

**REASONS GIVEN FOR THE DENUNCIATION
OF THE “PACT OF BOGOTÁ”:
CRITICAL ANALYSIS AND PROPOSALS**

RAZONES PLANTEADAS PARA LA DENUNCIA
DEL “PACTO DE BOGOTÁ”:
ANÁLISIS CRÍTICO Y PROPUESTAS

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Abstract

The Pact of Bogota has not had the success that was expected at the time of its signing; overtime, more than half of the signatory states did not ratify it, and member states have given different reasons for its effective or possible denunciation. This article addresses these reasons in detail, through cases and secondary sources, in order to determine their plausibility. Finally, an alternative dispute resolution system between Latin American states is proposed, through a scheme in which mediation and arbitration converge to save the Pact's major goals, and with it, the treaty-based longstanding tradition of peaceful resolution of conflicts in the Latin American region.

Keywords: Pact of Bogota, International Court of Justice, international dispute resolution, arbitration, mediation

Resumen

El Pacto de Bogotá no ha tenido el éxito esperado al momento de su firma; más de la mitad de los estados signatarios no lo han ratificado, y los estados miembros han planteado diferentes razones para su efectiva o posible denuncia. Este artículo aborda aquellas razones en detalle mediante el estudio de casos específicos y fuentes secundarias, con el fin de determinar la plausibilidad de las mismas. Finalmente, se propone un sistema alternativo de resolución de disputas para los estados latinoamericanos, a través de un esquema en el que la mediación y el arbitraje convergen para rescatar los objetivos principales del Pacto de Bogotá y, con ello, la larga tradición de resolución pacífica de conflictos en la región latinoamericana.

Palabras clave: Pacto de Bogotá, Corte Internacional de Justicia, resolución internacional de disputas, arbitraje, mediación

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Let us say that, upon hearing the ruling, the fishermen of San Andres and Providencia celebrate with joy because they have not understood, and believe that what they have just heard is good news: that if they have the cays, they have everything. But then someone explains to them that they do have the cays, but not the waters, and then the fishermen get scared because the fishing is not in the twelve miles left to them but in the hundreds of miles that were taken away from them and in which they - and before their parents and before their grandparents - have fished without restriction during the last two centuries.

Leila Guerriero, "Digamos Providencia,"
El Mercurio, December 15, 2012. ¹

¹ Unless otherwise noted, all translations from Spanish are ours.

I. Introduction

According to Article 33 of the UN Charter, disputes between sovereign states must be resolved peacefully. The American Treaty on Pacific Settlement, also known as the “Pact of Bogota” (hereinafter, also the “Pact” or the “Treaty”), signed in 1948 in the Colombian city of Bogota, is consistent with this international principle. However, less than half of the signatory states ratified it over time,² two have denounced it,³ and in others states permanence hangs on a thin thread. In fact, during the last years, there has been considerable speculation about the possibility of a denunciation of the Pact in Chile, one of the member states. The problem seems to be not, of course, the essence of the treaty—the peaceful resolution of conflicts between states—, but rather the body called to resolve these disputes: the International Court of Justice (ICJ).

This article aims to address the reasons different states have given for an effective or possible withdrawal from the Pact, in order to reach a solution to the problem that is consistent with the principles of International Law. As will be analyzed, the Pact’s apparent problem—the mandatory jurisdiction to the ICJ—is debatable, because the substance of the discussion arises in relation to the continental legitimacy of the ICJ and the political and legal value that the Latin American region assigns to the controversies brought before this Court of Justice. Nonetheless, in our opinion, the solution does not lie in denouncing the Pact, but in coming up with a new mechanism to resolve disputes between Latin American sovereign states. In this vein, this article has two main goals: first, to identify the arguments that states have used to renounce the international jurisdiction of the ICJ and analyze their origins; and second, to propose the merging of two mechanisms for the resolution of conflicts in place of the ICJ, that is, a hybrid scheme that implies both mediation and arbitration.

II. The American Treaty on Pacific Settlement: the “Pact of Bogota”

On April 30, 1948, 35 American states signed the Pact of Bogota. The purpose of this treaty was to establish a true inter-American peace system to resolve controversies among sovereign states, replacing the multiple Conventions that had been signed in

² 16 states ratified the Treaty out of the 35 that signed it. See Organization of American States, Convención Americana sobre Derechos Humanos, “Pacto de San José”, 7-22 noviembre 1969, art. 9.

³ Colombia and El Salvador.

the Americas until that point.⁴ The History of this Law in Chile⁵ explains how the Pact innovated in the resolution of controversies:

In the discussions originated regarding the reason for the elaboration of the American Treaty on Pacific Settlement, the two traditional theses on this matter confronted, that is to say: one, that only accepts the obligatory nature of arbitration for questions of a legal nature; and another, which favors compulsory and comprehensive arbitration for all kinds of disputes, whatever their nature or origin.

The Conference tried to obtain the agreement of all the participating delegations, and this was how it was pronounced by a compromise or eclectic formula between these two theses, which achieved the acceptance of all States, except for the United States of America. By virtue of it, as provided in the Pact of Bogota, compulsory recourse to judicial procedure is established, replacing compulsory arbitration. This is equivalent to making it mandatory to appeal to the International Court of Justice in The Hague when other means of peaceful resolution of a conflict fail, and only in the event that said International Court declares itself to lack jurisdiction, the mandatory arbitration proceeding applies.⁶

⁴ Before the signing of this treaty, the inter-American peace mechanism was based on the following Agreements: (i) Treaty to prevent or prevent conflicts between the American states, of May 3, 1923 (“Gondra Pact”); (ii) General Convention of Inter-American Conciliation, of January 5, 1929; (iii) General Treaty on Inter-American Arbitration, January 5, 1929; (iv) Protocol of Progressive Arbitration, January 5, 1929; (v) Additional Protocol to the General Convention of Inter-American Conciliation, of September 26, 1933; (vi) Convention on Maintenance, Consolidation and Restoration of Peace, December 23, 1936; (vii) Convention to Coordinate, Expand and Secure the Compliance with Existing Treaties between the American States, December 23, 1936; (viii) Inter-American Treaty on Good Offices and Mediation, December 23, 1936; (ix) Treaty Concerning the Prevention of Disputes, December 23, 1936; (x) Anti-war Treaty of Non-Aggression and Conciliation, October 10, 1933; and (xi) Inter-American Treaty of Reciprocal Assistance, September 2, 1947. *Historia del Decreto No. 526 Tratado Americano de Soluciones Pacíficas* *4–5 (Biblioteca del Congreso Nacional de Chile, 1967)

⁵ In Chile, international treaties are enacted through a Supreme Decree and then published. Once both formalities are fulfilled, a treaty is incorporated into the national legal order, “as a law of the Republic.” See, Hugo Llanos Mansilla, “Los Tratados Internacionales en la Constitución De 1925 y en la Jurisprudencia,” *Ius et Praxis* 9, No. 1 (2003): 223–244. doi: 10.4067/S0718-00122003000100012..

⁶ See *supra* note 4, 9–10.

In sum, the Treaty's Fourth chapter declares, regarding its judicial procedure, that the member states accept the mandatory jurisdiction of the ICJ for the resolution of disputes. In this regard, the Pact distinguishes between two cases: first, Article XXXI (which reproduces Article 36-2 of the ICJ's Statute) refers to disputes of a legal nature, which may be brought before the Court at any time; and second, Article XXXII (which leans more toward Article 36-1 of the Court's Statute) extends the jurisdiction of the ICJ, making it applicable to all disputes regardless of their legal or non-legal nature.⁷ In the latter case, a conciliation procedure will apply first and, if it does not work, any of the parties may appear before the Court, and the other party is compelled to accept the Court's jurisdiction.⁸ Also, it is important to note that issues already solved are exempt from the procedures of the Treaty (Article VI), as well as those "matters resolved by previous treaties valid at the time of its entry into force."⁹

Finally, regarding arbitration, the Pact's Fifth chapter states that the members agree on the following: "Notwithstanding the provisions of Chapter Four of this Treaty, the High Contracting Parties may, if they so agree, submit to arbitration differences of any kind, whether juridical or not, that have arisen or may arise in the future between them."¹⁰

The Pact has only been partially successful over time: even though 35 states signed it (most with reservations about different points),¹¹ only 16 ratified it over the years;¹² and currently, 14 members remain after the denunciations presented by El Salvador on November 24, 1973 and by Colombia on November 27, 2012. The current member states are, for the time being: Bolivia, Brazil, Costa Rica, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Chile.

⁷ Luis García-Corrochano Moyano, "El Tratado Americano de Solución Pacífica de Controversias (Pacto de Bogotá)," *Revista Agenda Internacional* 4 (1997): 57.

⁸ In *Nicaragua v. Honduras*, the Court ruled the following: "In short, articles XXXI and XXXII [of the Pact] provide two different ways by which the Court can be accessed. The first refers to cases in which the Court may be directly required, and the second, in cases in which the parties initially resorted to conciliation." Max-Planck-Institute for International Law, *World Court Digest*. Vol. 1, 1986-1990 (Berlin: Springer, 1993), 72. Also see *supra* note 7, 57.

⁹ *Ibid.*, 53.

¹⁰ Organization of American States (OAS), American Treaty on Pacific Settlement, "Pact of Bogota", April 30, 1948, <http://www.refworld.org/docid/3de4a7c24.html>.

¹¹ To see these reservations, see Maria Teresa Infante Caffi, "The Pact of Bogota: Cases and Practice," *Anuario Colombiano de Derecho Internacional* 10 (2017): 88-91. doi: 10.12801/revistas.urosario.edu.co/acdi/a.5294.

¹² The states that signed the Pact but never ratified it (and, therefore, are *not* under the mandatory jurisdiction of the International Court of Justice) are Argentina, Guatemala, Venezuela, Cuba, Canada, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent & Grenadines, Suriname, Trinidad & Tobago, and the United States of America

III. Reasons given to denounce the Pact

In 2009, Herdocia Sacasa wrote that the Pact of Bogota not only was not dead, but it was enjoying great health.¹³ This seems not longer to be the case. Not only an overwhelming majority of states did not ratify the treaty (and therefore are not bound by it), but also two have withdrawn from it, and it seems that at least one more member state is aiming toward that same direction.

So, what went wrong with the Pact? Its objectives are clearly in line with International Law principles accepted by all signing members.¹⁴ Presidents in office, former Presidents, respected individuals in the field and influential newspaper editorials have stated different opinions supporting the denouncing of the Pact, marking a way out from the mandatory jurisdiction of the ICJ. Some reasons are legal and others are political in nature.

When El Salvador denounced the Pact in 1973, the decline of the Treaty's validity was plain in the reasons that motivated said State to withdraw from it. In this spirit, El Salvador's denunciation stated that: "The realities that have become apparent over time as a result of the failure of a large number of signatory states to ratify it show that the system developed in the Pact of Bogota has not proven effective for the purposes that inspired it, and that it is not acceptable to many states of the Americas, since several of them signed or ratified it with reservations and not all new members of the Organization have acceded to it."¹⁵

Juan Manuel Santos, the President of Colombia in office since 2010, stated in 2012 in his official capacity: "I have decided that the highest national interests demands that the territorial and maritime delimitations be settled by treaties as has been the tradition, and not by judgments."¹⁶ Regarding the reasons for such a decision, Santos said that "the boundaries between States must be settled by the States themselves, boundaries should not be left to a Court, but must be established by mutual agreement in treaties."¹⁷

¹³ Mauricio Herdocia Sacasa, "El resurgimiento del Pacto de Bogotá," *Agenda Internacional* 16 (2009): 67.

¹⁴ See *supra* note 2.

¹⁵ Denunciation filed by El Salvador, "Signatories and Ratifications," the Organization of American States, accessed June 16, 2018, <http://www.oas.org/juridico/english/sigs/a-12.html#El%20Salvador>.

¹⁶ "Santos explicó por qué Colombia se retira del Pacto de Bogotá," *El Universal*, November 28, 2012. <http://www.eluniversal.com.co/cartagena/nacional/santos-explico-por-que-colombia-se-retira-del-pacto-de-bogota-99894>.

¹⁷ *Ibid.*

Regarding Chile's position, former president Eduardo Frei (1994-2000) argued recently: "Does The Hague [the ICJ] vote for treaties or agreements, or vote to fix issues and give a little to each? That is what we have seen, and Chile cannot forget: The Hague does not vote only for treaties and agreements that exist. That is worrisome."¹⁸ Frei's statement is preceded by the ICJ's decision on Peru's claim against Chile (analyzed *infra*), in which the former sought the tracing of a new maritime border with the latter in the Pacific Ocean, and *partly* succeeded. Regarding this same judgment, in 2014, the well-known Spanish Journal "El País" titled a note on it *Solomonic decision of The Hague in the maritime litigation between Chile and Peru*.¹⁹

In the same spirit, a Chilean academic recently wrote, regarding Chile's position toward the Pact, that "withdrawal from the Pact of Bogota becomes inevitable. Respected academics and diplomats have argued that this Pact provided Chile with an area of security, protected by International Law. This argument was—at least—questionable, considering the erraticism of the application of law by a panel of judges that has numerous political appointments."²⁰ Furthermore, Gabriel Gaspar, former Chilean ambassador in special mission for the Bolivian claim in The Hague, similarly stated that "Personally, I think we [Chile] should withdraw [from the Pact]. The basic objective is not met, which is to respect the treaties. The base on which we adhered is being altered. And it is not just about the Bolivian case. It has a precedent in the claim for the maritime boundary of Peru [...]. We stand before a Court that does not rule with the application of the law, but seeks to create it, to interpret it; we need a Court that applies, not that revises."²¹

In line with the arguments pointed above, the most influential journal in Chile, *El Mercurio*, published an editorial encouraging the denunciation of the Pact. The reasons are the following: "Withdrawing from the Pact of Bogota and the Court of The Hague does not imply challenging the international legal order: there is always the possibility of voluntary appearance and, besides diplomacy, there are better and more reliable formulas for peacefully resolving disputes between states. Of course, mediators and arbitrators are chosen according to their suitability and prestige, unlike those [judges] of The Hague, who are elected by vote of the General Assembly of the United Nations, where politics and geographical representation are key."²²

¹⁸ Jorge Soto and Alex Von Baer, "Ex Presidente Eduardo Frei abre debate sobre continuidad de Chile en el Pacto de Bogotá," *El Mercurio*, January 23, 2018, C4.

¹⁹ Isabel Ferrer, "Decisión salomónica de La Haya en el litigio marítimo entre Chile y Perú," *El País*, January 27, 2014. https://elpais.com/internacional/2014/01/27/actualidad/1390836755_275707.html.

²⁰ Fernando Wilson, "El inevitable retiro del Pacto de Bogota," *La Tercera*, April 2, 2018. <http://www.latercera.com/opinion/noticia/inevitable-retiro-del-pacto-bogota/119818/>.

²¹ Matías Bakit, "Pienso que deberíamos retirarnos del Pacto de Bogota," *El Mercurio*, March 11, 2018, D14.

²² "Denunciar el Pacto de Bogota," *El Mercurio*, February 12, 2018, A3.

In short, the arguments in favor of denouncing the Pact are: (i) border conflicts must be resolved through treaties, not in adversarial forums; (ii) the ICJ does not respect treaties but resolves cases by giving a little to each party, in a *Solomonic* way; (iii) the ICJ applies the law erratically, with judges who are elected politically; and (iv) there are more reliable ways of resolving disputes between states. In the next section we will analyze these arguments in order to determine their plausibility.

IV. Arguments' plausibility

A. Conflicts should be resolved through treaties, not in adversarial forums

The Colombian president, after the verdict in the case against Nicaragua in 2012 was issued, declared that border disputes should be resolved through treaties, and withdrew Colombia from the Pact. However, in 2016, the ICJ declared that it had jurisdiction to adjudicate two additional claims filed by Nicaragua against Colombia in 2013,²³ despite Colombia's definitive withdrawal from the Pact.²⁴ In 2017, and regarding the same conflict that both states maintain in the Caribbean Sea, the ICJ adjudicated *two counterclaims*²⁵ submitted *by Colombia* against Nicaragua.²⁶ By lodging these counterclaims, Colombia is implicitly recognizing the fact that disputes between sovereign states cannot be successfully resolved solely through negotiations.

²³ "Corte de La Haya se declara competente en la demanda de Nicaragua contra Colombia," *BBC Mundo*, March 17, 2016, http://www.bbc.com/mundo/noticias/2016/03/160317_nicaragua_colombia_corte_haya_competente_bm.

²⁴ It is important to bear in mind that the effect of withdrawing from the Pact of Bogota is not immediate, as for one year the mandatory jurisdiction of the ICJ is maintained, according to the Treaty's Article LVI.

²⁵ Regarding alleged violations of sovereign rights and maritime spaces in the Caribbean Sea.

²⁶ In these counterclaims Colombia seeks that the Court declares that: (i) Nicaragua has violated the artisanal fishing rights of the inhabitants of the Archipelago, in particular of the Raizal community, to access and exploit their traditional fishing grounds; and (ii) Nicaragua has issued a decree contrary to international law related to the points and baselines from which it measures its maritime spaces in the Caribbean Sea, seeking unilaterally to adjudicate marine areas with detriment of Colombia. Colombian Ministry of Foreign Affairs, "Comunicado de prensa sobre los avances en la defensa de Colombia en el caso Supuestas Violaciones de Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)" [in Spanish], accessed April 25, 2018, <http://www.cancilleria.gov.co/en/newsroom/publicques/comunicado-prensa-avances-defensa-colombia-caso-supuestas-violaciones-derechos>.

This erratic alignment denotes a fundamental issue: international treaties are not all-encompassing nor do they settle definitively the issues that were subject to the immediate negotiation. Underlying Colombia's criticism is an in-depth questioning of the hierarchical consideration made by the ICJ regarding treaties between states. By the same token, this is not a question about the international judiciary as an impartial third party capable of resolving international disputes, but to the mechanism it applies to settle them. It is important to bear in mind that the ICJ's judicial decisions have a fully binding character, even when compliance with their judgments is not necessarily enforceable. In this spirit, once its jurisdiction is recognized, the door is open to resolve the matters that are brought before it. On the other hand, and consistent with the foregoing, it is logical that a block of agreements based on an international treaty can coexist with another block of matters subject to a supranational decision mechanism when the interpretation of these instruments is not harmonious in each of its parts.

Firstly, the effectiveness of the judicial decisions issued in the international public order, whatever the form in which it is manifested, does not significantly depend on the mechanism of enforcement, but on the states' willingness to comply with them on the grounds that they recognize the international jurisdiction of the body that issues the decision. On this same perspective: "considering its socio-legal importance, international enforcement has enjoyed relatively meager doctrinal attention. One group of scholars has assumed that the major factor producing compliance in international law is 'conscience' or 'compelling morality.' [...] A second approach to enforcement simply presumes compliance. In numerous statements, the Permanent Court and the International Court of Justice have refused even to consider the possibility of non-compliance."²⁷ Therefore, even if a judgment is to be mandatorily enforced by nature, and in accordance with principles of International Law, its enforcement will depend ultimately on the will of the state against which the judgment is issued.

Secondly, even if the final judgment is not enforced by the required state, it does not lose its binding character: its strength comes from the fact that supra-state jurisdiction is incorporated into the state's legal order on the basis of an international treaty, that is, by virtue of a legislative decision of the state itself. The international jurisdictional body governs inasmuch as an internal state rule commands it to do so, and its judgments have binding force because they are the manifestation of that jurisdiction.

²⁷ William Michael Reisman, "The Enforcement of International Judgments," *American Journal of International Law* 63 (1969): 2.

Thus, in our opinion, the line of questioning analyzed in this section is not plausible, because the existence of a rule that incorporates international jurisdiction into the regulatory framework of a particular state allows international treaties to be interpreted through the courts, though only in the way provided by the international legislation governing the relationship between the states.²⁸

B. ICJ's way of resolving cases: A representative analysis

The ICJ, until June 2012,²⁹ had “dealt with approximately 58 judgments on merits, 23 preliminary objections, eight judgments on jurisdiction and admissibility, and 30 requests for provisional measures.”³⁰ Since 2013, the ICJ has adjudicated 14 contentious cases.³¹ In this context, there are many cases in which the application of *Solomonic* criteria to decide has been questioned. Next, we will mention some representative cases:

i. Representative cases before the ICJ

The selected cases have the particularity that, in the first place, they have a material territorial and borderline element and, secondly, they do not only refer to equity as the judgment's basis, but that it becomes, accompanied by other arguments, as part of the general analysis the ICJ makes in each case. The cases that will be presented are proof that the ICJ, in a relevant number of cases, not only argues in terms of traditional legal interpretation, but that it applies an open logic based on sources that seem to it of greater significance and usefulness.³²

²⁸ Carlos Manuel Vázquez, “Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties”, *Harvard Law Review* 122, (2008): 622.

²⁹ From 1922 to 1946, “the Permanent Court dealt with 33 contentious cases and 28 advisory opinions.” Ian Brownlie and James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012), 732.

³⁰ *Ibid.*

³¹ “List of All Cases,” International Court of Justice, accessed May 3, 2018, <http://www.icj-cij.org/en/list-of-all-cases>.

³² Alexander Cruz Martínez, “La labor hermenéutica de la Corte Internacional de Justicia en el fallo del diferendo territorial y marítimo entre Nicaragua y Colombia,” *Estudios internacionales* 46 (2014): 115.

1. *Burkina Faso v. Mali* ³³

In the border dispute between Burkina Faso and Mali, these States gave the ICJ jurisdiction over their conflict on the sovereignty over “a strip of land containing a temporary watercourse that was important for agriculture and grazing in the Dori region around the Béli River.” ³⁴ In deciding on this case, the ICJ “essentially halved the disputed territory, in recognition of inconsistencies and gaps in the record. When such inconsistencies or gaps existed, the court proceeded in equity, dividing the disputed territory in half.” ³⁵ It is plain in this case that the ICJ decided a territorial dispute in equity; which in the ICJ’s concept gravitates strongly toward giving something to each party.

2. *Nicaragua v. Colombia* ³⁶

On December 6, 2001, Nicaragua lodged a claim against Colombia with respect to a dispute “concerning title to territory and maritime delimitation” in the western Caribbean. ³⁷ In brief, the judgment stated that the islands of San Andrés, Providencia, and Santa Catalina were Colombian; recognized the sovereignty of the same country over the other formations that make up the archipelago of the same name; but also ruled that the maritime border of the referred archipelago with Nicaragua was not delimited, and therefore established—by

³³ Regarding this case, it is important to note that: “We have stated before that the judgment admits the possibility of using complementary methods for the resolution of a controversy in which the *uti possidetis* is applied. In the present case, the parties did not agree with the application of equity, for which reason the Court opted to apply it *infra legem* ‘qui est un méthode d’interprétation du droit et en est l’une des qualités’”. Pablo Moscoso de la Cuba, “El Uti Possidetis en la Sentencia de la Corte Internacional de Justicia sobre el Asunto del Diferendo Fronterizo entre Burkina Faso y Mali,” *Agenda Internacional* 14 (2007): 296.

³⁴ Brian Taylor Sumner, “Territorial Disputes at the International Court of Justice,” *Duke Law Journal* 53 (2004): 1797.

³⁵ *Ibid.*

³⁶ See *supra* note 32, 127:

Through its jurisprudence (*Libyan Jamahiriya v. Malta* 1985 and *Romania v. Ukraine*, 2009) the ICJ has design a method of delimitation when there is an overlap between the continental shelves and the rights of the exclusive economic zone. According to it three stages are covered that comprises the geometric trace of a middle line between opposite coasts, followed by consideration of relevant circumstances that may lead to adjustments to the provisional line and the final application of a test of disproportionality. The ICJ warned in a preliminary way that the method should not be applied mechanically, so it could make changes, as it had done in the past (*Nicaragua v. Honduras*, 2007), deviating from its precedents, especially due to particular conditions such as the disparity of the coasts and that the most relevant area is at the east. That is to say, it would apply equity as the basis of its decision.

³⁷ Territorial and Maritime Dispute (*Nicaragua v. Colombia*), 2001 ICJ 121, 2¶ 1.

itself—the contours of the relevant area that the ruling would impact, noting that the relevant shores of the parties in dispute were those of the continent (for Nicaragua) and those of the islands of the Archipelago of San Andrés, Providencia, and Santa Catalina (for Colombia).³⁸ As seen before in the *Burkina Faso v. Mali* case, the ICJ upheld part of the argument of each side, not resolving the dispute in complete favor of one of the parties. As noted above, this case is of paramount importance because its impact on Colombia was so immense that it caused the denunciation of the Pact. But, as stated earlier, this dispute is far from over: two claims from each part are pending before the Court.

3. *Peru v. Chile*

In this case, Peru brought action against Chile, claiming that the maritime border between the two countries was not yet delimited, and therefore asked the ICJ to do so by virtue of the *equitable* method of international law. In brief, “the Court had to ascertain whether a delimited boundary had been agreed either expressly or tacitly, in connection with the long standing proclamations of an extended maritime zone of 200 nautical miles.”³⁹ The ICJ decided that the 1952 Declaration of Santiago did *not* establish a maritime boundary, and also that the 1954 Convention recognized a “tacit agreement,” which established a maritime boundary.⁴⁰ The Court held that it had the power to determine that the maritime delimitation was “tacitly agreed” as extended beyond the first 12, but not until the 200 nautical miles. About the nature of this decision, Mario Artaza, a former Foreign Ministry official and diplomat said: “We still do not understand the arguments of the court for reducing the extension of the parallel, [...] [h]owever, Chile lost relatively little compared to what Peru was demanding.”⁴¹ It is important to note that this case, a maritime dispute, was decided by *partially* upholding the claim.

³⁸ Sebastián López Escarcena, “La disputa marítima entre Perú y Chile. Comentario de la sentencia de la Corte Internacional, de Justicia de fecha 27 de enero de 2014,” *Revista Chilena de Derecho* 41 (2014): 1123.

³⁹ Maria Teresa Infante Caffi, “Peru v. Chile: The International Court of Justice Decides on the Status of the Maritime Boundary,” *Chinese Journal of International Law* 13 (2014): 745.

⁴⁰ Pablo Moscoso de la Cuba, “Analysis of the Main Elements of the International Court of Justice Judgment in the Maritime Dispute (Peru v. Chile) in the Light of the Parties Positions,” *Derecho PUCP* 73 (2014): 91–92.

⁴¹ Pascale Bonnefoy, “Court Grants Peru Ocean Territory Claimed by Chile,” *New York Times*, January 27, 2014 <https://www.nytimes.com/2014/01/28/world/americas/court-grants-peru-ocean-territory-claimed-by-chile.html>.

4. Other maritime disputes

In 1969 the ICJ issued the *North Sea Continental Shelf judgment*, in which the Court established an important rule: “maritime delimitation is governed by *equitable* principles as customary law.”⁴² Moreover, the ICJ held: “The law of maritime delimitation should be defined only by this goal, i.e., the achievement of *equitable* results; no specific method of delimitation is incorporated into the legal domain, and the law of maritime delimitation prescribes only an equitable result.”⁴³ The ICJ, following this rule, “in the Tunisia/Libya judgment, accepted neither the mandatory character of equidistance, nor some privileged status of equidistance in relation to other methods. Later, basically this approach was echoed in the Gulf of Maine (1984), Libya/Malta (1985), Guinea/Guinea-Bissau (1985) and St. Pierre and Miquelon (1992) cases.”⁴⁴ The Court’s application of this rule is rather strange, since according to Article 38(2) of the Statute, the ICJ has the power to resolve a case *ex aequo et bono*, only *if* the parties agree to it;⁴⁵ but regardless, the Court has decided to resolve according to *equitable* principles, based on the grounds that the law of maritime delimitation prescribes an equitable result.

ii. The ICJ experience: Solomonic decisions?

The term *Solomonic*, is defined in English as: “marked by notable wisdom, reasonableness, or discretion especially under trying circumstances,”⁴⁶ but in Spanish, its meaning is somewhat different, referring to a solution, decision or sentence that tries to partially satisfy all the parties in conflict, with the purpose of equanimity.⁴⁷ Although the term

⁴² Tanaka Yoshifumi, “Reflections on the Territorial and Maritime Dispute between Nicaragua and Colombia Before the International Court of Justice,” *Leiden Journal of International Law* 26 (2013): 909, 914.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ In this vein, “Settlement of a dispute *ex aequo et bono* rather than on the basis of law, results neither from the nature of the dispute, nor from lacunae in international law, but solely from the decision of the parties to obtain such a solution.” Vladimir Đuro Degan, *L’équité et le Droit International* (Dordrecht: Martinus Nijhoff, 1970), quoted in Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public International Law* (Dordrecht: Martinus Nijhoff, 1995), 231.

⁴⁶ *The Merriam-Webster Dictionary*, “Solomonic,” accessed May 2, 2018, <https://www.merriam-webster.com/dictionary/Solomonic>.

⁴⁷ *Diccionario de la Real Academia de la Lengua Española*, “Salomónico,” accessed May 2, 2018, <http://dle.rae.es/srv/search?m=30&w=salom%C3%B3nico>.

emphasizes different meanings in different languages, the truth is that in both Spanish and English the term can be read in an equivocal way, not only as a decision in justice, but as a determination that seeks to please all the parties involved.

Some scholars have expressly noted the tendency of the ICJ to decide in a *Solomonic* way. According to Professor Tim Stephens of the University of Sydney: “[there is a] tendency for the ICJ to reach Solomonic decisions that seek to keep both parties equally happy, or unhappy.”⁴⁸ Grossman has stated in this same regard: “The perception that the Court [ICJ] is acting in a Solomonic fashion, even when it may not be, may harm its sociological legitimacy, or States’ perceptions of its justified authority when it detracts from the Court’s adjudicatory function. On the other hand, perceptions that the Court is making decisions that are rooted in law and also Solomonic may enhance the Court’s effectiveness, and thereby, sociological legitimacy.”⁴⁹ Grauer has also argued that: “In fact, as we have seen, the World Court has often made use of the application of equity *infra legem* in arriving at its decisions without requiring authorization by the parties to the dispute.”⁵⁰

As can be seen in the judgments analyzed earlier, the underlying legal argument is not always the same: sometimes it focuses on the theory of equidistance in maritime affairs, and in other cases, in the application of equitable principles. What is glimpsed in the background is a consistent willingness to apply equitable solutions to the disputes at hand. The vision that transpires from this legal alignment can be found, in our opinion, in two symptoms that are revealed in international judicial systems: the need for effective legitimation, and the desire for the judgments to be enforced in one way or another.

The ICJ needs permanent legitimacy, as its jurisdiction depends on the mutable will of the states to recognize the Court’s supra-state jurisdiction. If it is not capable of achieving this permanent legitimacy, it simply will not be able to enforce its judgments. On the other hand, from the perspective of political realism, it is reasonable to assume that the Court understands that by issuing Solomonic judgments it is forcing the states in dispute to

⁴⁸ Tim Stephens, “Sea Shepherd Antics Make a Great Story, but the Real Whaling News is Elsewhere.” *The Conversation*, January 9, 2012, <http://theconversation.com/sea-shepherd-antics-make-a-great-story-but-the-realwhaling-news-is-elsewhere-1877>.

⁴⁹ Nienke Grossman, “Solomonic Judgments and the Legitimacy of the International Court of Justice,” in *Legitimacy and International Courts*, ed. Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, and Geir Ulfstein (Cambridge: Cambridge University Press, 2018): 43–61. doi:10.1017/9781108529570.002.

⁵⁰ Christopher Grauer, “The Role of Equity in the Jurisprudence of the World Court,” *University of Toronto Faculty of Law Review* 37 (1979): 115.

negotiate and create instances of post-adjudication compliance. If there is not a complete winner nor an absolute loser, the parties will move around the provisions of the ruling, although not expressly in accordance with the equitable options pointed by the ICJ:

In reality, ICJ's rulings only have binding character when the juridical plane overlaps with the political one. Therefore, the UN Security Council is the only institutional enforcer of ICJ's rulings, and the mechanics of such Organ are entirely political. As perceived in the *Nigeria v. Cameroon Case* and in the *Nicaragua v. USA Case*, both strategic cooperation and political convenience must be the guiding concepts for States involved in controversial or greyish ICJ's decisions. At the same time, a pondered balance of the three factors involved in the reasonability test is vital.⁵¹

However, this search for equity—and for political legitimation—on the part of the ICJ implies a risk, given the fact that the express or implicit application of a criterion based on equitable treatment implies neglecting Article 38 of the ICJ's Statute, where the primacy of international treaties is stated to be over other customs or principles in the resolution of conflicts between states. In fact, “though it is clear that equity cannot be eschewed completely, its undue use may operate to negate the Court's consensual jurisdiction by leading to the application of principles completely outside the contemplation of one or more of the parties.”⁵² When an equity criterion is applied, no matter the reason, it damages the party that counted on the legal arguments of greater weight, and this is perceived by states outside the immediate case, generating an atmosphere of legal uncertainty.

The risk the aforementioned author points out is specifically materialized in the Latin American case with the denunciation of the Pact of Bogota by member states. If there are no certainties about the priority of the sources of International Law that the ICJ will apply to resolve future disputes, it is justified to state that the Pact no longer conforms to the states' interests in general. Moreover, this is aggravated by the fact that Latin American states do not have any type of real control or influence—permanently and/or directly—on the ICJ.

⁵¹ Santiago Torrijos-Pulido, “Defiance: A Political Alternative Lost in the Sea of Juridical Traditionalism,” *Revista Científica General José María Córdova* 14 (2016): 44.

⁵² See *supra*, note 50, 115.

C. The mechanism to elect judges in the ICJ is not appropriate for Latin America

Article 2 of the ICJ's Statute states: "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law;" which would overthrow the argument regarding the political bias that the judges of the Court might have. But candidates for the position of judge must obtain an absolute majority both in the Security Council and the General Assembly of the UN to get elected.⁵³ In this regard, James Crawford has written: "In practice political calculations feature prominently, and the attitude of judges in particular cases has occasionally affected the voting when they are considered for re-election. But it is difficult to see a way out: the Court's existence is apparently conditioned on a political basis for elections."⁵⁴

Since the foundation of the ICJ, the presence of states that are not permanent members of the Security Council has been a topic of special sensitivity. Judges that are representative of less influential regions or non-western cultures have historically been less represented in the Court.⁵⁵ The standard that prevails for the election of judges in the ICJ, in addition to the juridical expertise of the judges, is the nationality of the prospective candidates.⁵⁶ Among the states there is a generalized presumption that a national judge will be akin to the position of the state to which she belongs. Regardless of whether this criterion is truly material, the truth is that nominations favored before the ICJ tend to follow this standard: "Moreover, the fact that the developed custom has had the five permanent members of the Security Council always holding a seat has insured that the ICJ at least appears to be an as nationally interested body as the Security Council itself."⁵⁷ This trend has been specifically described in terms of the presence of two Latin American seats, only one for the United States and six for Europe.⁵⁸ Thus, the empirical verification is decisive:

⁵³ See UN's Charter Article 10.

⁵⁴ See *supra*, note 29, 723.

⁵⁵ William L. Ransom, "The Nomination and Election of Judges of the World Court," *American Bar Association Journal* 32, no. 1 (1946): 1-4.

⁵⁶ "In fact, while a judge associated with a party to a domestic suit may be required by municipal law to recuse herself, in "international adjudication... [it has been assumed that] each State in the litigation should be permitted to have a judge of its own nationality on the bench". Adam M. Smith, "Judicial Nationalism in International Law: National Identity and Judicial Autonomy at the ICJ," *Texas International Law Journal* 40 (2004): 197-198.

⁵⁷ *Ibid.*, 207.

⁵⁸ Edward McWhinney, "Law, Politics and Regionalism in the Nomination and Election of World Court Judges," *Syracuse Journal of International Law and Commerce* 13 (1986): 10.

The data suggest that national bias has an important influence on the decision making of the ICJ. Judges vote for their home states about 90 percent of the time. When their home states are not involved, judges vote for states that are similar to their home states—along the dimensions of wealth, culture, and political regime. Judges also may favor the strategic partners of their home states, but here the evidence is weaker because of multicollinearity; if they do, the magnitude of the bias is probably low.⁵⁹

This filter evidently reduces the legitimacy of the Court before the Latin American region, whose states (albeit not all of them) are the only ones currently bound by the Pact. As the United States of America and Canada do not share a common root and culture with the Latin American region, while clearly having a more powerful say in the international order, we think they should not be invited to the initiative proposed in this article. Latin America is a region of the World, one block, and therefore its members' interests are not necessarily similar to the ones these two northern states have.

In this context, when it comes to an international court like the ICJ, and attending to the method by which judges are appointed, it seems that the criticism regarding its political bias is correct. It is not easy to escape from this “court of the world,” where politics plays a very important (and undeniable) role. In particular, the influence of the Security Council in the composition of the Court entails additional political weight to the regionalist filter already in place: for a region that during the twentieth century has gone abruptly from one political model to another, with comings and goings according to the regime in office, it is very difficult to be represented coherently in the political conformation of the ICJ.⁶⁰

The institutional weaknesses of the Court in the continent have also been highlighted in the context of geopolitical and inter-American security:

⁵⁹ Eric A. Posner and Miguel F. P. de Figueiredo, “Is the International Court of Justice Biased?,” *Journal of Legal Studies* 31 (2005): 621.

⁶⁰ In particular, on whether the ICJ may judicially review one or more decisions of the Security Council in the context of sanctions imposed against Libya following the Lockerbie incident. See, e.g., Vera Gowlland-Debbas, “The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case,” *American Journal of International Law* 88 (1993): 613; Eric Zubel, “The Lockerbie Controversy: Tension Between the International Court of Justice and the Security Council,” *Annual Survey of International and Comparative Law International* 5 (1999): 259.

[W]hile for the US it is necessary to revitalize the institutions of collective security by strengthening the instruments that already exist in the matter (TIAR and Pact of Bogota), Argentina, Brazil, Chile and Mexico consider that these instruments of collective security are not adequate to current situations, that they are not representative or inclusive, and even that their disappearance should be considered. These delegations consider that while all the States analyzed do not foresee that in the medium or long term it is necessary to resort to the armed defense of the Continent, the mechanisms designed to face external threats of a military nature today are irrelevant. Canada, although it is not part of any of these legal instruments, shares this idea, and points out that the fact that they do not involve the entire American community undermines their legitimacy, and points out that an inter-American security system that is inclusive is required.⁶¹

Given the fact that the ICJ is subject to the UN and the Security Council, there is a high degree of political gravitation of that body through the administrative channel: “However, the degree of control exercised by political organs over judicial bodies through financial and procedural mechanisms may be significant.”⁶² By this token, if Latin American states do not have a significant membership within those international bodies, neither will they have it in the administration of the ICJ.

D. There are more reliable ways of resolving disputes between Latin American states

According to Luis García-Corrochano, the Pact of Bogota, despite its good intentions and the plurality of means it offers to resolve disputes peacefully, has not managed to be an effective tool for the amicable settlement of disputes in the Americas, and that, for the most part, governments have preferred to resort to political solutions and negotiate their differences outside of the Pact.⁶³ The same academic adds: “although the Pact has taken into account all means of peaceful solution, it has not taken into account the American reality. Given that most of the American controversies concern territorial disputes, which involve delicate interests linked to sovereignty, the fact of seeking legal solutions to mainly political problems is the same as having followed the wrong path, or at least the most difficult.”⁶⁴

⁶¹ Juan Pablo Soriano, “Acuerdos y Desacuerdos sobre la Redefinición del Concepto de las Instituciones de Seguridad Interamericana: Las Posiciones de Argentina, Brasil, Canadá, Chile, Estados Unidos y México,” *Security and Defense Studies Review* 1, no. 1 (2001): 39.

⁶² Ruth Mackenzie and Philippe Sands, “International Courts and Tribunals and the Independence of the International Judge,” *Harvard International Law Journal* 44 (2003): 281.

⁶³ See *supra*, note 7, 61.

⁶⁴ *Ibid.*

International Law and national politics is a complicated mix. It is clear that the signatory states of the Pact do not have—and cannot have—the intention of resolving their territorial and maritime disputes, as well as other controversies that may arise between them, violently; they are compelled to resolve them peacefully.⁶⁵ As stated, the Pact of Bogota establishes several peaceful ways of dispute resolution. Again, the problem seems not to be in the peaceful means proposed by the Treaty nor in the intention that they should be carried out whenever a conflict arises, but in the mandatory jurisdiction of the ICJ. Gilbert Guillaume⁶⁶ wrote in this regard: “Before making their choice in this respect [choosing the dispute resolution mechanism] States must first examine the composition of the body to which they accept to defer.”⁶⁷ Clearly, it was not possible in the time the Pact was signed (1948) to examine the composition of the ICJ regarding future disputes; therefore, the ICJ, with a panel of “15 judges representing the ‘principal legal system in the world,’”⁶⁸ is clearly a very appropriate venue for territorial disputes to be resolved, but the advice from Gilbert Guillaume is hard to ignore: states need to examine the composition of the Court in order to decide whether to submit a dispute to it. By that token, the door to the ICJ should not be closed completely, but under the same premise, compulsory submission to their jurisdiction should be discarded.

As stated before, the Pact deviated from the American tradition of arbitration as the main mechanism for the peaceful settlement of disputes, privileging instead mandatory jurisdiction of the ICJ, an institution that does not belong to the inter-American governments’ system but to the United Nations.⁶⁹ This deviation, coupled with the lack of adherence to the Pact and the need to have a regulated agreement across the whole of the Latin American region shows the great need to bring arbitration back to the table. We believe that from a political perspective, arbitration makes more sense as a mechanism to resolve territorial and maritime disputes between Latin American states.⁷⁰ In our opinion, there are two main reasons for this: first, as a former colonial continent, the fact that the ICJ sits in Europe can create the feeling that colonialism and the power to decide over the

⁶⁵ According to Article 33 of the UN Charter.

⁶⁶ Former Member and former President of the ICJ, and also member of Arbitration Tribunals.

⁶⁷ Gilbert Guillaume, “The Contribution of the Permanent Court of Arbitration and its International Bureau to Arbitration Between States” (executive summary, October 18, 2007), 5. <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Reflections-on-the-Current-Relevance-of-the-PCA-Presentation-by-H.E.-Judge-Gilbert-Guillaume.pdf>.

⁶⁸ *Ibid.*, 6.

⁶⁹ See *supra*, note 7, 61.

⁷⁰ A very interesting study on the Chilean tradition in international arbitration for public matters can be found in: Gonzalo Biggs, “Evolución y Singularidad de la Institución Arbitral en Chile,” in *Estudios de Derecho y Propiedad Intelectual: Colección de Trabajos en Homenaje a Arturo Alessandri Besa*, (Santiago: Editorial Jurídica de Chile, 2009), 59–82.

fate of the colonies is not over; and second, the arbitrators' appointment method creates an *appearance* of control or influence over the tribunal.⁷¹ The lack of control over the administrative bodies that provide support to the ICJ, as well as the evident cultural and political disconnect of the ICJ with the reality of the Latin American region, reinforce the existent dissociation between said region and the ICJ.

It is important to keep in mind that if arbitration is to be chosen as the “savior” of the Pact, there are several points of interest regarding the evolution of this mechanism over the last years; for even though arbitration during the last decade has risen to be the “leading forum for the resolution of transnational commercial disputes,”⁷² there is some dissatisfaction with this mechanism at a macro-level.⁷³ In this line, V. K. Rajah, Singapore's Attorney-General, is skeptic toward believing that arbitration will remain pre-eminent in the field of international dispute resolution. To support this statement, he points out that “there is a lack of an ethical framework to guide the increasingly diverse body of practitioners, both counsel and arbitrators,”⁷⁴ and that the “parties have expressed dissatisfaction with the ‘judicialisation’ of arbitration.”⁷⁵ To explain the latter statement, Mr. Rajah argued: “While arbitration first emerged as an informal and efficient means of resolving disputes, it has become more procedurally complex over time and now mimics litigation in many respects.”⁷⁶ It could be argued that comparing international commercial arbitration and public international law arbitration is not possible because of the nature of the parties and the issues under dispute; but it is important to bear in mind that this difference is apparent rather than real: both transnational companies and states, when in a dispute, need to maintain ongoing relationships, mainly commercial in nature; and in the case of states in particular, also diplomatic, especially when the states are neighbors. In this respect, Gary Born has defended the appearance of a second generation of arbitration tribunals—under the umbrella of the New York Convention—which have adjudicated matters involving a high linkage of national sovereign or economic and strategic interests

⁷¹ For example, the Pact's Article XL, regarding the arbitration procedure, states: “Each party shall name one arbiters of recognized competence in questions of international law and of the highest integrity.”

⁷² V. K. Rajah, “W(h)ither adversarial commercial dispute resolution?,” *Arbitration International* 33, no. 1 (2017): 17, 19.

⁷³ If arbitration is getting bigger and bigger in commercial disputes, it is reasonable to conclude that it can be the solution to resolve international public law controversies as well, especially if it was the tradition as the main means of peaceful settlement of disputes in America.

⁷⁴ See *supra*, note 72, 24.

⁷⁵ *Ibid.*, 25.

⁷⁶ *Ibid.*

relevant to the states.⁷⁷ We believe this second generation of arbitral tribunals can serve as a first approximation in order to design a body that gives administrative support to future arbitration tribunals, to the extent that the states may require it voluntarily. In this very context, an institutionalized arbitration tribunal can be created to the useful resolution of disputes between Latin American states.

In this light, it seems necessary to emphasize certain characteristics that should be essential for the legitimization and state recognition of such an institutionalized arbitration tribunal:

- The administrative composition of the institution should, in the spirit of balance, be comprised both by staff and executives of the different states that are willing to redirect their public disputes to it.
- On the one hand, the jurisdiction of the arbitration tribunals that are to be created should be restricted to the immediate case submitted for its resolution; and, on the other, the composition of the arbitral panel should be carried away with a very high degree of influence of the states in conflict.
- The system for the appointment of arbitrators must be coherent and integrated, with the academic and professional backgrounds of the potential arbitrators to be recognized before their nationality or political choices.
- The same system should be informed by the principles of coherence, transparency and independence.⁷⁸

In addition to the aforementioned scheme, we believe that, prior to the establishment of the arbitral tribunal, an instance of mandatory mediation would be useful for the purpose of providing a last chance for states in conflict to negotiate, therefore avoiding litigation. V. K. Rajah proposed a similar system for the resolution of international commercial con-

⁷⁷ Among these second generation of arbitration tribunals are “arbitral tribunals constituted pursuant to investment treaties, such as NAFTA and the ICSID Convention; international commercial-arbitration tribunals, such as the Iran-U.S. Claims Tribunal and the UN Claims Commission; the WTO; and national courts adjudicating claims against foreign states”, Gary Born, “A new generation of international adjudication,” *Duke Law Journal* 61 (2011): 775, 819.

⁷⁸ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007), 153.

troveries. In this regard, he stated the importance of including mediation in the picture: “While this [parties antagonizing each other] may not be a problem when the parties are either unconnected or bitter rivals in the same industry, it is unacceptable in the majority of cases where the parties need to continue dealing with each other. In such instances, it is in their rational self-interest to reach a settlement, facilitated through a consensual forum like mediation.”⁷⁹ In our opinion, the same rationale applies to disputes between states. Again, they must have ongoing relations of all kinds, especially when they are neighbors or members of the same region of the world.

Mediation has proven to be a successful dispute resolution mechanism on several occasions, to the extent that certain standards of support and recognition towards mediators are met. These standards include the presence of other states with recognized legitimacy, coalitions of states (co-mediation), international organizations, NGOs, among others.⁸⁰ This idea is strengthened by the premise that common cultural features have to be transferred to the mediator for her to enjoy the legitimacy and recognition she needs to operate effectively: “Could the Pope have served as a mediator in the conflict between Iraq and Iran? Probably not. But the Pope was acceptable as a mediator in the Beagle Channel Dispute between Argentina and Chile from 1979–1985.”⁸¹ The challenge in this regard is to provide the mediator with the political characteristics common to the parties in controversy by creating a cultural nucleus of negotiation within the Latin American region.⁸²

In Latin America, peaceful resolution of sovereign-related disputes has been the rule for a long time, and clearly that cannot change now. The Pact tried hard to put on the table all the means that reflect this principle—good offices and mediation, investigation and conciliation, arbitration, and judicial procedure before the ICJ—, but perhaps the solution,

⁷⁹ See *supra*, note 72, 25.

⁸⁰ Siniša Vuković, “International mediation as a distinct form of conflict management,” *International Journal of Conflict Management* 25 (2014): 74.

⁸¹ Peter J. Carnevale and Dong-Won Choi, “Culture in the Mediation of International Disputes,” *International Journal Of Psychology* 35 (2000): 105, 108.

⁸² In this regard, Maria Carmelina Londoño Lázaro writes: “In the analysis of their data set, Bercovitch and Elgström found that cultural differences between parties lead to fewer successful cases of conflict management. Their study shows that mediation is more likely to be successful when the countries in conflict share the same level of political rights, civil liberties and religion. They also noted that whereas most conflicts in international relations take place within the same region, much of them are between states with different political systems, different levels of political rights, civil liberties and different religion.” Maria Carmelina Londoño Lázaro, “The effectiveness of international mediation—The current debate,” *International Law: Revista Colombiana de Derecho Internacional* 2 (2003): 340.

as proposed by Mr. Rajah for commercial arbitration, is the merger of two of these elements: mediation and arbitration.⁸³ The aforementioned author points out that “the two forms of dispute resolution [mediation and arbitration] are likely to converge, creating new and exciting opportunities [...]”⁸⁴

As stated, the Pact of Bogota has a chapter on arbitration, which is mandatory if the Court decides it lacks jurisdiction to adjudicate a controversy.⁸⁵ Of course, the solution cannot be just to eliminate the Pact’s Fourth Chapter, therefore establishing arbitration as the mandatory means of resolution if a dispute cannot be settled by the other peaceful means. There are other items to consider: for instance, the process to appoint the arbitrators cannot have the obligation to choose “ten jurists chosen from among those on the general panel of members of the Permanent Court of Arbitration of The Hague [...] to be members of the Arbitral Tribunal,” as it is today. It is our opinion that, in the long run, Latin American states should create their own “Permanent Court,” such as the Permanent Court of Arbitration,⁸⁶ of course without permanent judges, but with a list of potential arbitrators, and agree on their own institutional arbitration rules to state procedural rules and govern the arbitrators’ appointment procedure. We think that it would also strengthen this body if any company, state or organization would adhere to these rules when seeking to resolve a controversy, whether contractual, investment-related, regarding sovereignty or any other public or private international legal dispute. In the same vein, member states should provide the infrastructure and equipment this kind of entity needs in order to appear serious before the international community. To show the strength of the system, Latin American states themselves should be the first to adhere permanently to this “Court” and

⁸³ It is important to note that: “In the past, some cases, such as those involving the Beagle Canal or the Rainbow Warrior, have been resolved by mediation.” See *supra*, note 67, 3.

⁸⁴ See *supra*, note 72, 34. Moreover, the author points out that this change is already happening in Asia: “The China International Economic and Trade Arbitration Commission (CIETAC), for instance, already resolves 20 to 30 per cent of its caseload through Med-Arb. Similarly, the arbitrators of the Japan Commercial Arbitration Association (JCAA) regularly assist parties in reaching a settlement and have reported a success rate of more than 50 per cent when they take on this mediatory role. These statistics are not just dependent on culture; they reflect a preference for collaboration over competition which businessmen will gravitate to over time.” (Ibid.)

⁸⁵ Article XXXV of the Bogota Pact states: “If the Court for any other reason declares itself to be without jurisdiction to hear and adjudge the controversy, the High Contracting Parties obligate themselves to submit it to arbitration, in accordance with the provisions of Chapter Five of this Treaty.”

⁸⁶ “Not a true Court and had no permanence.” See *supra*, note 67, 1.

its rules by incorporating them as an integral part of the new Pact, and therefore as part of their own domestic legislations. For the time being, arbitration needs to be considered as the main method for resolving disputes between Latin American states, but these should also consider coupling it with mediation.

V. Conclusion

Taking into account the mandatory nature of the peaceful resolution of disputes according to the UN Charter, the solution to the problem presented in this article should not be to withdraw from the Pact of Bogota or to terminate it completely, which would generate nothing but a state of chaos in the resolution of disputes in the region.⁸⁷

In our opinion, the solution lies in calling on the Latin American states to sign on and, more importantly, ratify an improvement to the Treaty, eliminating its Fourth chapter, in which the members gave mandatory jurisdiction to the ICJ to resolve their disputes, and amending its Fifth chapter by establishing only one avenue for the resolution of disputes: a compulsory system through a mixed scheme in which mediation and arbitration converge; an amicable and consensual stage, followed by an arbitral proceeding in case the former fails. In the same way V. K. Rajah proposes a mixed system between mediation and arbitration for resolving international commercial disputes,⁸⁸ we think that a similar system would be completely applicable to resolving disputes between sovereign states in the Latin American region.

It is undeniable that arbitration, as a method of resolving international disputes, has grown exponentially, through trial and error. In our opinion, the issues that give rise to conflicts between sovereign states are not necessarily more complex than those that are debated in international commercial arbitration or investment arbitration. In this vein, Latin American states must learn from the mistakes made in the past by the arbitration community in general, and propose improvements to the system through clear rules of procedure and appointment of arbitrators, and the creation of a center for the resolution of conflicts through the proposed system.

⁸⁷ “The situation is thus presented in which various treaties which were to have ceased to be in force upon the ratification of the Pact of Bogota are still in force between particular American States, and it would require a degree of research to determine what specific obligations of pacific settlement hold good between this state and that.” Charles G. Fenwick, “The revision of the Pact of Bogota,” *American Journal of International Law* 48 (1954): 123.

⁸⁸ See *supra*, note 72, 33–34.

The time has come for the member states to the Pact of Bogota to stop complaining about it, either by leaving it, or threatening to do so. Let us be clear: there is no way out of the peaceful resolution of controversies between sovereign states. The path to the future is not for the Latin American states to isolate, believing that they can succeed on their own. Today more than ever, Latin American states are in need of each other, if they want to strengthen the region's power before the world. A united region needs an effective and peaceful method for the resolution of disputes among its members: that method comprises mediation and arbitration. ■

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