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We'll See You in Court!

Forum Shopping and Territorial Dispute Settlement in Latin America

THIRD DRAFT

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Abstract

In recent years a growing literature on the resolution of territorial disputes via judicial processes has flourished. Countries willing to settle their maritime and territorial disputes have a plethora of forum options available, including regional and global tribunals. Yet, some states seem to prefer global courts over regional tribunals. What explains this choice of forum? Does the overlap of two or more memberships in international organizations affect their relative use? The article explores forum selection by analyzing Latin American cases of territorial dispute settlement. Evidence from these cases suggests that forum choice is not all strategic bargaining or institutional design. Rather states seek specific courts influenced by regional and cognitive biases, as well as emulation and diffusion patterns.

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In 1999, Nicaragua and Honduras instituted proceedings in the International Court of Justice (ICJ) with regard to the legal issue subsisting between the two states concerning the maritime delimitation in the Caribbean Sea. For decades, Nicaragua had maintained the position that its maritime Caribbean border with Honduras had not been determined, while the Honduras position sustained that its delimitation had been long defined by an arbitral award made by the King of Spain in 1906. (ICJ 1999/120) The issue at stake seemed to be strictly bilateral and might have been easier for both Central American countries to pursue remedies bilaterally, through ad hoc mediation, or with the help of the many regional forums available in the Western Hemisphere. For instance, since 2000, the Organization of American States (OAS) has a mechanism, the Fund for Peace, to help finance the costs of proceedings when the parties involved agree to turn to the OAS for assistance in resolving their disputes peacefully. Yet, Honduras and Nicaragua mutually agreed to turn their case to the most global organization of judicial settlement; one which entailed high economic and judicial costs in terms of international arbitration and which took almost a decade to render a judgment.

Interestingly enough, Honduras and Nicaragua are not alone. After centuries of attempting different forms of third-party intervention, some countries in Latin America are now turning to global international organizations and international tribunals, such as the ICJ, to try to solve their territorial and maritime disputes. In fact, all pending Central American territorial and maritime disputes, with the exception of the Guatemala-Honduras border conflict, lie in the hands of The Hague. A smaller number of South American countries have also appealed to the Court, including Nicaragua in its territorial claim with Colombia and Peru-Chile. One case, Guyana-Suriname, was submitted to international arbitration to the United Nations (UN) Convention on the Law of the Sea to delimit the maritime

boundary between the two states. The OAS, by contrast, is not analyzing a single territorial or maritime dispute, despite the incentives provided by its Fund for Peace. What explains this pattern of behavior among regional neighbors? Why do countries in the region turn to global courts while overlooking regional forums of dispute settlement? Why do countries prefer some forums while they discriminate against others? Why the ICJ and not other tribunals?

The act of strategically choosing among different and overlapping international organizations to litigate a claim is often referred to as forum shopping. It is a legal scholar term and a key part of any litigation strategy that also encompasses other consequential choices, including overlapping jurisdiction of treaties, tribunals, and sequential litigation claims. Yet, forum shopping has received very little academic attention from international relations (IR) scholars. While there is an increasing literature available on forum shopping in international political economy, dealing essentially with trade and financial disputes¹, little research has been conducted on forum shopping in international security, dealing with territorial borders and maritime conflicts. The logic of forum shopping in trade is quite different from forum shopping in security, since not only the stakes are different, but border, territorial and maritime disputes often involve sensitive issues with strong connections to nationalism and sovereignty. In fact, recent research on contentious issues has shown that territorial claims may be more difficult to solve than would be suggested by a strictly economic analysis. (Hensel 2001, 85) Unlike most economic disputes, conflicts over territory are more likely to involve military force and escalate into war. As Paul F. Diehl argues, “not only are territorial concerns significant in generating militarized conflict, they also play a role in the dynamics of conflict behavior between disputants.” (Diehl 1999, xiv)

¹ See for instance Busch 2007, Gantz 1999, Horlick 2003, Lopez 1997, Marceau 1997, Ortiz Mena 2001, Vega & Winham 2002-2003.

Hence, when countries decide to settle a territorial or maritime conflict, they too have to make strategic choices about forum options without eroding sensitive issues. In contrast to private international law, where individuals have a plethora of choices, the methods and permutations of forum shopping for states are not limitless. Countries willing to settle their disputes can go bilaterally by mutually agreeing to a solution, trilaterally through third-party intervention, regionally via the mediation of a regional organization, multilaterally through the assistance of a global organization, or through legal means in the form of judicial settlement or arbitration. The first four methods are termed diplomatic means and can take place in formal or informal forums. The latter, however, require states to agree to a binding decision, usually on the basis of international public law and can involve the reference of a dispute to the ICJ or some other standing tribunal.²

I contend that the overwhelmingly favorable preference to use the ICJ versus other forums of dispute settlement is largely determined by geographical and regional interactions that strongly influence the constraints and opportunity structures for individual states. Regional dynamics shape not only the biases against regional organizations, but have an influence on how states favor global forums. Countries will in general avoid regional organizations if higher and more authoritative institutions in the global arena are available, since their procedures and rules often confer and withhold more international legitimacy than other regional options. But the choice of a specific forum is narrowed by geography and proximity too. States will shop for alternative forums by relying on the strategies, policies and decisions of other neighbors to inform their own actions. In other words, regional interactions will induce states to mimic and emulate the actions of proximate actors.

² International lawyers separate judicial settlement from arbitration, in which the former entails reference to established courts, while the latter requires the parties themselves to set up the machinery to handle the dispute. I will use both terms interchangeably since they both require the submission to a binding agreement. See Merrills 2005, 91.

If one set of neighboring countries has been able to identify a forum for settlement, chances are that others will follow by emulating a similar strategy. Hence, some Latin American countries have invoked the power of the ICJ not based solely on strategic and rational calculations, but influenced on what other close-by states have done with regards to similar territorial disputes. As such, regional dynamics shape behavior, as geographic proximity to an actor constitutes a strong influence in determining the forum of settlement.

It is important to note that this argument deals essentially with the selection of forum and does not address issues regarding compliance. Forum shopping hardly guarantees that a border will be settled once and for all. In fact, once a forum for resolution has been chosen, states can still disagree with the ruling and decide not to comply with it. Forum shopping merely provides insights as to where states are more likely to render their cases, once they have shown willingness to solve a dispute.

To analyze forum shopping, I will focus primarily on Latin American cases. A regional study offers three methodological advantages for improving our understanding about why states shop in some forums while they neglect others. First, Latin America has the highest concentration of regional organizations after Europe, with treaties, agreements, and formal and informal institutions whose foundations go back to the nineteenth century. This part of the southern hemisphere has also witnessed a large number of territorial and maritime disputes, some of which have been settled through some form of institutional arbitration. According to Beth Simmons, Latin America has the highest rate of territorial arbitration compared to other regions, with as many as 20 cases of arbitration in the past two centuries. (Simmons 2002, 836) Consequently, these regional features provide an important test for alternative theories. For instance, given the availability of regional forums, all of which vary in terms of their institutional design, Latin America should be the “most likely

case” for regional settlement. Yet, the continent defies standard theoretical expectations, since many of these cases have rarely used or appealed regional organizations to reach territorial settlements, while most recent disputes are being handled by global organizations or other kinds of third-party intervention.

Second, by looking at Latin American cases, I can hold other important suspected variables constant, since the countries share similar (although certainly not identical) underlying conditions, such as language, culture, and political regimes (democracy). The analysis here presented will also center on the post-1990 period because I can gauge variability in outcomes by holding two additional important suspected variables constant; namely, the demise and collapse of the Soviet block and the wave of democratization that emerged in the region.

Third, the region shows variations in the dependent variable, where some states have used judicial and quasi-judicial settlement, while others have used third-party or trilateral intervention, and some have relied solely on bilateral negotiations. Each case leads to multiple observations over time.

Similarly, this study offers a number of theoretical and empirical insights for our understanding of international organizations. First, it sheds light in explaining the explosive growth of law treaty and the so-called “legalization of world politics” by analyzing why states favor judicial forms of territorial settlement versus other forms of conflict resolution. (Abbott, Keohane, Moravcsik, Slaughter, and Snidal 2000 and Keohane, Moravcsik, Slaughter 2000) Second, this paper also explores the relationship between regional and global forums by analyzing how the availability of these organizations affects their use, compatibility and eventually their performance, leading to institutional variation. Do regional failures allow for a prominent role of global multilateral institutions, such as the UN

and the ICJ? Finally, a large legal literature is available on forum shopping, but little has been written on the political motivations of shoppers.³ This article provides political rather than legal arguments about forum shopping in international relations. The act of delegating authority over dispute resolution is not only a legal move, but a political action of significance to both countries and international institutions. As Keohane *et.al.* argue, “the legal form does not necessarily determine political process. It is the interaction of law and politics, not the action of either alone, that generates decisions and determines their effectiveness.” (Keohane, Moravcsik, and Slaughter 2000,487-488) Hence, a political explanation about forum choice is necessary.

I use various qualitative research methods, including interviews, archival research and process tracing. The findings presented below are based upon a series of confidential interviews conducted in 2008 in Mexico City, New York City, and Washington, DC. The individuals interviewed were diplomats, OAS staff members, and lawyers who had familiarity with the pre-litigation phase of disputed cases. Unless indicated otherwise by citation, the interviews are the source of all positions describe below. This article will proceed as follows. The first section establishes the main patterns of dispute settlement in post-1990 Latin America. The second part briefly reviews and critique existing theoretical explanations that are relevant to this study. The third section critically evaluate the regional forum choices

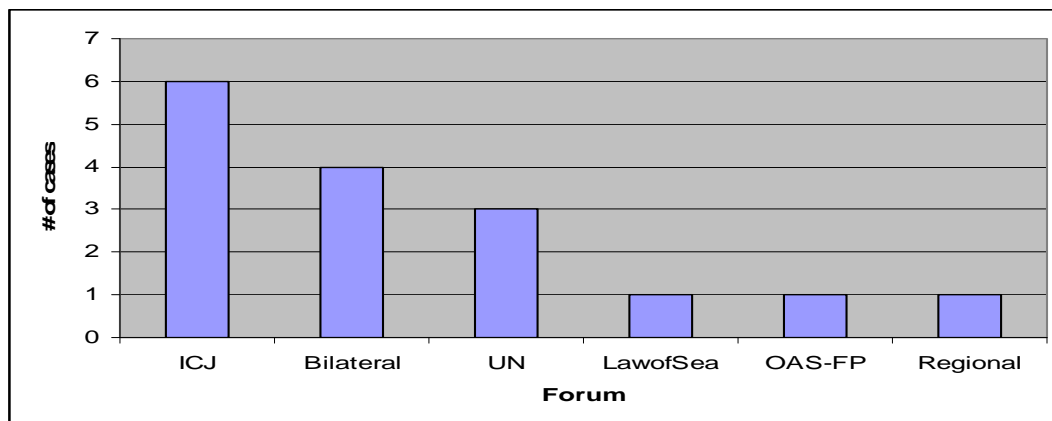
³ For lawyers, the considerations that may motivate a forum shopper involve the convenience or expense of litigating in a specific venue, the inconvenience to one’s adversary, the probable or expected sympathies of a potential jury pool, the nature of appellate reviews, judicial calendars, and interjurisdictional differences.³ Some legal explanations will tend to focus on arbitration agreements and jurisdiction clauses to explain the forum selection. Submission to a specific forum is often determined by the existence of treaties or agreements that provide for an arbitral tribunal or specify a jurisdiction to which parties can submit their cases. Ultimately, forum shopping is essentially about identifying proper legal competence, jurisdiction, procedural laws, and legal rules. (Goldsmith 1997, Born 2006, Helfer 1999) Legal motivations are relevant in understanding forum shopping, especially if one considers that lawyers are often delegated the task of representing states in international courts. To some extent, dispute settlement, via diplomacy or arbitration, is an attempt to insulate a conflict from the day-to-day political demands of states. Specifically, what a judicial settlement process does is to literally legalize a dispute by making it a subject matter of law rather than politics or military strategy; in other words, de-politicize and de-militarize a dispute by transforming it into a legal conflict.

available in the continent and explains how diffusion and emulation have influenced the choice of forum.

PATTERNS OF DISPUTE SETTLEMENT IN LATIN AMERICA POST-1990

As mentioned above, forum shopping is a legal practice by which litigants strategically chose among competing jurisdictions. As such, Latin America is not foreign to this concept as countries in the region have shopped for various forums of international dispute-settlement, ranging from diplomatic to quasi-judicial and judicial methods of resolution. While the mechanisms of territorial and maritime conflict resolution have varied throughout time, certain general patterns can be identified. In dealing with border and maritime disputes, Latin American states have relied on bilateral, trilateral, regional, global and judicial forums.

Country choice of forum for settlement, 1990-2008



To some extent, all Latin American states with border disputes have dealt with bilateral mechanisms, given their geographic proximity. Every unresolved territorial dispute that is not under the good offices of a mediator or third party can be subject to bilateral negotiations. As of today, there are at least 11 cases pending resolution in Latin America

that are not under any form of bilateral or third-party negotiation.⁴ Surprisingly, some key disputes have been settled bilaterally. In the post-Cold War period, Argentina and Chile were able to solve most of their outstanding boundary disputes through bilateral negotiations. The Argentine-Chilean rapprochement began in 1978 with the Pope's successful mediation effort of the Beagle channel dispute. The issue was solved with the signature of the 1985 Treaty of Peace and Friendship; a binding agreement, ratified by both countries, supported by an Argentine referendum that effectively conceded sovereignty of the channel to Chile. Since then, the two countries have relied on bilateral diplomacy to deal with their other disputes. In 1991, Presidents Patricio Aylwin of Chile and Carlos Menem of Argentina settled twenty-three out of twenty-four outstanding territorial disagreements through executive action and direct negotiations, without the assistance of any international institution or mediator. A failure of the Argentine Congress to ratify an agreement reached between the two governments left the Hielos Continentales as the only pending territorial dispute between these two former foes. (Escudé and Fontana 1998, 67) Likewise, another instance of successful bilateral territorial dispute settlement was the treaty signed between Venezuela and Trinidad and Tobago in April of 1990. This bilateral effort put an end to a conflict over the jurisdiction in the Gulf of Paria waters (even though it created another dispute with neighboring Guyana, who claims the treaty violated its own maritime sovereignty.)

Nevertheless, bilateral negotiations have often failed as a mechanism of conflict resolution in Latin America. For instance, in the early 1990s both Bolivia and Peru made

⁴ Argentina-UK, Bahamas-US, Barbados-Trinidad & Tobago, Bolivia-Chile, Bolivia-Peru, Brazil-Uruguay, Colombia-Venezuela, Cuba-US, Dominica-Venezuela, Guatemala-Honduras, Haiti-Navassu Islands (US). Based on CIA World Fact 2008 "International disputes" <www.cia.gov/library/publications/the-world-factbook/fields/2070.html>

several bilateral attempts to resolve their respective territorial disputes with neighboring Chile, yet the three countries have failed to agree on any solution. (Domínguez 1998, 15) In 1998, Menem visited London and stated that Argentina would use only peaceful means to recover the disputed Falklands/Malvinas islands. In 2001, Tony Blair reciprocated by visiting Argentina. He encouraged both countries to resolve their differences that led to the 1982 war. However, no bilateral agreements or negotiation on sovereignty took place during these bilateral visits.

The failure to bilaterally solve a dispute is the reason why a third-party is often called on to help. As Page Fortna argues, third-parties help disrupt any of the causal pathways to war and make peace agreements more durable by increasing the costs of attack, by reducing uncertainty about actions and intentions, and by preventing and controlling accidental violations and skirmishes. (Fortna 2004, 487) Within the Latin American region, countries have relied on ad hoc regional mediators, regional institutions, global organizations, and world tribunals to overcome their mutual suspicions while attempting to solve territorial and maritime claims.

For instance, the most successful regional mediation effort took place between 1995 and 1998, when four regional guarantors (Argentina, Brazil, Chile and the US), as defined by the 1942 Rio Protocol, effectively helped Ecuador and Peru to settle their dispute over the Cenepa Valley, for which they fought at least two wars. This process entailed a bilateral binding boundary agreement, subject to international public law, followed by a peacekeeping mission. (Herz and Pontes Nogueira 2002) While successful, this has been a rather unusual and unique process of dispute settlement in Latin America, since it relied essentially on an ad hoc regional forum that was outside the Inter-American System and which, in fact, bypassed the OAS. Furthermore, the guarantor does not have the same formal features of an

arbiter, since as Beth Simmons argues, “while third parties acting as guarantors may be expected to increase the treaty implementation, this guarantee is subject to caveats that reduce the certainty of the guarantee itself.” (Simmons 1999b, 8) No other ad hoc regional forum has been put in practice since then.

Belize and Guatemala have attempted to solve their dispute through a regional mechanism too, but with a much more formal approach, by appealing to the OAS Fund for Peace. On November 8, 2000, the heads of the delegations of both countries signed an agreement to adopt a comprehensive set of negotiations, mediated by the OAS, to resolve their territorial *differendum* that originated two centuries ago between Britain and Spain over their colonial territories in Central America. The dispute endured following their independence from Spain in 1839 and from the United Kingdom in 1981, respectively. It involves a Guatemala claim to gain access to the Atlantic sea through the Caribbean, entailing almost two thirds of Belize’s territory. At the core of the dispute lies what Guatemala sees as the inability of the UN General Assembly to reach a satisfactory solution to Guatemala's unresolved territorial claims against Britain, in November of 1980. Nevertheless, like previous bilateral and UN efforts, the OAS mediation failed in 2007 when Guatemala rejected the proposals from the OAS-sponsored facilitation process. The two countries are now preparing their respective legal teams to begin proceedings at the ICJ, pending a referendum on the matter in Guatemala. This remains the only case of dispute settlement brought to the OAS forum by a Latin American state.⁵

⁵The other cases brought to the Fund involve the implementation of a demarcating boundary established by the ICJ between El Salvador and Honduras, and negotiations to improve relations between Honduras and Nicaragua, who have also summoned their cases to The Hague. No new cases have been referred to the Fund since 2003. For cases being analyzed by the Fund see <http://www.oas.org/sap/espanol/cpo_sustentabilidad_programas_paz_documentos.asp>

Countries in the region have also relied on third-mediation by global organizations. For example, the UN Secretary General has been called upon several times to mediate between Venezuela and Guyana. Since gaining independence from Spain in the 19th century, Venezuela has claimed parts of Guyana's territory, which is believed to be rich in minerals and oil. In 1899 an international tribunal awarded most of the territory to Britain, then the colonial power in Guyana, but Venezuela has periodically protested the outcome, so the matter was referred to the UN Secretary General, first in 1984 and again in 1991, when a UN special envoy was appointed. However, since Hugo Chávez arrived to power, third-party UN mediation efforts have continuously failed. Irritated by the decision of neighboring Guyana to allow an American company to build a satellite-launching center, President Hugo Chavez has denounced UN efforts, Guyana and the US. As of to date, the UN mediation attempt is stalled. (Rohter 2000; Serbín 2003) Similarly, in January 2002, Honduras raised at the UN Security Council El Salvador's alleged refusal to give effect to the 1992 ICJ ruling regarding their border dispute. The Council, however, refused to take the case in 2003. The Argentine-UK dispute over the Falklands/Malvinas islands has followed a similar pattern. Argentina has approached the world body several times; while the UN General Assembly and the UN Decolonization Committee have repeated calls for the resumption of negotiations, especially since the restoration of the Argentine democracy. (Resolution GA/COL/3122) Yet, talks in the UN forum have not led to any form of negotiation.

This leads us to our final form of conflict resolution; namely, the judicial mechanism by means of adjudication to an international tribunal, as opposed to an arbiter, guarantor or mediator. Interestingly enough, the number of cases invoking courts has increased in the past years. On September 20, 2007 the Guyana-Suriname Arbitral Tribunal established under the UN Convention on the Law of the Sea made public its findings on the long-

standing maritime controversy between these two countries. Suriname actually tried to prevent the Tribunal from reaching a conclusion by arguing that it had no jurisdiction on the matter. The Tribunal, however, found that it had the authority to establish the maritime boundary between the two claimants and established that Guyana had sovereign rights to explore and exploit the hydrocarbon resources within the boundaries of the Exclusive Economic Zone, which were once contested by Suriname. This has so far been the only maritime dispute brought by a country in the Western Hemisphere under the UN Convention of the Law and the Sea.

More readily used has been the ICJ in The Hague. Historically, the Court was never the preferred forum for dispute settlement in Latin America. From 1948 to 1990 The Hague delivered one single ruling with regards to a Latin American territorial and frontier dispute.⁶ In 1960, by fourteen votes to one, the Court held that a territorial award given by the King of Spain in 1906 was valid and binding in favor of Honduras; thus obligating Nicaragua (the loser country) to give its effect. (ICJ 1960/31) More than three decades would pass before the Court would deliver another ruling involving a Latin American territorial conflict. The trend of invoking courts and judicial arbitration, as opposed to political and diplomatic mediation, began before the end of the Cold War, when a joint Honduras-El Salvador commission that was unable to settle a bilateral territorial dispute, decided to remit the case to the ICJ for its consideration in 1986. On September 12, 1992, seven years after the first request was made, the presidents of both countries met at the border to receive the final ruling to a dispute that had caused the ultra famous Soccer War between these two neighboring Central American states. The ruling, again, favored Honduras more than El

⁶ The ICJ had heard other Latin American cases regarding non-territorial and frontier disputes, including the US-Nicaragua, and the Nicaragua-Honduras, Nicaragua-Costa Rica case regarding frontier incidents and armed attacks in the 1980s.

Salvador, because the former was granted the right to two-thirds of the disputed territory.⁷ Although officially accepted by both states, this ruling has failed to lower border tensions and has even prompted Honduras to approach the UN Security Council, while El Salvador requested a revision of the judgment to the ICJ in 2002. In spite of the final decision, Honduras, El Salvador, Nicaragua and many others have since continued to invoke the power of the Court.

Since 1992, almost all Central American territorial and maritime disputes, with the exception of Guatemala-Honduras, have been surrendered to The Hague. As mentioned earlier, El Salvador requested a revision of the ICJ's 1992 judgment in 2002; Nicaragua turned to the ICJ twice in 1999 and again in 2001 to delineate its border disputes with Honduras and Colombia, respectively; Costa Rica brought a case against Nicaragua in 2005 to resolve its dispute concerning navigational and related rights on the San Juan River. Likewise, in South America, Peru instituted proceedings in 2008 against Chile concerning the delimitation of its boundary in the Pacific Ocean. Belize and Guatemala are now following their neighbors by preparing their case to the Court.

In sum, the fact that some Latin American countries are now invoking legal and judicial forms of settlement when historically they haven't is intriguing. It is especially puzzling given the fact that they have regional forums available, which often entail less legal costs and perhaps more expedite resolutions. Why invoke a global tribunals and not other regional forums? Why the ICJ?

⁷ The ICJ found that Honduras had sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. At the same time, it delineated a single maritime boundary in accordance to Nicaragua's preferences at a point with the co-ordinates 15° 00' 52" N and 83° 05' 58" W; that is 2° co-ordinates less of what Honduras had originally claimed. (ICJ Press Release 2007/23)

COMPETING EXPLANATORY FRAMEWORKS: FORUM SHOPPING IN THEORETICAL PERSPECTIVE

Forum shopping has been defined as a “litigant’s attempt to have his action tried in a particular court of jurisdiction where he feels he will receive the most favorable judgment or verdict.” (Harvard Review Association 1990, 1677) Political scientists and legal scholars have developed different theoretical approaches to understand why states prefer some formal organizations over others. These approaches can be classified as rational design institutionalism (RDI), domestic-legal arguments, and constructivist explanations. While they all provide sophisticated tools to analyze forum shopping, they are insufficient to explain why Latin America states have turned to global courts while overlooking their own regional forums.

First, the RDI is the most recent project grounded on rational choice that seeks to account for the wide range of design features that characterize international institutions. In trying to explain why major institutions are organized in radically different ways, advocates of this research agenda have also argued that “states pay careful attention to institutional design” and thus rationally discriminate among international organizations based on their institutional features, such as membership, scope, centralization, control, and flexibility. (Koremenos, Lipson, Snidal 2001, 762-763) To some extent, forum shopping is the product of a market-oriented mechanism whereby different methods of dispute settlement are offered at different forums and from which states can choose based on their design, assets and liabilities. Three key institutional dimensions dominate the literature on forum shopping; membership, flexibility and centralization.⁸

⁸ Some of these key dimensions overlap with variables used by other institutionalists. For instance, Keohane, Moravcsik and Slaughter, in their analysis of legal dispute resolution, refer to independence (who controls the

For instance, Marc L. Busch, in his study of overlapping institutions and trade dispute settlement, argues that a complainant choice of forum depends on “whether it prefers to set a regional or multilateral precedent, or no precedent at all. Setting a precedent means adding to an institution’s body of case law concerning the obligation in dispute. It matters because, according to Busch, it can facilitate future litigation, and encourage more *ex ante* settlement, in relation to other members of the same organization. (Busch 2007, 736)

The use of a forum is ultimately dependent on the treatment of membership; that is how ample or restrictive are the membership rules in setting regional or multilateral precedents. Following a similar logic, Beth Simmons has argued that solving territorial conflicts can help increase the terms of trade, allow for regional integration and solve future economic conflicts among states. Her argument implies that territorial dispute settlement via international arbitration can set precedents to solve outstanding economic issues. (Simmons 2002, 832-836)

By contrast, Walter Mattli considers that flexibility and centralization best explain the choice of forum arbitration. In his study of private settlement of cross-border trade and investment disputes through commercial arbitration, Mattli finds that institutional flexibility often determines the institution for arbitration. Forums offering the highest levels of procedural flexibility will be preferred against those who are most inflexible with their rules. Institutional flexibility comprises features such as the number of arbitrators, the appointment of judges, the place of arbitration, and the powers of tribunals. (Mattli 2001, 925) Likewise, institutional centralization is favored when there is uncertainty about the behavior of other actors and the state of world affairs. As Mattli argues, “traders with little experience in international exchange or traders from very different cultural and linguistic

adjudication), access (who sets the agenda), and embeddedness (who controls the formal implementation. (2000) Overall, these variables are synonymous of control and centralization.

regions may rely more heavily on centralized support and expertise for resolving their disputes than veteran traders operating in a relatively homogenous region.” (Mattli 2001, 922)

The RDI agenda has shed important light on the nature of forum shopping, most notably by identifying key features that can be measured and compared across different sets of forums. Yet, institutional design insights offer poor guidelines to analyze forum shopping in territorial dispute settlement. The use of precedents when making legal judgments is probably prevalent in international trade and finances, but virtually absent in international public law. Forums such as the ICJ will only analyze cases on their own merits; their rulings have binding force only for the parties involved, while the judges abstain from dealing with similar previous cases to make their judicial decisions. In other words, the legal procedures in international public law prevent the application of the common law doctrine of *stare decisis* or precedent from applying to judgments of the Court.⁹ For this reason, a case settled among one set of countries will rarely be used as a precedent against another set of countries or members.¹⁰ So precedents based on regional or multilateral membership are not strong determinants of forum choice either, at least not among parties with territorial or maritime conflicts.

On the other hand, flexibility is an institutional characteristic that can be valued by states, but not for the reasons argued by the RDI agenda. In his assessment of Latin American institutions, Jorge Dominguez argues that Inter-American organizations “have been flexible to the point of ineffectiveness.” (Dominguez 2007, 122) Arie M. Kacowicz

⁹ This does not mean that the Court will be inconsistent with its own rulings. In fact, it rarely departs from its earlier decisions, but decisions by the Court are not applicable to other cases and the decisions are binding only between the parties which have submitted their dispute to the tribunal itself. The Court may use previous cases as a reference, but only to ensure consistency. For a discussion of how the ICJ uses precedent cases, see Crawford and Grant 2007 and Shahabuddeen 2007.

¹⁰ For an analysis of the ICJ’s procedures see John Collier and Lowe 1999, pp. 175-185.

considers that Latin American states designed very legal forms of institutions, only to displace them by less legal forms of organization; so the countries were formal and legalistic in their principles, yet informal and pragmatic in their workings. (Kacowicz 2005, 44) But even with such flexibility at hand, states in Latin America have rarely settled their disputes through regional forums.

Moreover, if flexibility is indeed something that disputants prefer among institutions, as claimed by the RDI research agenda, then certainly the outcome would not favor organizations such as the ICJ. Of all options available for territorial dispute settlement (bilateral, trilateral, regional, multilateral and judicial settlement), international courts offer the least flexible forums. In The Hague, disputants can only choose one *ad hoc* judge; the rest is determined by very inflexible rules that govern the highest international tribunal. Proceedings are made public, the powers of the tribunals are set by the UN Charter, the arbitration takes place in the Netherlands, and public international law is the only applicable law. By contrast, centralized expertise is an institutional feature that should favor regional forums, since being local means they are closer to home and surely know more about their members and their needs. In spite of the flexible, inflexible or centralized institutional designs, Latin American countries have shopped at different forums, but rarely turned to regional organizations.¹¹

Domestic-legal scholarship offers a second source of theoretical explanation to account for the selection of forum. Both legal scholars and political scientists are often inclined to explain forum preference by focusing on the characteristics of the domestic legal structure. That is, states are usually more willing to pursue international organizations that reflect their own domestic institutions than those that do not. According to Andrew

¹¹ For a critical review of the RDI endeavor and its shortcomings see Duffield 2003.

Moravcsik, a domestic legal system, which constitutes an embodiment of societal preferences, interests, and ideas, can determine a state's behavior towards other states and international institutions. (Moravcsik 1997) For instance, states with civil law systems are more likely to accept compulsory jurisdiction of international courts than states with other forms of legal systems, such as common and Islamic laws. This is so because international public law most closely resembles civil law in its use of *bona fides* (or good faith in contracting) and in its disregard for jurisprudence (the use of precedents.) By virtue of sitting in The Hague, the ICJ is exposed to continental European legal traditions, which are predominantly civil. The institutional similarity between international public law and civil legal systems encourages civil law countries to approach international courts for arbitration. As argued by Powell and Mitchell “civil law states accept similar legal principles domestically, which makes it easier for them to correlate their behaviors, and the adjudicator and civil law disputants will converge naturally on the same outcomes.” (Powell and Mitchell 2007, 403)

However, an explanation based on domestic legal systems does not properly explain why the ICJ has recently become the preferred forum of territorial dispute settlement in Latin America. Most countries in the world system are ruled by civil law traditions, yet Latin America has the highest propensity to submit to legal rulings vis-à-vis other regions, including continental Europe, where civil law was founded. According to a study by Beth Simmons, there had “never been a legally constituted third-party ruling on a land border in Europe, there have been two between independent countries in Africa, two in the Middle East, three in Asia, the Far East and the Pacific, and twenty in Latin America!” (Simmons

1999, 214)¹² To date, one half of the court's docket is made of Latin American cases, including four instances of territorial and maritime disputes.¹³

Moreover, if the legal tradition determines the forum, then we should have seen more historical cases adjudicated to the ICJ, since most Latin American countries have been ruled by civil law for centuries. Yet, interest in The Hague is a relatively recent trend in Latin America and this attraction cannot be attributed to prevalence of civil law, since the latter has been a constant. Furthermore, The Hague is not the only international tribunal mandated by international public law; other regional and global courts use similar procedures, yet they are not invoked as often as the ICJ by countries with civil law traditions. Finally, the fact that countries as diverse as Guyana, Surinam, and perhaps even Belize, are pursuing a settlement via an international tribunal despite their common law tradition casts some doubt about how domestic law influences the choice of forum. At best, the domestic legal tradition is only a necessary, but certainly not a sufficient condition to explain why states prefer international tribunals to other forms of dispute settlement.

Finally, constructivist explanations offer a third theoretical approach by focusing on the role of international legitimacy. From this perspective, actors are not only concerned about maximizing material gain, but share a number of legitimacy concerns about the authoritative and moral power of the institution that they are invoking. (Acharya & Johnston 2007, 13) As Ian Hurd argues, international legitimacy is a subjective quality between an

¹² Simmons seems to have overlooked other ICJ rulings regarding Eastern and Central European cases of territorial and maritime settlement. The ICJ has settled cases in Europe, although some of these cases are relatively recent, belonging to former Communist countries in the post-1990 era. In any case, Latin America still has the highest rate in using judicial settlements. See Appendix 2 for cases analyzed by the ICJ.

¹³ The ICJ is not only looking at territorial disputes in Latin America, it also analyzes non-territorial disputes, such as the Argentina-Uruguay conflict for the pulp mills, the Ecuador-Colombia conflict for aerial spraying, and the US-Mexico conflict regarding consular rights for illegal immigrants. Of the 12 pending cases currently under the jurisdiction of the ICJ, 6 belong to Latin America, 4 to Europe and 3 to Africa. See "Pending Cases", the International Court of Justice, < <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&sort=2&p3=0>>.

actor and an institution and is defined by the actor's perception of the institution. (Hurd 2007, 6) International legitimacy emerges from the organization's complex of symbols, authority, and history. From this perspective, specific forums will be preferred provided they confer and withhold collective legitimation from actors and decisions; that is, when its actions, statements and resolutions have been recognized as representing the views of a large sentiment of the world's states. (Claude 1967) For Hurd, this often takes place when its utterances carry more force than had they been carried out by individuals members, and when the actions and pronouncements represent the collective sentiment of the international community. (Hurd 2007, 6)

A constructivist approach accounts for the apparent Latin American bias towards the ICJ. The Hague is not only the highest international court available, but its relative neutral composition, as well as its history in delivering impartial rulings provides strong incentives to invoke its power. International legitimacy raises the costs of non-compliance by affecting the reputation of those who decide to ignore its ruling and authority. But international legitimacy is not an exclusive attribute and the ICJ is not the only organization that confers international legitimacy. The UN Security Council, the Holy See and even the Court in Hamburg have collective legitimation authority; yet they are not invoked as often as the ICJ. The Latin American puzzle thus remains unexplained and the constructivist research agenda provide only a partial explanation as to why states refer their cases to global courts as opposed to regional organizations. If anything, the region points the analyst of forum shopping to look for insights from within the region by analyzing regional trends.

IMPARTIAL FORUMS AND REGIONAL DIFFUSION DYNAMICS

An explanation as to why Latin American states by-pass their own regional

mechanisms of conflict resolution is necessary in order to analyze the choice of forum for territorial dispute settlement. Hence this section will first analyze the bias against regional organizations and then explain the preference for international tribunals by focusing on regional clustering and policy diffusion.

Cheap Talk in Regional Forums: Explaining the Regional Bias

Countries in the Americas have a plethora of regional organizations, treaties, agreements, and even tribunals to go to in order to solve their disputes. The forums available vary in terms of scope, domain, level of institutionalization, and even membership. With the exception of Europe, no other regional block has produced so many treaties, conventions and resolutions with the objective of promoting conciliation and understanding of states. As Juan Carlos Puig argues, “no other group possesses such a diversified and, at times, sophisticated panoply of juridical resources.” (Puig 1983, 11) At the same time, Latin America’s numerous border, territorial and maritime disputes provide a role, if not a mandate, for these regional mechanisms to operate. Nevertheless, as demonstrated in section one, there are very few instances of regional dispute settlement, involving only Ecuador-Peru and Belize-Guatemala.

Latin American countries willing to solve their mutual conflicts can appeal to twelve varying forms of treaties and institutions¹⁴, although only three types of forum deal specifically with the settlement of territorial disputes: a) a legally-binding agreement of conflict resolution, b) a regional framework; and c) sub-regional organizations. First, the American Treaty of Pacific Settlement, also known as the Pacto de Bogotá, is the principal

¹⁴ A full list of Western Hemisphere treaties is available in Paul R. Hensel (2005) data set, version 1.4, available at <<http://data.icow.org>>.

instrument for peaceful resolution of dispute settlement. Conceived in 1948 by a Mexican diplomatic initiative that was backed by Brazil, it covers every kind of international conflict, except those dealing with domestic disputes. Its procedures include good offices, mediation, conciliation, investigation, judicial settlement, and arbitration. It also indicates the institutional steps to be followed in case one of the parties refuses to carry out the award, such as invoking the ICJ and the OAS Council. According to Juan Carlos Puig, from a strictly legal point of view, the Pacto de Bogotá is perfect, as it has no gaps or fissures that would leave its functioning subject to the will of the parties. (Puig 1983, 13)

The second Inter-American forum option available to Latin American states is more flexible in its approach; it involves the invocation of the OAS. This institution emphasizes the peaceful settlement of disputes in its article 13 and encourages states to use diverse mechanisms ranging from negotiation to arbitration in article 24. States shopping in this institutional venue can invoke its procedures directly or indirectly. Countries can turn to the OAS directly by summoning its Inter-American Peace Commission, which is a pre-jurisdictional organ that replaced the Inter-American Peace Committee in 1956 and whose mission is to “permanently see that those States among which there is, or may arise, conflict of any nature whatsoever, reach a solution as soon as possible, and to suggest to this end, without detriment to the formulae chosen by the parties” (OAS Charter)

An even more flexible option is available by directly appealing to the Permanent Council of the OAS, since it has specific competence on issues regarding the resolution of controversies through peaceful means. With the consent of the parties, it too can exercise good offices on its own or through the Inter-American Peace Commission, and can disseminate information by submitting reports to the General Assembly and the Secretariat.

Alternatively, member-states can use the OAS Fund for Peace. Created in 2000 under the initiative of former OAS interim Secretary General, US Ambassador Luigi Einaudi, this forum is perhaps the most innovative mechanism of dispute settlement established in the post-Cold War era within the Inter-American system. Ambassador Einaudi, who had played a key negotiating role as part of the US guarantor delegation to the Ecuador-Peru territorial conflict, implemented some of the lessons learned from the Andean region in an attempt to strengthen the OAS capacity for peacebuilding. He realized that just like the Guarantor states in the Ecuador-Peru case, the OAS could provide expertise in diplomacy and international law by establishing a formal agency within the organization in charge of centralizing all regional mediation efforts. He also recognized that regional powers, such as Brazil and the US, had played a significant role by providing resources and economic support. Hence, the fund would help defray the costs of proceedings by relying on donations from powerful member states, like Brazil and the US, and other permanent observers. He also grasped that an ad hoc and flexible approach had best served the interests of Ecuador and Peru. So, unlike the Pacto de Bogotá, which is a formal document, the Fund could rely on a much flexible approach by offering a range of conflict resolution mechanisms contemplated under the OAS Charter, including direct negotiation, good offices, mediation, investigation, conciliation, judicial settlement and arbitration.¹⁵ Finally, the American Ambassador also reasoned that the Guarantor states had left Ecuador and Peru with orphan agreements, since as he explains: “once the peace agreement was signed, their parents left with unfulfilled promises.”¹⁶ Consequently, Einaudi thought of the Fund as a tool to help implement the agreement, while ensuring that the promises derived from it

¹⁵ On the establishment of the OAS Fund for Peace, see OAS resolution on Peaceful Settlement of Territorial and Maritime Disputes AG/RES.1756 (XXX-O/00).

¹⁶ Personal phone interview with Ambassador Luigi Einaudi, former interim-Secretary General of the OAS, November 26, 2008, New Orleans, Louisiana.

would be properly delivered with the resources available to the OAS. In his view, the combination of flexibility, centralization, membership, and resources would offer strong institutional incentives for Latin American states to approach the OAS.

If the OAS framework is not appealing enough, a third and final forum option is available in the form of sub-regional tribunals. Specifically, the Central America countries of El Salvador, Honduras, and Nicaragua have the choice of referring their claims to the Central American Court of Justice (CACJ), which has the ability to analyze cases between member, non-member states and even legal persons, provided they agree to the Court's jurisdiction. More than any other international tribunal, the CACJ best reflects the legal traditions of Central America, since it is based not only on civil law, but it emanated from a common regional history and appoints its justices from a pool of jurists from within the region itself.

Nevertheless, a critical evaluation of all these regional forums indicates that they have been underused at best or neglected at worse. In spite of their legal-binding arrangements, the Pacto de Bogotá and the CACJ have never been called upon to deal with territorial or maritime disputes in post-1990 Latin America.¹⁷ General procedures within the Pact have not been normally applied due to the dearth of ratifications and reservations that in many cases totally set aside compulsory jurisdiction.¹⁸ For Scheman and Ford, the Pact is vivid testimony “that rigid and compulsory procedures make it a good legal document... but a poor political one.” (Scheman and Ford 1985, 205)

¹⁷ The Pacto de Bogotá has been invoked by Latin American countries in the ICJ, but it has been essentially mentioned as a justification to why the case is being brought The Hague. Historically, only one case has been brought the Central American Court in 1906...(check)

¹⁸ As of 2008 the treaty had 21 signatory states, of which only 15 ratified it, with 7 imposing reservations to its statute. See As of 2008 <www.oas.org/juridico/spanish/firmas/a-42.html>

The OAS framework is the only regional forum that has been invoked at least once, but it has had a mixed record and continues to be underused. The Organization has been relatively successful in containing some crises and military disputes when they emerge, especially among Central American states and most recently between Ecuador and Venezuela; yet it has been historically unable to secure a permanent settlement of territorial and maritime disputes. (Domínguez 2008, 96 Shaw 2004, 71-85, Lyon 1970, 126-127) The Fund for Peace, which provides strong economic incentives to lower judicial costs and settle disputes faster than the ICJ, failed to settle the one single dispute it was commissioned to deal with between Belize and Guatemala.

While other regions may behave similarly, Latin America is particularly puzzling because unlike Asia or Africa, and even Europe, it is the only region that possesses such a high concentration of institutions dealing specifically with the pacific and legal resolution of territorial and maritime disputes. Other regions might be tempted to go to The Hague in the absence of regionally-binding forums, but Latin America has plenty of them, yet states rarely use them.

The under-use of regional organizations is even more puzzling if one considers that Latin American foreign policy has been ruled by a collective and normative understanding that favors legal obligations among regional neighbors. This common regional understanding is based on the expectation and practice that countries from the Americas will engage in pacific settlement whenever conflict emerges. (Domínguez et.al. 2002, 23) For that purpose, they have relied on international public law to regulate their external behavior by appealing to various regional norms, such as non-intervention, sovereignty, good offices, mediation, and arbitration. (Kacowiz 2005) At the same time they have behaved as norm entrepreneurs by encouraging and spreading regional norms that applied exclusively to them.

(Finnemore and Sikkink 1998) For example, jurists from the continent formulated laws to limit the ability of nations to use force to protect the interests of their national citizens in foreign countries; this principle is now widely known as the Calvo and Drago Doctrines. (Connell-Smith 1974, 111-115) *Uti possidetis* (as you possess, so you may possess) was devised by Latin American republics after their independence as a relief measure against the need for treaty delimitation of international boundaries of several adjoining states. Through these doctrines, most boundaries between former Portuguese and Spanish colonies were accepted as things existed in 1810, for South America, and 1821, for Central America. (Cukwurah 1967, 112-116, 190-199; Lyon 1970, 122-123; Domínguez et.al. 2002, 21-22) While Latin American states have relied on these common, regional and normative understandings in their mutual interactions and even developed their own diplomatic culture, they have rarely, if ever, invoked their own regional institutions to settle a dispute when it arises.

Institutional design features offer few insights in understanding these regional forum choices. As mentioned above, the abundance of regional forums available in the Americas varies in terms of institutionalization, flexibility, centralization, membership and binding mechanisms, but the outcome remains the same. Likewise, domestic legal traditions are not inspiring countries to rely on their very own sub-regional courts, which in some aspects mirror their domestic tribunals.

By contrast, international legitimacy does provide a cogent and logic explanation as to why regional forums are disliked. Latin American countries are legitimately concerned about the impartiality and neutrality of regional forums. Certainly, there is the fear that most regional institutions tend to reflect the interests and preferences of the regionally powerful actors. (Acharya and Johnston 2007, 19.) As David Mares argues, “US power and geography

have meant there would be no great-power concert or balancing in Latin America... producing fundamental security externalities for each and every Latin American nation.” (Mares 1997, 198) Even when the US is not the major source of concern, regional powers can still influence outcomes. Bolivia once vigorously supported an OAS exit to its dispute with Chile, but then had a sudden change of mind when José Miguel Insulza –a native of Chile- became the OAS Secretary General in 2005. Likewise, diplomatic discussions about revitalizing the CACJ were opposed by most of Nicaragua’s neighbors, especially Honduras, in part because this regional tribunal is headquartered in Managua.

Nevertheless, being surrounded by regional powers might offer strong incentives to use regional institutions too, since the most influential countries can always endow institutions with resources, capacity, leadership, and diplomatic support to carry-on with their mandate. The Ecuador-Peru settlement clearly demonstrated that a concert of regional powers can indeed change the preferences of the disputants from conflict to cooperation by inducing them to settle for an agreement. The bias against regional organizations in Latin America is not due to lack of regional leadership or power.

Instead, regional organizations may actually make accommodation more difficult by providing incentives for cheap talk. Going regional imposes two sets of dilemmas, which in turn question their ability to withhold legitimacy from actors and decisions. First, there will always be the temptation to go to a higher, more authoritative and legitimate court.

Countries in the Americas know that regional forums are not the last resort. If all goes wrong regionally, they can still appeal to global courts without being damaged by reputational costs for not abiding to regional rulings. Ultimately, if an agreement negotiated under regional auspices seems adverse for domestic ratification, then states can simply reject it and then favor a solution via a global tribunal. This enables rival states to win time or

freeze a conflict, while pretending to settle the dispute. As one lawyer working for a legal firm that provides international legal counseling explains: “going regional is often merely a strategy used by the counterpart to win time to prepare the case in the ICJ.”¹⁹

Second, the information provided by regional organizations becomes an institutional liability rather than an asset. Indeed, the regional forum reveals strategic information about the parties in dispute: their positions, claims, and historical and legal records. This often allows claimants to know in advance the rival’s stand and provides ample opportunity to explore his/her weaknesses if the case is then taken to a higher international tribunal. Hence, the problem with most regional organizations is not that they lack information and a system to centralize it, but they often know too much about their members, making settlement difficult.

For this reason, jurists like J.G. Merrills believe that while boundary disputes are almost always intra-regional, regional organizations generally have little to contribute. In his view, regional mechanisms often provide “the antagonists with the diplomatic and material support necessary to continue the struggle.” (J.G. Mills 2005) This view was shared by the early literature on regionalization, which cautioned that regional organizations had only limited success at resolving the issues behind disputes. (Nye 1971, Haas 1983) Paradoxically, their very own potential –closeness to home- becomes the major source of weakness, since proximity often compromises the organization’s mission.

To some extent, the Belize-Guatemala territorial conflict is a vivid example of this regional dilemma. The OAS facilitated negotiations by establishing a conciliation panel, led by Guyana’s diplomat Sir Shridath Ramphal and by US lawyer Paul Reichler. The panel favored Belize more than Guatemala, since the former was granted more territory; but it did

¹⁹ Personal and confidential interview with a legal advisor and lawyer at Dewey and LeBoeuf who requested anonymity, Washington, D.C., October 14, 2008.

recommend some adjustment to the land border and new maritime limits giving Guatemala an economic exclusion zone (EEZ). For that purpose, Belize and Honduras each agreed to contribute 1,000 square nautical miles to Guatemala's zone. The OAS also recommended the establishment of a tri-national ecological park covering the three Central American states.

However, the Guatemalan government rejected the offer, citing that Honduras and Belize would still have more benefits out the EEZ, making the deal extremely difficult to ratify at home. In September 2003, the United Kingdom, which by then had become a major donor to the Fund for Peace, joined the OAS Group of Friends. Yet its presence raised Guatemala's concerns about the Organization's impartial status, since Belize is a former British colony. In other words, the proceedings of the OAS were not perceived as legitimate by one of the actors. By 2007, regular meetings of both countries, under the auspices of the OAS, failed to reach agreement on a definitive solution, leading its Secretary General to recommend a solution via an international tribunal. (Foreign and Commonwealth Office 2008)

In sum, the OAS provided information about Belize's case and gave Guatemala access to historical colonial records provided by the British; yet the OAS proposal ultimately favored Belize's claim; this eventually tempted the Guatemalan government to search for a favorable judgment in an alternative and more authoritative forum. On the other side, Belize feels betrayed by its neighbor, since in its view Guatemala had stalled the negotiations and played cheap talk all along. This situation has certainly offered incentives for both countries to go global, while it might have dissuaded other future litigants from pursuing a regional solution. This does not mean that countries will neglect the OAS all along. In fact some countries might return to the regional organization to help them in implementing

decisions from other international tribunals, as was the case between El Salvador and Honduras. Yet, they will rarely invoke the OAS to settle the dispute itself, given the relative availability of higher global courts and the risk of becoming a victim of cheap talk. So, why do states prefer the ICJ and not other legitimate and global forms of settlement?

Diffusion, Emulation and the Neighbourhood Effect

The previous section examined why Latin American states tend to avoid regional organizations, but this still leaves a lot of room for choice, since there are multiple global organizations that states can refer to. For instance, most disputes in Latin America involve maritime *differenda*, including Peru-Chile, Nicaragua-Honduras, Costa Rica-Nicaragua and even Belize-Guatemala. These states have at least four different alternative means for settlement: a) the International Tribunal for the Law of the Sea in Hamburg, b) the ICJ in The Hague, c) an arbitral tribunal constituted in accordance with the Convention of the Sea, d) and a special arbitral tribunal. Paradoxically, even with all these options available, only Guyana and Suriname have turned to a tribunal different to The Hague.

Latin America's interest in the Court is relatively recent, since historically countries have tended to invoke other forums, including European countries, kings, popes, the US, and regional powers. While the ICJ is one of the most authoritative and legitimate international tribunals to date, its invocation entails high costs because the proceedings are expensive and its judges often take decades before ruling. It is also the most inflexible forum, allowing states to have very little control over the cases and procedures. The

outcome can be uncertain too, since past rulings are not used to inform present cases. In fact, more than one disputant country has been stunned by the Court's decisions.²⁰

Certainly, its neutral composition makes it particularly appealing vis-à-vis regional forums. Beth Simmons recognizes the benefit of having a neutral legal authority handy when she argues that “even if an arbitration panel produces the same terms as did political compromise, some domestic groups will find it more attractive to make concessions to a disinterested institution than a political adversary.” (Simmons 2002, 834) Nevertheless, there are many tribunals that offer such neutrality and international legitimacy, including the one in Hamburg, so why do Latin American states continue to refer their cases to The Hague and not to Hamburg?

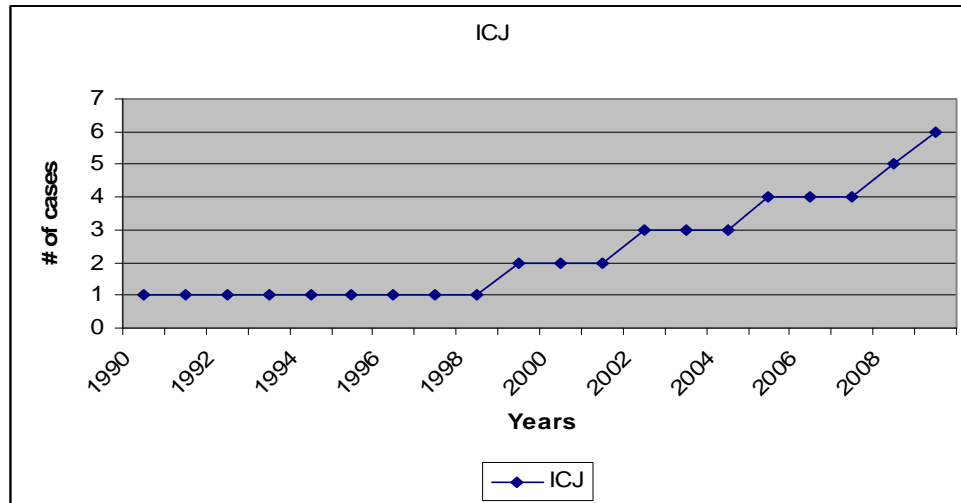
International legitimacy and reputation costs can play a role, especially when states anticipate that they will pay a higher cost in the long run if they break their commitments. States willing to solve their disputes might be tempted to turn to forums that increase those costs in order to ensure enforcement. (Simmons 1999, 2002; Mitchell and Hensel 2007) Yet a variety of forums can help increase reputation costs and increase the legitimacy of a ruling. For instance, Argentina accepted the Pope's mediation and ruling in 1978 regarding the Beagle Channel dispute, in part because the military junta perceived the Papal institution as carrying moral authority; rejecting the Pope's judgment would thus have incurred prestige costs. Interestingly enough, Guatemala and Belize considered the Papal path too when OAS negotiations failed in 2007, but in the end The Hague option is being preferred over all other forums.²¹ Why The Hague and not the Holy See?

²⁰ In 2002 the ICJ surprised Nigeria when, in a controversial ruling, awarded the Bakassi peninsula to Cameroon, whose residents consider themselves Nigerian and who had opposed being transferred to Cameroon. (ICJ 852/2002)

²¹ Personal and confidential interview with a senior diplomat from Belize, Washington, D.C., July 22, 2008.

Evidence from these cases suggests that forum choice is not all strategic bargaining. Rather, there appears to be a diffusion wave whereby neighboring states have adopted similar patterns of settlement by imitating and emulating each other. International diffusion entails the adoption of similar policies in varied national settings, which produces commonality in diversity. According to the theoretical literature available on international economic policy, diffusion patterns have at least three distinct features, a wavelike character, a geographical clustering, and the spread of commonality amid diversity. (Weyland 2005; Skrede Gleditsch 2002) To some extent, Latin America's preference for forums such as the ICJ has followed a diffusion pattern that is linked spatially.

First, mapping the number of times the ICJ has been invoked and adopted as the preferred forum resembles a wave, with an S-shaped curve and a bell-shaped pattern. Interest in The Hague began very slowly in the mid eighties and nineties and has evolved as more states have appealed to the Court's power. The ICJ had originally very few followers, beginning first with El Salvador-Honduras in 1986, leading to the 1992 ruling. By the end of the 1990s the trend expanded to cover Costa Rica, Nicaragua and Colombia. By 2005 more than half of Central America's border and frontier disputes were under the Court's jurisdiction. Gradually, the wave reached South America in 2008, as Peru, Chile and Colombia filed a case against or were brought to the Court by a neighbor.



Second, if Latin America has followed a diffusion policy trend, then we should also see geographical clustering in the data on the distribution the cases brought to the ICJ. Diffusion theories suggest that proximity prompts imitation, leading to a strong pattern of policy regional diffusion. (Collier and Mesick 1975, Walt 2000) Indeed, the wave spread first in Central America, among small and neighboring states with symmetrical military capabilities. This is also a sub-region of Latin America where states interact regularly via trade and through various diplomatic networks. They also share a common history, since many of these countries experienced similar patterns of civil wars in the eighties and eventually hosted UN peacekeepers in the nineties.

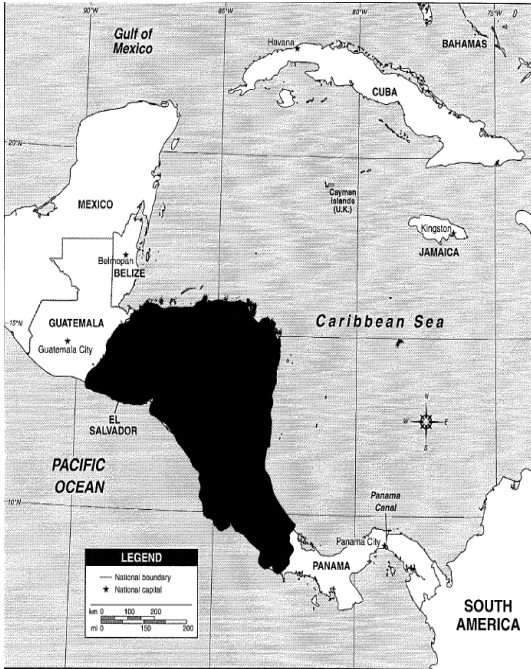
The maps below show the distribution of cases for four distinct periods. They all show regional patterns of geographical clustering over time. The first phase began 1990 with El Salvador, Honduras, and Nicaragua; all countries that originated the wave and share a common dispute regarding the Golf of Fonseca. These are all neighboring states that, surprisingly, had an alternative regional court to go to, their very own CACJ, yet followed the ICJ path. The second period began in 2001, when Costa Rica brought its northern neighbor, Nicaragua, to the court itself for the San Juan river dispute. This trend expanded further in

2003 to cover a third instance when Nicaragua sued the South American nation of Colombia for a dispute regarding the Caribbean islands of San Andres, Providencia and Santa Catalina. By 2008 the contagion effect reached the Southern Cone, when Peru brought a suit against neighboring Chile over the location of their maritime border. The trend continues as both Belize and Guatemala are preparing their case in The Hague, in which case all Central America disputes –with the exception of Guatemala-Honduras- would have been put under the jurisdiction of the Court itself. This suggests the existence of a diffusion pattern, where “models usually spread first in the region in which they originate and only later search other areas.” (Weyland 2005, 266)

Phase 1: Honduras, Nicaragua and El Salvador 1990-1999



Phase 2: Costa Rica and Nicaragua, 2001



Phase 3: Nicaragua and Colombia, 2003



Phase 4: Peru and Chile, 2008



When asked why Guatemala and Belize now prefer the ICJ over other forums, a high level diplomat interviewed for this study responded that “all of our neighbors have gone to the ICJ.”²² This finding is again consistent with policy diffusion theories, which often argue that the closer two actors are to each other the greater their mutual relevance. Diffusion, indeed, tends to be higher between proximate actors. (Skrede Gleditsch 2002, 5)

Consequently, the geographic interaction context of Central America has influenced the constraints and opportunity structures available for individual states.

Third, commonality of policies can be identified among the diversity of cases. Territorial disputes in Latin America vary in terms of the claims and historical legacies, but they share common features; not only do they all involve frontier disagreements, but they entail serious differences of interpretation regarding international treaties on the delimitation of borders. (Orozco 2003) Latin American countries go to a tribunal because they want someone to interpret numerous colonial documents supporting expansive claim over

²² Personal interview with Ambassador Jorge Skinner, Permanent Representative of Guatemala to the OAS, Washington, D.C., August 2008.

territory. From this perspective, legalization is a way of de-politicizing and de-militarizing a conflict by making it subject to legal interpretation. But what is interesting about the Latin American cases is that in spite of their different legal claims, they use similar wordings and language to file their cases in the Court, suggesting strong emulation trends among the cases.

In suing Colombia in 2001, Nicaragua referred to article 31 of the Pacto de Bogotá (referred but never called upon or invoked the Pact itself) to invoke the jurisdiction of the ICJ:

As a basis for the Court's jurisdiction, Nicaragua invokes Article XXXI of the American Treaty on Pacific Settlement (officially known as the "Pact of Bogotá"), signed on 30 April 1948, to which both Nicaragua and Colombia are parties. Nicaragua also refers to the declarations under Article 36 of the Statute of the Court, by which Nicaragua and Colombia accepted the compulsory jurisdiction of the Court, in 1929 and 1937 respectively. (ICJ Press release No. 2008/4)

The Pacto indeed stipulates that if states fail to settle their disputes, then they can appeal to The Hague. This was the first time that a Latin American country had referred specifically to the Pacto to establish the Court's jurisdiction; a strategy that would soon be emulated by others. In 2005 Costa Rica mimicked the strategy of its neighbor Nicaragua to bring him to the court by alledging that "The Court also has jurisdiction over the present dispute in accordance with the provisions of Article 36, paragraph 1, of its Statute, by virtue of the operation of the American Treaty of Pacific Settlement of Disputes, Bogota, 30 April 1948, Article XXXI." (Costa Rica c. Nicaragua ICJ 2005) As soon as the Court accepted the arguments of Costa Rica, in 2008, Peru used the same article and treaty as the basis for the Court's jurisdiction in its case against Chile, in a way emulating Nicaragua's and Costa Rica's procedures. (ICJ Press release No. 2008/1) This case is now being closely followed by Bolivia, which may soon consider a similar path in its maritime claim against Peru and Chile, both of whom ratified the Pacto and have used the treaty to create judicial jurisdiction.

Emulation is evident not only in the procedures, but in the legal practice too. States hire the same legal practitioners to represent them in international courts. This practice often increases the costs of litigation, but reinforces policy diffusion. For instance, Foley Hoag is a legal firm headquartered in Washington DC that provides international legal counseling to several countries. It was Foley Hoag which drew heavy notice among Third-World diplomats when one of its lawyers, Paul Reichler, successfully represented Nicaragua in the ICJ against the US in 1984. (ICJ REP. 392, 1986)²³ It currently runs a practice that now has four cases before the Court, representing a full third of the 2008 august court's docket. Four of the firms' clients are Latin American states who have been attracted by the success of its practice, including Nicaragua. (Ford 2008) Dewey and LeBoeuf is the other legal firm located in New York City with expertise on territorial dispute settlement. Its practice includes representing Honduras against El Salvador before the ICJ –a case won against Foley Hoag in 2007- and representing Suriname in the delimitation of its maritime boundary under the 1982 Law of the Sea Convention. Its successful practice has now drawn the attention of Guatemala, which might hire the firm in its case against Belize, now currently advised by Foley Hoag.

Finally, there is the question of who is making the final decision to invoke the ICJ's power. In Latin America, the study of foreign policy decision-making has focused on the individual level, including the role of the executive branch and presidential systems.

(Domínguez and Lindau 1984) As Jeanne A.K. Hey and Frank O. Mora argue, "Latin

²³ Specifically, Nicaragua charged the US for being involved in the unlawful use of force by training, arming, equipping, financing and supplying forces within its own territory, with the clear purpose of overthrowing its government. In a surprising ruling, the ICJ sided with Nicaragua and found the US to be in breach of its international obligations. (ICJ REP. 392, 1986) While the US ignored the ruling and disputed the Court's jurisdiction, the case was seen as a David versus Goliath legal battle. The ICJ's ruling in effect gave Nicaragua an important legal victory. While this incident did not deal with a territorial claim per se, it effectively modified perceptions about the Court itself, especially in Central America.

America's political culture, specifically its tradition of personalism and authoritarianism rule, has accentuated the role of the executive. Latin American foreign policy, more so than domestic policy, has traditionally been the preserve of the executive and the narrow elite.” (Hey and Mora 2003, 4)

Nevertheless, most presidents are advised by a small cohort of foreign policy experts and in Latin America this group tends to be dominated by lawyers or economists. This is seen not only in the approach the countries use to deal with each other, but also in the practice, where lawyers and economists are usually in charge of supervising and implementing foreign policies. In other words, jurists are *de facto* the regions' diplomats. This is reflected in the appointment of ambassadors and foreign affairs ministers who overwhelmingly tend to be lawyers or economists.²⁴ The historical practice of appointing lawyers as diplomats has reinforced the idea and perception that foreign policy in Latin America is essentially a legal or economic more than a political issue.

Yet, the legalization of foreign policy emphasizes regional diffusion policies. It means that decisions to go to court rely on a rather small cohort of individuals who in fact share a similar view of world affairs. Increased policy cohesion often lead decision-makers to reject certain paths in favor of others based not necessarily on cost-benefit assessments, but on cognitive and personal biases. (Weyland 2005, 283)

In Guatemala, for instance, the foreign policy making has been dominated by a small group of economists and lawyers who have advocated for a legal path in the dispute against Belize. The most influential figure in this strategy has been Ambassador Gert Rosenthal, a

²⁴ Argentina, Brazil and Mexico have even appointed some of these jurists to serve as chief justices in the ICJ. Mexico, for instance, has rarely participated in the UN Security Council as a non-permanent member, following a non-interventionist and mostly pacifist foreign policy tradition; but four of its most distinguished diplomats have served as judges in the ICJ: Isidro Fabela, Luis Padilla Nervo, Roberto Córdova and, currently, Bernardo Sepúlveda.

widely renowned economist who has made his public career by serving in and for the UN in several posts. Although an economist by training, Rosenthal knows the ICJ procedures with some degree of expertise. He is often referred as the ultimate Guatemalan expert in the UN system since he served twice as permanent representative in New York from 1999 to 2004 and currently. As minister of foreign affairs from 2004-2007, he supported the idea of invoking the Court's power.²⁵ Thus, the nature of Latin America's foreign policy-making style that emphasizes international public law and economic development provide a strong impetus that favors judicial settlement via the UN system. This translates into an excessive importance given to the Court's procedures as the only logical option available. If regional dynamics are added to these cognitive and personal biases, then the decisions to appeal the ICJ appears less strategic than it is often assumed.

Therefore, most Latin American countries have followed similar strategies in instituting proceedings in the ICJ. They have followed the El Salvador-Honduras model more readily than the Belize-Guatemala (OAS), Ecuador-Peru (regional ad hoc) or the Guyana-Surinam (Convention of the Sea) models. So far, the region remains hooked on the Court, as more and more cases are being instituted in The Hague; thus suggesting a diffusion pattern subject to regional emulation and cognitive biases.

Conclusions

Adjudication to international tribunals has emerged over the past two decades as one of the preferred methods for settling a growing number of territorial and maritime disputes in Latin America. The most important conclusion drawn from this analysis is that although governments have a broad range of regional and multilateral options for settling their claims,

²⁵ Personal interview with Guatemalan diplomat who requested anonymity, Guatemalan mission to the OAS, Washington, DC, July 17, 2008.

they will tend to prefer specific forums over others. One of the most interesting findings is that the selection of forum cannot always be attributed to the institutional qualities of those international organizations. The results do not seem to be fully consistent with theories that focus on flexibility, centralization or organizational membership. Forum shopping is difficult to note without analyzing the countries' motives, which quite often lie outside the institutions themselves. When states make a forum choice, through action or inaction, their decisions affect the forum for dispute. Therefore, this study suggests the need to look for exogenous factors that can account for institutional choice and not just institutional outcome or efficiency. Likewise, legal domestic traditions do not play a central role in explaining Latin America's forum choices.

Instead, the picture here presented supports a regional approach to the matter by focusing not only on the biases against regionally-based organizations, but on the geographic clustering of diffusion cases that are pronounced by neighborhood effects. On the issue of biases, this article finds reason for cautious optimism about the potential role of regional forum shopping. Regional forums in Latin America might help with logistical and operational matters regarding the implementation of a ruling, but seem to be inadequate to settle the disputes themselves. No matter how many efforts are invested in making these organizations more flexible, binding or more economically appealing, their inadequacy is not the result of their design. It is their location and the availability of other global forums and higher courts that greatly affects their use and appeal.

With regards to forum shopping in global organizations, the findings in this research show that regional diffusion is a powerful force driving Latin American states towards global courts, such as the ICJ. In some of the cases discussed here, what might appear the result of careful consideration to strategic interaction, reputational costs, and bargaining is really not

so. To some extent, choosing the ICJ over other alternative forums is prompted by a contagious behavior in which proximate states emulate and imitate strategies, policies, and practices. The limited size and relative homogeneity of the legal and foreign policy teams in Latin America reinforces these regional trends.

This analysis has only scratched the surface of a complex but fascinating area of research; yet, several issues remained unexplained and merit fuller analysis in the future. For instance, is the diffusion effect exclusive to countries in the same neighborhood? Enthusiasm for the ICJ in Africa and Central Europe suggests diffusion patterns that go beyond Latin America. Of course, room for refinement and additional research also exists; particularly in identifying the causes of emulation and diffusion. The literature on international diffusion so far available offers varying and competing explanations as to why policies in one state attract the attention from other countries. Constructivists like Martha Finnemore emphasize the role played by international organizations in creating new norms and patterns of behavior, in which imitation is triggered by an attempt to gain international legitimacy. For cognitive-psychological theorists like Kurt Weyland, emulation is driven largely by inferences and judgments emanating from the decision-makers themselves. A comparative analysis among countries with similar filing strategies in the ICJ might provide an interesting way of rigorously testing these competing explanations.

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