.
34 Additional Protocol to the Convention for the Establishment of a Central American Court of Justice, 1907 *Papers Relating to Foreign Rel. U.S.* 701 (1910).
35 T.M. Leonard, *Central America and the United States. The Search for Stability*, University of Georgia Press, Athens 1991, pp. 72-74.
36 Nyman Metcalf & Papageorgiu (2005), 30.

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*Establishment and Jurisdiction:* The Court was finally resurrected in 1991 through the Tegucigalpa Protocol[37] as a necessary element in the reconstruction of the entire Central American Integration System and to underpin a new era of democratic institutions and the rule of law in the region.[38] The *Corte Centroamericana de Justicia* (or CCJ) was established in Managua, Nicaragua and, although those who drafted the 1992 Statute of the Court[39] tried to emulate the ECJ considering it as a worthwhile model,[40] the CCJ – from various aspects – has inherited from the 1907 Court jurisdiction rendering it an international tribunal and even a court of arbitration. In such way, the CCJ has a much broader remit that the ECJ, inherent in which is a more political role between the Member States.

2. *Andean Community Court of Justice*

*History:* In the late 1970s, the then Member States of the Andean Pact restructured their regional institutions in a bid to rescue the flagging integration project. In so doing, they followed the institutional model of the EU[41] more faithfully than the Central American States.[42] One important innovation was the creation of the region's own court, directly modelled on the ECJ.[43]

*Establishment and Jurisdiction:* The Court of Justice of the Andean Community (*Tribunal de Justicia de La Comunidad Andina* or ACCJ)[44] was established in Quito, Ecuador, through the 1979 Treaty creating the Court,[45] which began operations in 1984. On the basis of the 1996 Cochabamba Protocol[46] amending the 1979 Treaty the ACCJ acquired new competencies. It is regarded[47] as much more of a clone of the ECJ than the CCJ: it was directly modelled on the Luxembourg Court due to the fact that some of its members advised the government officials who drafted the Treaty establishing the Quito Court.

37 The CCJ was re-established under Art. 12 h) of the 1991 Tegucigalpa Protocol to the (1951, renewed 1962) Charter of the Organization of Central American States; its powers are set out in the 1992 Convention on the Statute of the Court.

38 Nyman Metcalf & Papageorgiu (2005), p. 31.

39 Convention on the Statute of the Central American Court of Justice, 10 December 1992, 1821 *UNTS 280*.

40 Nyman Metcalf & Papageorgiu (2005), p. 28.

41 F. Barthélemy, *Un Continent en Quête d'Unité*, Les Editions ouvrières, Paris 1991, pp. 67-93.

42 L.R. Helfer & K.J. Alter, 'The Andean Tribunal of Justice and Its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community' (2009) 41 *N.Y.U. J. Intl L. & Pol.*, p. 871, at p. 880.

43 Helfer & Alter (2009), p. 880.

44 The ACCJ was originally established through the 1979 Treaty creating the Court of Justice of the Andean Community and its powers extended through the 1996 Cochabamba Protocol to the 1969 Cartagena Agreement (the original Andean Sub-regional Integration Agreement).

45 Treaty creating the Court of Justice of the Cartagena Agreement, 28 May 1979: (1979) 18 *ILM* 1203.

46 Cochabamba Protocol to the Treaty creating the Court of Justice of the Cartagena Agreement, 28 May 1996. For a consolidated version, *see*: <www.comunidadandina.org/ingles/normativa/ande_trie2.htm>. Visited 4 June 2010.

47 L.R. Helfer & K.J. Alter, 'The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community' (2009) 41 *Intl. L. & Pol.*, p. 871, at p. 874 and p. 880.

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Among its jurisdiction, the ACCJ controls the legality of Andean Community legislation, rules on actions for failure to act against a Member State, can receive references from national courts and may, where called upon do so, act as an arbitration mechanism between Andean Community institutions or between them and third parties.

## D. Jurisdictional and Case-law Migrations

### *I. Commonalities in Jurisdiction between the Three Courts*

As already indicated with respect to the ECJ model, there are two main competences which set that Court apart from classic international courts and which have, in general, been imported or emulated by regional organizations in Latin America. First the possibility of direct actions before the regional courts for judicial review of acts of the regional organization's organs is available before all the courts listed.[48] Secondly, the preliminary reference procedure from national courts – either to request the interpretation of regional community law or to test its validity or (usually) both – is available in both Central American and Andean jurisdictions.[49] Indeed the ECJ model for this procedure, under Article 267 TFEU (ex-Article 234 EC), more specifically provides that all courts may make such a reference but those courts, against whose decisions there is no judicial remedy, must make a reference: of the two Latin America regional courts, only the Andean one followed this distinction.

### *II. Dialoguing on Regional Constitutional Principles*

For the two Latin American courts, their case-law on the nature and effect of their regional community laws have been influenced by the ECJ's foundational jurisprudence in the cases of *Van Gend en Loos*,[50] *Costa v. ENEL*[51] and *Simmenthal*.[52] Together, these cases confirmed that European Community (now EU) law (i) formed a distinct legal order; (ii) enjoyed primacy over any conflicting national law; (iii) in certain circumstances, enjoyed 'direct effect', i.e. it created rights for individuals and companies who could rely on them directly as the basis of a claim before a national court; and (iv) implied (through its primacy) the non-application of conflicting norms of national law, without prior repeal by the legislator or annulment by a constitutional court.

This short paper certainly focuses on comparative analysis, the citation and discussion of ECJ foundational decisions before the CCJ and ACCJ are a classic example of horizontal dialogue, in which courts of the same status treat foreign

48 CCJ Statute Art. 22 b); and ACCJ Treaty Arts. 17-22.

49 CCJ Statute Art. 22 k); and ACCJ Treaty Arts. 32-36.

50 Case 26/62 *N.V. Algemene Transport- en Expedite Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

51 Case 6/64 *Costa v. ENEL* [1964] ECR 585.

52 Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

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judicial decisions as valuable sources to help elucidate the issues at hand and to suggest new approaches to similar problems.[53] It has been stated that:[54]

> As courts look all over the world for sources of authority, the process of international influence has changed from reception to dialogue. Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather cross-pollination and dialogue between jurisdictions is increasingly occurring.

Nevertheless sight must not be lost of the fact that the previously indicated factors influencing the choice of regional organizations and courts only explains part of the readiness of the CCJ and ACCJ to use ECJ constitutional case-law. These regional courts have no shared history or legal tradition, neither is their dialogue based on any formal, treaty-based organizational structure or hierarchy:[55] "Rather they are engaging each other out of a developing sense that they are part of a common enterprise." There is evidently a need from these courts, when seeking to put flesh on Treaty provisions, to look to the "Mother of all regional economic community courts" for inspiration and justification in their decision-making.

*III. Central American Court of Justice*

Despite its relatively fewer decisions when compared with its sister court in the Andean region, the CCJ has clearly been guided by the fundamental case-law of the ECJ and even that of its Latin American counterpart, the ACCJ. In a 2001 case, it held:[56]

> The Court of Justice of the European Communities, the Luxembourg Court, has confirmed it in a repeated manner since the case of *Costa v. ENEL* of 15 August 1964 in which ... it has established that that all claims by States to insist upon their constitutional criteria as prevailing above the norms of Community law is a fermenting agent for dislocation, contrary to the principle of membership to which the Member States submitted themselves freely and in a sovereign manner. Moreover, the Luxembourg Court in its historic case *Van Gend en Loos* has clearly established that the Community Treaties conferred on individuals rights that the national courts had to protect, not only when the provisions in question considered them as legal subjects, but also when they imposed a well-defined obligation on the Member States. The

53 A-M. Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *U. Rich. L. Rev.*, p. 99, at pp. 103-106.

54 C. L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998). 34 *Tulsa L.J.* p. 15, at p. 17.

55 M.A. Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) 93 *Georgetown L.J.*, p. 487, at p. 492.

56 CCJ, 27 November 2001, *Nicaragua v. Honduras – Asunto del Tratado de Delimitación Maritima entre la República de Honduras y la República de Colombia*.

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> Court of Justice of the Cartagena Agreement [ACCJ] has equally confirmed this on many occasions in the cases *1-IP-87*, *2-IP-88* and *2-IP-90*.

In Case *5-11-96*,[57] the CCJ reaffirmed its decisions contained in Cases *4-1-12-96;*[58] *2-24-5-95*;[59] and *2-5-8-97*;[60] together with the opinion of a number of EU law academics as regards the guiding principles of Central American Community law. Having noted that such Community law was separate with its own autonomous legal order, the Court noted its primacy "since Community norms occupy a place of priority with respect to national norms, given that its application is given preference or priority with respect to the national law of the Member States, primacy of an absolute character includes respect for constitutional norms" because the effects of Community law could be annulled or avoided by the Member States. In dealing with direct effect and its implications, the CCJ held:

> Its immediate applicability, as it automatically becomes – in a clear, precise and unconditional form – internal norms of the Member States, without needing any [domestic]act to incorporate the Community norms into national law, without them being confused with national law and without the national authorities having compulsorily to apply national law; its direct effect or applicability, as the Community norms can create in themselves rights and obligations for individuals, or impose on Member States their realisation and implementation by which they have full effect.

Finally, the Court referred to the principle of state liability, "formulated by the CJEC, which affirms that the States are obliged to make good damages caused to individuals as a consequence of the breach of Community norms". All these principles had been recognized in the doctrine of the CCJ which, according to Article 3 of the Convention on the Statute of the Court, had binding effect on all states, organs, and organizations that formed part of or participated in the SICA as well as for subjects of private law.

The CCJ has even gone so far as to employ the methodological approach to interpretation of Community law as that used by the ECJ[61] and was able to maintain that "between the law of integration – Community law – and national laws, harmony must exist since the law is a whole which must be analysed principally in a systematic and teleological manner, like a single normative body".[62]

57 CCJ, *10-5-11-96*, *Coto Ugarte v. Consejo Superior Universitario de la Universidad de El Salvador – Demanda por el Desconocimiento del Convenio Sobre el Ejercicio de Profesiones Universitarias y Reconocimiento de Estudios Universitarios y del Protocolo al Tratado General de Integración Económica o Protocolo de Guatemala*.

58 CCJ, *4-1-12-96* concerning PARLACEN and the Guatemala Constitutional Court.

59 CCJ, *2-24-5-95* concerning SICA, the Tegucigalpa Protocol and ALIDES.

60 CCJ, *2-5-8-97* concerning SIECA and the Convention on the Central America Regime for Tariffs and Customs.

61 *See generally*, T. Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 *EL Rev*. 199.

62 CCJ, 27 Novembre 2001, *Nicaragua v. Honduras – Asunto del Tratado de Delimitación Maritima entre la República de Honduras y la República de Colombia*.

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*IV. Andean Community Court of Justice*

The ACCJ much earlier than the CCJ set out its own understanding of Andean Community law, its nature and effect, following closely the ECJ rulings already mentioned.[63] In ruling *08-IP-96*,[64] the ACCJ held that: "an autonomous legal order, with its own system of making laws, enjoys a specific force of penetration into the internal legal order of the Member States born of its own nature, which is manifested in its immediate applicability and, fundamentally, in its direct effect and primacy."

Just like the ECJ, the ACCJ has held that the principle of supremacy derives from its direct application.[65] In case *76-IP-2005*,[66] the ACCJ stated that: "The principle of direct applicability assumes that the Andean Community norm goes on to form part of the internal order of each and every Member State of the Community ... and therefore Community law prevails as such and gives rise in every national judge the duty to apply it." In fact, the ACCJ has not been reticent in explaining in detail its understanding of Andean Community law and has been heavily influenced in this by the case-law of the ECJ. In decision *02-IP-90*,[67] the ACCJ set out at length how primacy of Community law was to act in practice:

> Integration law, as such, cannot exist if the principle of its primacy or prevalence over the national or internal laws of the member States is not accepted... In those matters whose regulation devolves upon Community law, according to the fundamental or basic norms of the integrationist order, it automatically produces a displacement of competency, which passes from the national to the Community legislator. The organised Community invades or occupies, so to speak, the national legislative ground, by reason of the subject, displacing in this way domestic law. The national legislator thus remains incompetent to modify, substitute or derogate from Community law in force on its territory, whether under the pretext of reproducing it or regulating it, and the national judge, whose duty is the application of Community laws, is obliged to guarantee the full effect of the Community norm... The law of integration does not annul national laws, which are intruded into the domestic order: just that it makes them inapplicable those laws which are contrary to Community norms. This does not prevent, of course, within the national order every norm that is incompatible with Community law to be considered unconstitutional.

63 J.J. Calle y Calle, 'La Supranacionalidad y la Jurisdicción del Tribunal de Justicia de la Comunidad Andina' (2000) 50 *Revista Peruana de Derecho Internacional* No. 116, 53.

64 ACCJ, *08-IP-96*, caso 'ELCHE', G.O.A.C. 261 del 29 de Abril de 1997.

65 *See generally*, J.R. Reyes Tagle, 'El Principio de Supremacía del Derecho Comunitario y las Constituciones de los Estados Miembros de las Comunidades Europea y Andina' (2006) 56 *Revista Peruana de Derecho Internacional* No. 133, 190.

66 ACCJ, *76-IP-2005*, de 22 de Junio de 2005.

67 ACCJ, *02-IP-90*, G.O.A.C. N 69, de 11 de Octubre de 1990.

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It reinforced its opinion on primacy of Andean Community law by express reference to and direct quotation from *Costa v. ENEL* in the later decision, *03-AI-96*,[68] in which the ACCJ stated:

> The legal basis for the doctrine of supremacy/primacy of Community law was given through the ruling of the CJCE on 15 July 1964 in the Costa case. In it, according to which 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

In analysing the sources of Andean Community law, the ACCJ had previously stated in decision *01-IP-96*[69] that the treaties constituting the Andean Community together with their amending protocols[70] were at the summit of the whole Community legal order, and constituted the original basis of Community law. It noted that among Europeans, such norms were referred to as the 'Community Constitution', in order to indicate their independent nature and their being the primary source of law, from which the other sources of Community law were derived and to which these subsidiary sources were subject. Redolent of *Van Gend en Loos* and *Costa v. ENEL*, the ACCJ continued to explain further the nature of Andean Community law:[71]

> It can be affirmed that the basic characteristic of the Community legal system is the one that the States in a sovereign manner cede part of their regular competencies transferring them from the sphere of internal state action to the sphere of Community action through the putting into practice and development of the aims of sub-regional integration. In this way, the constitutive treaties – primary law – join the legal acquis issued by the organs of Community control like the Commission and the Junta of the Cartagena Agreement, that by means of legal norms of the supranational order – derived law – regulate matters that have originally formed part of the exclusive com-

68 ACCJ, *03-AI-96*, G.O.A.C. Nº. 261, 29 April 1997.

69 ACCJ, *01-IP-96*.

70 As indicated specifically in Art. 1a) and b) of the Treaty creating the Court of Justice of the Cartagena Agreement.

71 Similarly in decision *03-AI-98*, the ACCJ stated: "This legal order nourishes itself from two sources: from one source 'original', 'primary' or 'constitutional' that stands formed by the provisions contained in the Cartagena Agreement and in the Treaty on the Court of Justice, with their respective amending protocols.

The other source is the one which springs from 'derived' or 'secondary' law, including the Decisions of the Council of Foreign Affairs Ministers and of the Commission of the Cartagena Agreement and from the Resolutions emanating from the Junta, now the Secretary General.

The arranging in order of importance between some or other norms springs from the actual content of the first article of the Treaty creating the Court, from which a relation of subordination is deduced between original law and derived law."

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> petence of the Member States, which States resolved in a sovereign manner to transfer them as a 'competency of attribution to the said organs

The ACCJ has also addressed the principles of direct effect and direct applicability and has underlined the close links between them. It noted in decision *02-N-86*[72] that the norms of the Andean legal order, (whatever their form, i.e., treaties, protocols, agreements, conventions or resolutions) were, as a rule, of direct effect and directly applicable in all the Member States from their publication in the Official Gazette of the Cartegena Agreement. As a result, they were of binding and immediate effect for the Member States, the organs of the Agreement and individuals.

Subsequently, in decision *03-AI-96*,[73] the ACCJ – using the ECJ rulings in *Van Gend en Loos* and *Simmenthal* – explained how it understood direct applicability and direct effect to operate in the Andean Community context:

> In the European area, the principle of direct applicability has been recognised since the ruling Van Gend en Loos, 1963, of the CJEC, and specified in the ruling Simmenthal, 1978, in which it maintained that direct applicability means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.

It continued by observing that the principle of direct effect was related to the legal proceedings that parties could initiate to protect the infringement of their rights under Community law. In other words, Andean Community law would generate rights and obligations for individuals as happened through the national legal norms and thus allowing for the possibility that such individuals could directly demand their observance before their respective national courts.

## E. Conclusion

The emulation of the EU's own model of co-operation, partnership and regional integration[74] includes its own particular judicial model that implicitly carries with it the opportunity for each regional court to develop the legal ways to regional integration, using the ECJ case-law if not as precedent then at least as inspiration. Since legal integration and the constitutionalization of the basic Treaties of the European Union were achieved by the ECJ, the prospects for regional courts in Latin America remain pregnant with possibilities, given the wording of their

72 ACCJ, *02-N-86*.

73 ACCJ, 03-AI-96, G.O.A.C. Nº. 261, 29 April 1997.

74 C. Bretherton & J. Vogler, *The European Union as a Global Actor*, Routledge, London and New York 2004, at p. 8.

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own regional (economic) community treaties and the regional courts' jurisdiction in many ways similar to that of the ECJ.

Nevertheless, the constitutionalization of the legal orders in Central America and the Andean region has not so far happened. In part, this is occasioned by political problems: the Statute of the CCJ has not been ratified by all the Member States of the SICA and, in particular, Costa Rica maintains a vehement opposition to the Managua Court in political discourse;[75] the ACCJ, for its part, has been handicapped in its integration agenda by divisions between, on the one hand, Colombia and Peru, and, on the other, Bolivia and Ecuador.[76]

In addition, the reticence of national judges in Latin America to engage in dialogue with regional courts – a matter which was instrumental in the development of EU law and led to judicial empowerment for lower-level national courts[77] – is in marked contrast to that in the European Union.[78] Both the CCJ and the ACCJ, irrespective of the number of cases dealt with, have not pursued an integrationist agenda with the same vigour as the ECJ and this, it may be argued, is as much linked to the scope of the economic rights contained in the respective regional treaties as it is to the actual jurisdiction of the courts and their interest in pursuing such an agenda.[79]

In fact,[80] in contrast to the European process, the countries of Latin America have attempted to execute an integration process without meeting the constitutional requisites at national and European level. The focus so far has only been on political and economic considerations together with, at most, very elementary community constitutional interpretation by the regional courts, based on the foundational constitutional case-law of the ECJ. It therefore remains to be seen whether emulation of the constitutional concepts enunciated by the ECJ will eventually bring forth Latin American regionalism based on EU foundational principles.

75 Nyman Metcalf & Papageorgiu (2005), pp. 32-34.

76 Whereas Colombia and Peru have free trade agreements with the USA and both countries at the recent EU-LAC summit in Madrid agreed similar deals separately with the EU, the Ecuadorian and Bolivian governments are opposed or sceptical of such moves outside the framework of the Andean Community.

77 K.J. Alter, *Establishing the Supremacy of European Law: The Making an International Rule of Law in Europe* 2001, pp. 48-52.

78 Helfer & Alter (2009), pp. 920-930. *See also* E. Tremolada, 'Application of the Andean Communitarian Law in Bolivia, Ecuador, Peru, and Venezuela in Comparison with the European Union Experience', January 2006, 6/3 Jean Monnet/Robert Schuman Paper Series, Miami European Union Center University of Miami (2006): <www6.miami.edu/EUCenter/Tremoladafinal.pdf>. Visited 6 June 2010.

79 *See generally*, O. Saldías, 'Supranational Courts as Engines of Disintegration: The Case of the Andean Community', *Berlin Working Paper on European Integration* No. 5, Freie Universität Berlin, Berlin 2007.

80 A.R. Brewer-Carías, 'Constitutional implications of regional economic integration', *in* J.W. Bridge (Ed.), *Comparative Law Facing the 21st Century*, 20 United Kingdom Comparative Law Series, UKNCCL 2001, p. 729, at p. 751.