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The World's Most Powerful International Court? The Central American Court of Justice and the Quest for De Facto Authority (1907-2020)

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**THE WORLD’S MOST POWERFUL
INTERNATIONAL COURT?
THE CENTRAL AMERICAN COURT OF
JUSTICE AND THE QUEST FOR DE FACTO
AUTHORITY (1907–2020)**

SALVATORE CASERTA* & MIKAEL RASK MADSEN**

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I. INTRODUCTION

The original Central American Court of Justice (CACJ) is often referenced as the world's first international court (IC).¹ Functioning from 1907 to 1918, and commonly known as the Cartago Court,² this court was the first-ever IC and a precursor to the Permanent Court of Justice, or “World Court”, established in 1922 in The Hague.³ The CACJ does, however, hold another record. The current incarnation of the court – established in 1994, in Managua, Nicaragua as the judicial arm of the Central American System of Economic Integration (*Sistema de la Integración Centroamericana* (SICA) – which is the

1. See FREYA BAETENS, *First to Rise and First to Fall: The Court of Cartago (1907–1918)*, in EXPERIMENTS IN INTERNATIONAL ADJUDICATION: HISTORICAL ACCOUNTS 211, 211 (Ignacio de la Rasilla & Jorge E. Viñuales, eds., 2019) (describing how Central America deserves recognition as the first region with a supra-national court); see also CESARE P.R. ROMANO et al., *Mapping International Courts and Tribunals, the Issues, and Players*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 12 (Cesare P.R. Romano et al. eds., 2014) (identifying the role and purpose of the first Central American International Courts).

2. See Sasha Maldonado Jordison, *The Central American Court of Justice: Yesterday, Today and Tomorrow*, 25 CONN. J. INT'L L. 183, 194–96 (2009) (explaining the Cartago Court got its name because of its location in Cartago, Costa Rica).

3. See OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY 17 (2005) (proving a brief history of international courts prior to 1922).

world's most powerful international court, formally speaking.⁴ The 1991 Protocol of Tegucigalpa (the Protocol)⁵ and the 1992 Statute of the CACJ (the Statute)⁶ provide the Court with remarkably extensive powers.⁷ The CACJ is competent to rule as an inter-state IC,⁸ as a European Union (E.U.)-style regional economic court,⁹ as a supranational constitutional court,¹⁰ and as an arbitral tribunal.¹¹ Access to the Court is also broad and, in fact, broader than that of the Court of Justice of the European Union (C.J.E.U.) and similar regional economic ICs.¹² In addition to states, individuals, national judges, and other private entities have standing before the Court, making it *par*

4. See generally KAREN J. ALTER et al., *Conclusion: Context, Authority, and Power*, in INTERNATIONAL COURT AUTHORITY 435, 453 (Karen J. Alter et al. eds., 2018) [hereinafter *Context, Authority, and Power*] (explaining the variations of authority of international courts).

5. Tegucigalpa Protocol to the Charter of the Organization of Central American States (ODECA), Dec. 13, 1991, 1695 U.N.T.S. 382 [hereinafter Tegucigalpa Protocol].

6. Estatuto de la Corte Centroamericana de Justicia [Convention of the Statute of the Central American Court of Justice], Dec. 10, 1992, 1921 U.N.T.S. 280 [hereinafter CACJ Statute].

7. See SALVATORE CASERTA, INTERNATIONAL COURTS IN LATIN AMERICA AND THE CARIBBEAN: FOUNDATIONS AND AUTHORITY 66 (2020) [hereinafter FOUNDATIONS AND AUTHORITY] (explaining the broad authority of the Court).

8. In its international jurisdiction, the Court has the power to decide on: i) any kind of disputes arising between the Member States of the SICA, with the exception of border, territorial, and maritime disputes; and ii) any controversy and conflict that may arise between Central American States and a third State, when all the parties have agreed in submitting the dispute to the CACJ. See CACJ Statute, *supra* note 6, art. 22(a).

9. When the CACJ acts as a regional economic court, the Court interprets and applies the Protocol of Tegucigalpa and its complimentary instruments. Here, the Court can hear acts of annulment, decide on the validity of the acts of the organs of the Community, and receive preliminary rulings from national courts. See *id.* art. 22(b)–(c), (g), (k).

10. When the CACJ acts as a regional constitutional court, it is empowered to rule: i) over separation of powers disputes between the constitutional organs of the Member States; and ii) in situations in which judicial decisions of national courts have not been complied with. See *id.* art. 22(f).

11. In addition to these competences, the CACJ is also the advisory organ of both national Supreme Courts and the SICA's institutions. *Id.* art. 22(c)–(e).

12. For an overview of the institutional features of the many ICs, see CESARE ROMANO, *A TAXONOMY OF INTERNATIONAL RULE OF LAW INSTITUTIONS*, 2 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2011).

excellence a “new style” IC; that is to say, an IC with compulsory jurisdiction and access for non-state actors to initiate litigation.¹³

Notwithstanding the above presented extensive powers vested in the Court and its broad access provisions, the CACJ has thus far failed to leave a significant mark on Central American law and society.¹⁴ As an economic integration court, for example, the CACJ has had little impact despite numerous rulings.¹⁵ As a supranational constitutional court, it has at best only indirectly influenced domestic law.¹⁶ As an inter-state court, it has struggled to enforce its rulings on territorial matters and most of these cases have ended up before the International Court of Justice (ICJ) in The Hague.¹⁷ As an arbitral court, it has yet

13. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 5–8 (2014) [hereinafter *THE NEW TERRAIN*] (explaining the idea of a “new style” International Court and its uniqueness in legal standing); HÉCTOR PÉREZ-BRIGNOLI, *A BRIEF HISTORY OF CENTRAL AMERICA* 123 (1989) (discussing the ability of the Court to not recognize governments that came to power unconstitutionally).

14. See Salvatore Caserta, *Regional Integration through Law and International Courts – the Interplay between De Jure and De Facto Supranationality in Central America and the Caribbean*, 30 *LEIDEN J. INT'L L.* 579, 592 (2017) [hereinafter *Regional Integration*] (arguing the Courts are still intergovernmental and controlled by the member states which do not view the authority as binding).

15. To date, the CACJ has ruled upon 194 cases, comprising contentious cases (64% of the total), advisory opinions (23% of the total), and preliminary rulings (13% of the total). Of these, only 27 are directly concerned with the internal application of SICA law, and a further 33 with general issues of economic law. The remaining 134 cases involve disparate issues only partially linked to the regional economic integration of the region, such as; institutional conflicts, constitutional and political issues, labor law, civil and criminal law, administrative law, and issues linked to the elections and immunities of the members of the regional parliament (PARLACEN). See César Ernesto Salazar Grande, *Acceso a la Justicia Comunitaria*, CORTE CENTROAMERICANA DE JUSTICIA (2019) (on file with authors)

16. Interview with Nicaraguan Professor of Law (July 9, 2014) [hereinafter Interview No. 7] (providing the following statement: “The CACJ has merely replicated the sentences of the Court of Justice of the EU, with the result that its judgments are mere reflections and comments – like a series of lectures – which have no real impact on the legal systems of the Member States”).

17. The cases we refer to here concern two longstanding territorial disputes between Honduras and Nicaragua and between Nicaragua and Costa Rica which have been repeatedly litigated before the ICJ and the CACJ. The cases before the CACJ are *Nicaragua v. Honduras*, CACJ 05-29-11-1999 (1999), *Honduras v. Nicaragua*, CACJ 06-03-12-1999 (1999), and *FONARE v. Costa Rica*, CACJ 12-06-12-2011 (2011).

to play any role whatsoever.¹⁸ More generally, the Court lacks visibility and seems not to have become the “go-to” institution for lawyers operating in the region.¹⁹

Part of the reason for this discrepancy between the CACJ’s formal powers and its actual impact is its Member States’ general reluctance to fully accept and embrace the institution.²⁰ Among its founding Member States, only Nicaragua, Honduras, and El Salvador have fully ratified the Court’s Statute, while Guatemala, Costa Rica, and Panama have yet to substantively engage with the Court.²¹ The CACJ has also been subject to criticism from the Member States and other regional organs of the SICA.²² The Member States have on multiple occasions sought to curb the Court’s powers, although these proposals remain unimplemented.²³ Moreover, in 2003, the Central American Heads of

18. The CACJ has not provided a single ruling in its arbitral competence. In addition to this, in early 2001, a new system of arbitration was created under the auspices of the Secretariat of the SIECA. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 190–91 (highlighting the challenges of the CACJ and SICA to produce an effective arbitration system).

19. Interview with Nicaraguan Lawyer (July 11, 2014) [hereinafter Interview No. 18].

20. FOUNDATIONS AND AUTHORITY, *supra* note 7, at 67 (arguing member state reluctance to respect the court hinders its authority).

21. Guatemala ratified the Court’s Statute in 2008 under the Presidency of Alvaro Colom but has thus far not appointed its national judges to the Court. See ALEJANDRO DANIEL PEROTTI ET AL., DERECHO Y DOCTRINA JUDICIAL COMUNITARIA: CORTE CENTROAMERICANA DE JUSTICIA Y TRIBUNALES SUPREMOS NACIONALES 131 (3d ed. 2019), <https://www.corteidh.or.cr/tablas/r39218.pdf> (discussing who has ratified the statute and which countries have not); see also Interview with Guatemalan Politician (June 18, 2014) [hereinafter Interview No. 1]. (arguing that the Guatemalan reluctance to fully join the Court is chiefly due to the strong influence of some politicians, who are concerned with the possibility that the Court could turn into a human rights tribunal).

22. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 67 (arguing some member states have harshly criticized the Court and tried to circumvent the jurisdiction of the Court).

23. In three instances, the SICA Member States have attempted to limit the Court’s jurisdiction and financial resources. In 1997 with the *Declaration of Panama II*, in 1998 with the *Declaration of Managua*, and, finally in 2003 in the context of two Presidential Meetings held in Belize and Guatemala. These attempts, however, remain non-implemented, thus placing the Court in the impasse position of legally having attributed competences that are *de facto* not accepted by the Member States. See KATIN N. METCALF & IOANNIS PAPAGEORGIOU, REGIONAL INTEGRATION AND COURTS OF JUSTICE 98 (2005) (discussing the proposals to limit the power of the

State created an alternative system for solving trade disputes through arbitration under the auspices of the Secretariat of the Central American Economic Integration (SIECA), which competes directly with the community law competences of the Court.²⁴ This has created both a cheaper and faster alternative to adjudication than the CACJ, further challenging the authority of the Court.²⁵ Going beyond Member State interactions with the Court, many legal professionals operating in the region do so with a noticeable degree of skepticism towards the CACJ; some have even alleged that the Court is too politicized to be a credible institution.²⁶

Although direct actions such as lack of ratification, curbing of competences, or the creation of alternatives to the Court have undoubtedly had negative impacts on the CACJ and its authority,²⁷ we contend that the striking imbalance between the Court's extensive formal powers and its actual authority is, at least in part, a result of the CACJ's particular and unique history. Although it is a relatively new court – established only in 1994²⁸ – the current CACJ reflects a much longer, extremely complex history that has imported decades of

Court and the strong rejection of the proposals by the Court).

24. See generally *Lista de Casos Presentados*, SIECA, <https://www.sieca.int/index.php/integracion-economica/integracion-economica/mecanismo-de-solucion-de-controversias/casos> (last visited Apr. 9, 2022) (showing the cases handled by SIECA since its inception).

25. See KAREN J. ALTER et al., *How Context Shapes the Authority of International Courts*, in *INTERNATIONAL COURT AUTHORITY* 24, 39–40 (Karen J. Alter et al. eds., 2018) [hereinafter *How Context Shapes the Authority*] (discussing the alternatives to litigation and its impact on the authority of the CACJ).

26. Interview No. 18, *supra* note 19. (providing the following statement: “The CACJ is not competent in arbitration and commercial issues. The Court has been focusing chiefly on issues of separation of powers within the States. This has really been its expertise. . . . The people at the Court are our friends, but I do not see how . . . you know . . . the clients bring money . . . I believe that, for historical reasons, they have been more focused on issues of public law rather than private law. From here, my reservations arise.”).

27. For the impact of these actions on the authority of ICs, see Mikael Rask Madsen et al., *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 *INT'L J. L. IN CONTEXT* 197, 197–220 (2018) [hereinafter *Backlash against International Courts*] (explaining how resistance to the Court's authority can be achieved by creating alternative forums).

28. See METCALF & PAPAGEORGIU, *supra* note 23, at 31 (providing a brief history of the events prior to the formal establishment in 1994).

political struggle and attempts at regional unification into the current Court.²⁹ More specifically, the CACJ's unique broad jurisdiction encompassing both constitutional and international law dimensions is rooted in the idea of simultaneously pacifying and politically unifying Central America by legal and judicial means.³⁰ As explored more thoroughly below, such ideas date back to the earliest days of Central American independence, in the aftermath of the retreat of the Spanish Empire in 1821, when various proposals were tabled which would unify the region through federal constitutions or international institutions.³¹ These attempts were all intended to secure peace and integration among the newly independent nations.³² The precursor to the current CACJ, the aforementioned Cartago Court, was itself created as a result of these projects aiming at pacifying the region through legal means.³³ With the exception of the current CACJ's function as an EU-Style community law court, the Court's jurisdiction is in large part a continuation of the historic Cartago Court and its extensive quasi-federal powers.³⁴ The current Court's community law competence has been significantly updated, yet in practice it replicates the powers vested in many other ICs set up in regional integration systems in the aftermath of the end of the Cold War.³⁵ Most of these

29. See generally Maldonado Jordison, *supra* note 2, at 191–204 (acknowledging the challenges faced in the previous attempts to form a Central American union).

30. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 67 (discussing the emergence of the CACJ and its attempts at unifying Central America using international and constitutional law).

31. See *id.* at 65 (explaining how the fraught history of the CACJ formed after Central America gained its independence from the Spanish).

32. *Id.* at 71.

33. See CARLOS JOSÉ GUTIÉRREZ G., *LA CORTE DE CARTAGO* 16 (3d ed., 2009) (discussing the similarities and shared goals of the prior iterations of the CACJ).

34. See SALVATORE CASERTA & MIKAEL RASK MADSEN, *Hybridity in International Adjudication: How International are International Commercial Courts?*, in *INTERNATIONAL COMMERCIAL COURTS – AND THE FUTURE OF INTERNATIONAL ADJUDICATION* (Stavros Brekoulakis & Georgios Dimitropoulos eds., forthcoming 2022) [hereinafter *Hybridity in International Arbitration*] (explaining the direct connection and retention of quasi-federal competences).

35. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 713–18 (1999) [hereinafter *The Pieces of the Puzzle*] (arguing the structure of the CACJ cannot fulfill the elements necessary for an international judicial body).

courts emulate the institutional features of the Court of Justice of the EU (CJEU) with varying degrees of success.³⁶

This article argues that this mix of underpinning structural processes—pacification, constitutionalization, federalization, regionalization, and globalization—and their specific legal-political articulations in relation to the CACJ have played a major role in the Court's genesis, and later in the difficult transformation of the Court's extensive formal powers into actual legal authority.³⁷ As outlined below, each of these processes has been visible in the actions of the actors establishing the CACJ. This has, in turn, made it very difficult for the Court to cater to the many political, legal, and professional interests which might have been theoretically attracted by its broad institutional framework.³⁸ The differences in interests related to, for example, the Court being a constitutional court and matters connected to regional market integration are manifest and sometimes contradictory.³⁹ Overall, this has made the institutionalization of the CACJ a complicated and incomplete affair.⁴⁰

To depict the complex relationship between the Court and its various audiences across Central America, the article employs the theory of *de facto* authority (DFA) of international courts developed by Karen Alter, Laurence Helfer, and Mikael Rask Madsen.⁴¹ The impetus was the authors' observation of the "wide variation in the activity and influence of the nearly two dozen ICs currently in existence."⁴² Their goal was to explain the contextual factors that have "lead some ICs to become active and prominent judicial bodies that

36. See Karen Alter, *The Global Spread of European Style International Courts*, 35 W. EUR. POL. 135, 138–140 (2012) [hereinafter *The Global Spread*] (arguing aspects of the CACJ parallel EU legal institutions).

37. See discussion *infra* Section II.

38. See discussion *infra* Section V.

39. See discussion *infra* Section V.

40. See also FOUNDATIONS AND AUTHORITY, *supra* note 7, at 67–68 (explaining the history creating the unique incomplete institution which is now the CACJ).

41. See *How Context Shapes the Authority*, *supra* note 25, at 24, 28 (explaining the methods for assessing de facto authority, specifically whether the audience recognizes the jurisdiction); see FOUNDATIONS AND AUTHORITY, *supra* note 7, at 179 (arguing the CACJ is unable to overcome the hurdles that ultimately influence its authority).

42. *How Context Shapes the Authority*, *supra* note 25, at 24.

cast a rule-of-law shadow beyond the courtroom, while others remain moribund or legally and politically sidelined.”⁴³

The authors of the theory of DFA argue for a more realist and sociological understanding of authority, which assesses how audiences react towards ICs’ claim to authority.⁴⁴ They thereby challenge existing formalist and legalist accounts of authority, which generally emphasize formally delegated powers or procedural aspects of courts.⁴⁵ Essentially, they want to understand the processes of translating formally delegated authority into actual *de facto* authority.⁴⁶ More specifically, they assess DFA by observing whether relevant constituencies regard the decisions of ICs as being binding and providing impetus for making consequential changes in their behavior.⁴⁷ In this light, ICs will typically gain DFA “through the iterative process of issuing decisions that key audiences recognize and respond to with consequential steps toward compliance.”⁴⁸

The theory then distinguishes different types of DFA: no authority, narrow authority, intermediate and extensive authority.⁴⁹ These types of authority are measured against the nature and size of audiences that are likely to recognize IC decisions as binding and therefore take consequential steps to implement those decisions.⁵⁰ *Narrow authority* is wielded when the immediate parties of a given case recognize a

43. *Id.*

44. *See id.* at 28 (arguing the perception of relevant actors impacts the authority of the Court).

45. *See generally* Karen J. Alter et al., *International Court Authority in a Complex World*, in *INTERNATIONAL COURT AUTHORITY* 3, 5–14 (Karen J. Alter et al. eds., 2018) [hereinafter *International Court Authority in a Complex World*] (calling for an alternative approach in assessing the authority of the Court outside of legal formalism).

46. *See How Context Shapes the Authority*, *supra* note 25, at 26 (assessing the difference between formal authority and *de facto* authority).

47. *See id.* at 30 (arguing authority is inherently impacted by governmental and non-governmental influences).

48. *See id.* at 45 (explaining how international courts obtain *de facto* authority).

49. There is also a fifth dimension, popular authority, which is of little relevance to this study. *See id.* at 31–32 (explaining the different levels of authority between international courts).

50. *See id.* at 45 (reviewing the types of authority against the levels of compliance).

court ruling and take consequential steps toward respecting it.⁵¹ *Intermediate authority* is achieved when a larger group of similarly situated actors to the parties of a given case, such as potential litigants and government officials charged with implementing IC decisions, recognize the Court's ruling and actively move to implement it.⁵² *Extensive authority* is delineated by a broad range of actors engaging meaningfully with the IC – such as NGOs, legal professionals, academics, and business actors.⁵³ ICs with extensive authority will typically play a central role in developing the law and politics within its remit of legal authority.⁵⁴ It is important to reiterate that these are different types of authority and that they might coexist.⁵⁵ Moreover, the authority of an IC may well vary across Member States.⁵⁶

To make this theory operational, a set of contextual factors needs to be studied, including; institution-specific factors, the various constituencies of an IC, and the different political contexts of the IC.⁵⁷ To do so, the article refers to a number of sources to inform the analysis of the interactions of the CACJ with its major audiences across its different legal areas of jurisdiction.⁵⁸ Firstly, the article relies

51. *Id.* at 31.

52. *See How Context Shapes the Authority*, *supra* note 25, at 31 (describing intermediate authority as authority supported by relevant parties or government entities).

53. *See id.* at 32 (finding extensive authority exists where the authority is recognized and supported by non-state actors).

54. The European Court of Human Rights (ECtHR) and the CJEU arguably have such extensive authority. *See* R. Daniel Keleman, *The Court of Justice of the European Union in the 21st Century*, 79 L. & CONTEMP. PROBS. 117, 118 (2016) (using the ECJ as an example of extensive authority); *See also* Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & CONTEMP. PROBS. 141, 142–43 (2016) [hereinafter *The Challenging Authority*] (offering international courts in Europe as an example of extensive authority).

55. *See generally How Context Shapes the Authority*, *supra* note 25, at 33 (offering definitions of the types of authority and the ways in which they overlap).

56. *See id.* at 56 (explaining the authority of an international court is dependent upon the jurisdiction as certain actors may show respect for the court's authority where others do not).

57. *See id.* at 31–33 (considers the broad range of factors impacting the authority of any given court including the political matters and the audience).

58. *See id.* (providing the context around the authority of CACJ in comparison to other international courts).

on primary information accessed during 26 qualitative interviews conducted in Central America with central stakeholders of the CACJ and the SICA, including judges, lawyers, politicians, civil servants, private businesses, and civil society groups.⁵⁹ The interviews were informed by an approach known as the reflexive sociology of law and with the aim to develop an understanding of the institutional and legal developments from the perspective of the agents surrounding and operating the Court.⁶⁰ The data collected through these interviews in combination with other sources (see below), moreover, enables the CACJ and its practices to be framed as historically produced—and to a certain extent historically contingent—social constructions embedded in changing national, regional, and international relations of power.⁶¹

In addition to the material gathered through interviews, the article also uses primary and secondary legal and historical sources. These comprise relevant legal materials including a number of CACJ judgments which are hard for system outsiders to access as the Court is not good at updating its repository of case law. By visiting the CACJ in person, we managed to obtain all relevant legal materials. In terms of historical material, we rely mainly on historic legal documents, including treaties and case law from the institutional predecessors of

59. Each interview lasted between one to three hours and was recorded and transcribed. All interviewees were guaranteed anonymity, and they will therefore not be quoted by name in the present article. All material from the interviews is on file with the authors and stored in a secure location in compliance with EU data protection standards. Appendix 1 of this paper provides a complete list of our interviews. For further information relating to the interviews, please email the authors directly.

60. See Mikael Rask Madsen & Yves Dezalay, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 ANN. REV. L. & SOC. SCI. 433, 436–37 (2012) (reflecting on the social science understanding of the legal forum of judicial authority).

61. See Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, 2 INT'L POL. SOCIO. 128, 139 (2008) (offering the ELF as a comparable example for the history, influence, and authority of the CACJ); See generally Jakob V. H. Holtermann & Mikael Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LEIDEN J. INT'L L. 211, 223 (2015) (using the European model of international courts as a parallel example to the authority and history of the CACJ).

the current CACJ. As secondary sources, we include historical and political analyses of the region and its individual states. Our research interest is not in providing a descriptive and state-centric account of the formal empowerment of the CACJ – the powers delegated to the Court by the Member States.⁶² The intention is instead to explore the transformation of formal competences into DFA through an analysis of audiences' interactions with the decision-making of the Court.⁶³ Throughout the article, the interview-based empirical approach is combined with a socio-legal perspective on law and institutions that draws on the aforementioned primary and secondary sources.

The article makes an important contribution to contemporary scholarship on ICs. First, it provides an in-depth account of a court that, with rare exceptions, has not been explored in the literature.⁶⁴ Importantly, the article integrates the few existing accounts on the Court with original new data collected via recent interviews, which have provided the authors with a unique knowledge of the Court's current situation. Moreover, we have also managed to access the most recent rulings of the Court, which are not easily available. This, in turn, provides new nuances concerning the challenging and challenged authority of the Court. Existing accounts, including one written by one of the authors of this paper, have generally assessed the Court's developments in negative terms, by emphasizing the struggles experienced by the Court in becoming authoritative.⁶⁵ Yet, while in general this article confirms and adds to these conclusions,⁶⁶ we also

62. See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1, 1 (2008) (discussing how member states subject to the jurisdiction of an international court must surrender some level of autonomy); See Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 61, 65 (2013) (explaining a traditional method of authority is established by state consent).

63. See *How Context Shapes the Authority*, *supra* note 25, at 24 (showing the alternatives to the traditional methods for understanding international court authority).

64. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 65–95 (discussing the CACJ, its history, and authority whereas other research focuses on other international courts).

65. See *generally id.* (offers a comprehensive background on the successes and challenges of the CACJ).

66. See discussion *infra* Section III.1–3.

observe an attempted change of direction on the part of the Court, which may well have important repercussions on its future trajectory.⁶⁷ More generally, this study of the CACJ is also instructive for theorizing about ICs entrenched in politically challenging environments.⁶⁸ We analyze the dilemma facing many ICs in such contexts.⁶⁹ On the one hand, the Court has done what would be expected by a judicial institution. It has developed a body of community law that could, in principle, have a strong impact on national legal systems;⁷⁰ it has addressed a number of socially and politically salient issues in an effort to become a socio-politically relevant institution;⁷¹ and it has been activated in four of its five delegated functions, showing itself to be capable of attracting many and diverse litigants.⁷² On the other hand, regardless of these practices, the Court continues to struggle. Revisited in our conclusions, this situation can be explained in part by the Court's lack of overall strategy in terms of addressing the professional interests and legal visions of large sectors of the body of actors potentially interested in its operational context.⁷³ Moreover, the CACJ excessive formalism at times clashes with its position as a court established as part of an international organization.⁷⁴ As we argue, the Court has on occasion lacked a necessary sense of legal diplomacy to ensure its success within its complex set of operational contexts.⁷⁵

The structure of the article is as follows: Section II analyzes the protracted genesis of the CACJ, paying specific attention to the different pathways leading to the current court. These notably include

67. See discussion *infra* Section III.4.

68. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 178–79 (providing context to CACJ and the effect of political tensions and conflicts on its operations).

69. See generally Salvatore Caserta & Pola Cebulak, *The Limits of International Adjudication: Authority and Resistance of Regional Economic Courts in Times of Crisis*, 14 INT'L J. L. CONTEXT 275, 275 (2018) (comparing the “involvement of four regional economic courts in legal disputes mirroring constitutional, political, and social crises at national or regional levels”).

70. See discussion *infra* Section III.1.

71. See discussion *infra* Section II.3.

72. See discussion *infra* Sections II.1–3.

73. See discussion *infra* Part IV.

74. See discussion *infra* Section IV.1.

75. *Id.*

the post-colonial project of constructing a unified and peaceful Central America through political federations, the neo-colonial intervention of the United States (US) prompting the establishment of international organizations and tribunals in the region, and the post-World War II notion of regional economic integration through law. In each case, we explore the extent to which these historic processes have influenced the CACJ's authority. In Section III, we explore the Court's attempts to develop jurisprudence in the three different dimensions of its jurisdiction and assess its audiences' reactions towards the Court's case law. Section IV discusses the findings on the CACJ and its relative authority. Section V concludes the article and lays out the broader implications of our analysis for the study of ICs.

II. THREE PATHWAYS TO THE PRESENT CACJ: POST-COLONIAL FEDERALISM, US SECURITY POLICY, AND ECONOMIC INTEGRATION

While the present CACJ only opened its doors in 1994, its history is much longer with roots that go back to the early decades of the 19th Century.⁷⁶ The CACJ is not, therefore, merely a byproduct of the socio-political dynamics of the end of the Cold War era, as often argued in the literature,⁷⁷ but is in our view best understood as the latest institutional incarnation of recurrent projects related to establishing common regional judicial institutions in Central America.⁷⁸ Importantly, as we explain in this section, these projects have been pursued by different actors with divergent – and at times even conflicting – ideas and interests in relation to the project of a regional Court.⁷⁹ In reconstructing this long history, we argue that

76. See Maldonado Jordison, *supra* note 2, at 185 (stating that “after their independence from Spain in the late nineteenth century, the Central American countries . . . provided a fresh venue for the [CACJ].”).

77. See ALTER, *THE NEW TERRAIN*, *supra* note 13, at 5–8 (Many scholars tend to view many ICs entrenched in system of economic integration as a consequence of the legalization of international relations and the global spread of neoliberalism that indeed took place after the fall of the Berlin Wall.).

78. See generally FOUNDATIONS AND AUTHORITY, *supra* note 7, at 25–64 (stating that “the Court is the institutional crystallisation of two long-enduring movements”).

79. See discussion *infra* Sections II.1–3.

three specific historical pathways have been pivotal for understanding the present CACJ, all of them influencing both the genesis and the practices of the present Court: post-colonial federalism,⁸⁰ US security policy inspired by the Monroe Doctrine,⁸¹ and regional economic integration.⁸²

The first pathway, post-colonial federalism, was a long-standing project to develop a common Central American federation in the region after the withdrawal of the Spanish Empire in 1821 and the uncertainty which this created for the newly founded nation-states.⁸³ Responding to this turmoil, a succession of common regional supreme courts with jurisdiction over the federated states were proposed,⁸⁴ without ever leaving much of a direct mark on the legal systems of the Central American states.⁸⁵ In the second half of the 19th century, when these projects of federation had run out of steam and the region entered into a period of conflict and inter-state wars in some more extreme circumstances, the second pathway towards the CACJ emerged.⁸⁶ Reflecting shifts in US foreign policy following the discovery of gold in California, which triggered an interest in constructing an interoceanic canal in the region to facilitate exchanges between the West and East Coasts of the US, the established Monroe Doctrine was reevaluated.⁸⁷ The new strategy put forward by the US to stabilize Central America was very much inspired by the most recent

80. See discussion *infra* Section II.1.

81. See discussion *infra* Section II.2.

82. See discussion *infra* Section II.3.

83. See THOMAS L. KARNES, *THE FAILURE OF THE UNION: CENTRAL AMERICA 1824–1975* 64 (1961) (“The still vague boundaries and the nascent nationalism had not yet permitted definitive ideas of what might be the extent of any of the inchoate states. Representatives spoke of confederacies and even federations of some or all of the Spanish peoples in America.”).

84. See *generally* Maldonado Jordison, *supra* note 2, at 193–205 (outlining the attempts to form regional courts in Central America).

85. See *id.* (stating that the first regional court attempt was “highly artificial.”)

86. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 78 (analyzing the extended foundation of the CACJ’s economic jurisdiction).

87. See JAMES DUNKERLEY, *POWER IN THE ISTHMUS: A POLITICAL HISTORY OF MODERN CENTRAL AMERICA* (1988) 17 (noting that Nicaragua, “from the first decade of independence[,] had been identified as the most likely site for a trans-isthmian canal. Early proposals to this end were given weight by the ‘Gold Rush’ to California from the end of the 1840s.”).

developments in international law at the time: the two Hague Conferences and the burgeoning idea of establishing international judicial institutions to promote and secure peace.⁸⁸ Accordingly, in 1907, the precursor to the present CACJ and the very first IC in the world, the Cartago Court, was established in Costa Rica with the clear goal of pacifying the region through legal and judicial means.⁸⁹ Although the Cartago Court itself was only short-lived, it offered a third path towards the present CACJ, which developed in the aftermath of the Second World War.⁹⁰ Like many other countries of the “Global South”, Central American States pursued economic cooperation to become actively involved in the international economy as it was re-emerging.⁹¹ To this end, the establishment of an EU-like regional economic court was proposed multiple times by actors involved in the new Organization of the Central American States (ODECA)⁹² and in the Central American Common Market (CACM).⁹³ These attempts did not culminate in the formation of an operative court until the 1990s, when the geo-political re-structuring triggered by the end of the Cold War and the resulting rise of neo-liberalism led to the revision of these systems and to the establishment of the SICA.⁹⁴

88. See Luis Anderson, *The Peace Conference of Central America*, AM. J. INT'L L. 144, 146 (1908) (asserting that the establishment of the CACJ was the realization of plans American delegates recommended at the Hague).

89. See generally GUTIERREZ G., *supra* note 33 (outlining the establishment of the Cartago Court).

90. All of our interviewees confirmed this viewpoint either directly or indirectly.

91. See generally Gary W. Wynia, *Central American Integration: The Paradox of Success*, 24 INT'L ORG. 319 (1970) (analyzing the success of Central America's economic integration efforts).

92. See *Organización de Estados Centroamericanos (ODECA)*, SICA, <https://www.sica.int/odeca> (last visited Apr. 5, 2022) (The ODECA was established in 1951 to create regional unity in Central America. Its members are Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua).

93. See *Mercado Común Centroamericano*, SICE, <http://www.sice.oas.org/trade/camers.asp> (last visited Apr. 26, 2022) (The ODECA established the CACM in 1961 to facilitate regional economic development through free trade and economic integration. Established by the General Treaty on Central American Economic Integration signed by Guatemala, Honduras, El Salvador, and Nicaragua in December 1960, its membership expanded to include Honduras 1962 and Costa Rica in 1963.).

94. FOUNDATIONS AND AUTHORITY, *supra* note 7, at 85.

As argued further below, these three different pathways—the post-colonial federative project, the US foreign policy project, and the regional economic law project—do not merely provide a distant historical context, but are in fact central to explaining the institutional design, activity, and authority of the present Court. They have all merged into the institutional structure of the present CACJ and, as such, have integrated decades of political struggles, attempts and failures at regional unification, and visions of how regional law and institutions should develop into the Court's functioning.

In the final section of the paper, we return to the question of how the entrenchment of these three pathways towards the present CACJ has made it extremely difficult for the Court to navigate the different socio-political dynamics and constituencies of its operational contexts since colonial times, when the countries of the region were formally grouped into the *Capitanía General del Reino de Guatemala* effectively as one territory under Spanish rule.⁹⁵ In 1821, reflecting the influence of the revolutionary developments taking place elsewhere, the Central American States claimed independence from the Spanish Empire.⁹⁶ Yet, independent Central America faced numerous economic, political and legal challenges. After a brief initial period of annexation to the Mexican Empire, the region unified as the *Federal Republic of Central America* (1823-1838) under the auspices of which a regional supreme court was established.⁹⁷ By 1826, however, the outbreak of inter-state conflicts jeopardized the coherence of this new federation.⁹⁸ The rise to power of Francisco Morazán – the Central

95. See Maldonado Jordison, *supra* note 2, at 186 (“As Guatemala succumbed to the Spanish conquest, so too did the rest of the countries in Central America. However, these countries were not established as colonies of Spain, but rather were annexed to Guatemala; the Spanish decided to establish the *Capitanía General del Reino de Guatemala* in Guatemalan territory.”).

96. See *id.* (“The American and French examples, as well as the desire to open their markets to other regions, motivated the Central American colonies to declare independence from the Kingdom of Spain in 1821.”).

97. See *Central American Federation*, SW. POL. SCI. Q. 397, 401 (1921) (This Court was constituted by seven judges and had jurisdiction over disputes to which the Federation was a party; over disputes between two or more states; over conflicts between authorities within a state or with the Federation concerning the constitutionality of their acts; and over all other matters which by the Constitution or organic law were entrusted to it.).

98. See *Central American Federation*, SW. POL. SCI. Q. 397, 401 (1921) (This

American liberal *caudillo* par excellence – did little to save the Federation, which dissolved in 1838.⁹⁹ In its wake, a sort of nostalgia persisted among legal and political elites for a *Patria Grande* uniting the region.¹⁰⁰

The political leaders of the region did not, in fact, give up on the idea of creating political unity in Central America. In 1842, Nicaragua, El Salvador, and Honduras signed the *Chinandega Agreement creating the Central American Confederation*.¹⁰¹ A Federal Supreme Court composed of three judges appointed by the two houses of congress of the Member States was included in the institutional structure of the Confederation.¹⁰² Once again, however, conflicts arose between the member states and caused the collapse of the Confederation in 1845.¹⁰³ Hereafter, other attempts at creating political unity in the region were discussed without producing any tangible results, except the short-lived project of the *Greater Republic of Central America* of 1895.¹⁰⁴ This Republic was never recognized by Guatemala or Costa Rica and the project was renamed the *United States of Central America* when it came into force 1898 but lasted for less than a month overall.¹⁰⁵ Its projected Federal Supreme Court never

Court was constituted by seven judges and had jurisdiction over disputes to which the Federation was a party; over disputes between two or more states; over conflicts between authorities within a state or with the Federation concerning the constitutionality of their acts; and over all other matters which by the Constitution or organic law were entrusted to it.)

99. See Maldonado Jordison, *supra* note 2, at 188 (stating the Federation last until 1838, with Honduras' withdrawal initiating its dissolution).

100. Interview with Judge of the Central American Court of Justice (July 10, 2014) (sharing a viewpoint confirmed by a majority of interviewees) [hereinafter Interview No. 14]; Interview with Former President of the Supreme Court of Nicaragua (July 10, 2014) [hereinafter Interview No. 15].

101. See KARNES, *supra* note 83, at 127 (stating that Nicaragua, El Salvador, and Honduras “sent delegates on March 17, 1842, to Chinandega for the purpose of forming a new federal union”).

102. See *id.* (“Temporarily there was a council made up of one delegate from each state chosen by his assembly.”).

103. See Maldonado Jordison, *supra* note 2, at 188 (stating that the Central American Republic lasted approximately two years).

104. See Maldonado Jordison, *supra* note 2, at 188 (noting that the Republic was established in 1896 but was not recognized by Guatemala or Costa Rica).

105. See William F. Slade, *The Federation Central America*, 8 J. RACE DEV. 204, 213–214 (1917) (“The federation failed within a month of its inauguration. Revolutionary movements arose, demanding unity of action on the part of the

opened.¹⁰⁶ Eventually, in 1921, Costa Rica, Guatemala, Honduras, and El Salvador signed the *Treaty of the Union*, which, in Article 5, section e) provided for a regional supreme court whose goal was to reduce the legal differences between the States.¹⁰⁷ Like many of the previous attempts, this project was also short-lived and was finally abandoned in the course of the same year as its opening.¹⁰⁸

Despite these evident, and at times spectacular, failures, the number of successive attempts to unify Central America reveal a high degree of shared identity and solidarity among the nations and elites of the region.¹⁰⁹ As Alejandro Alvarez, a key Latin American lawyer of the period and a spokesperson for the cause of Latin American international law, noted in the pages of the *American Journal of International Law* in 1909:

The Latin States recognized the community of interests that existed between them, and, feeling that they were members of one great family of nations, desired to establish a political unity, a confederation which would furnish them protection from the dangers of European intervention, show them the course to take in their new life, aid them in arriving at the best solution of their special problems, bind them through mutual interests, and obviate the conflicts that might arise between them.¹¹⁰

This alleged shared identity was, however, continuously tested by a set of centrifugal forces.¹¹¹ In particular, through the course of its history, Central America has proven to be a region which is socially,

military power of the Federal States to suppress them. It was the test of the Federation. The new union weakened under the strain, and utterly collapsed.”).

106. See Maldonado Jordison, *supra* note 2, at 205.

107. See Manley O. Hudson, *The Central American Court of Justice*, 26 AM. J. INT’L L. 759, 782 (1932) (“In the Treaty of Union signed at San Jose, January 19, 1921, on behalf of Costa Rica, Guatemala, Honduras and El Salvador, provision was made (Article 5, section e) for a Supreme Court of the Federation, with a competence to deal with legal differences between two or more states.”).

108. See *id.* at 783 (noting that “the plans for establishing the federation were abandoned soon after that date”).

109. Interview with Legal Officer of the SICA (July 8, 2014).

110. Alejandro Alvarez, *Latin America and International Law*, 3 AM. J. INT’L L. 269, 270 (1909).

111. See generally Wynia, *supra* note 91 (outlining the challenges to Central American integration).

economically, and politically fragmented.¹¹² At the political level, the contrasts between Conservatives and Liberals and the different choices made by the latter during the period of liberal reform in the 19th Century led Central American states to develop different political regimes.¹¹³ Over time, Guatemala and El Salvador adopted totalitarian regimes,¹¹⁴ Costa Rica eventually became a consolidated democracy,¹¹⁵ Honduras became a politically unstable state dominated by foreign interests and mono-exports,¹¹⁶ while Nicaragua progressively turned into a sustained personalist dictatorship.¹¹⁷ Although the region was politically and legally unified during the colonial period, this unification was not substantial from an economic perspective.¹¹⁸ The Spanish colonies in Central America were deliberately set up in such a way as to avoid commerce among the territories, and instead favor the exchange of goods between the colonies and Spain.¹¹⁹ One interviewee described the structure of the Central American economies during the colonial times in the following way:

[I]n order to bring a balsam from El Salvador to Guatemala it was

112. See generally WILLIAM I. ROBINSON, *TRANSNATIONAL CONFLICTS: CENTRAL AMERICA, SOCIAL CHANGE, AND GLOBALIZATION* (2003) (mapping the shape of change in Central America).

113. See JAMES MAHONEY, *THE LEGACIES OF LIBERALISM: PATH DEPENDENCE AND POLITICAL REGIMES IN CENTRAL AMERICA* 53 (2001) (“By the time of Central American independence in 1821 . . . loosely defined liberal and conservative political factions had formed.”).

114. See *id.* at 111 (stating that radical liberal leaders in Guatemala and El Salvador embarked on aggressive modernization programs).

115. See *id.* at 158 (“From 1889 until the conclusion of the reform period, all Costa Rican presidents attained office through elections and left at the end of an officially elected term.”)

116. See *id.* at 165 (“U.S. capitalists wielded tremendous political power within the Honduran government, eventually to the point that U.S. companies assumed many of the tasks that one would normally associate with a national state.”)

117. See *id.* at 166 (noting Nicaragua only experienced U.S. intervention “after major and potentially far-reaching domestic changes had already been partly enacted”).

118. See generally PÉREZ-BRIGNOLI, *supra* note 13 (outlining the impoverishing growth in Honduras, Nicaragua, and Costa Rica).

119. See *id.* at 98 (highlighting that Central America’s coffee industry increased the subordination of the ruling class’ vested interests to foreign capital and the dynamics of foreign markets).

necessary to follow this process: from El Salvador, the balsam was sent to Omoa – in Honduras – on the back of a mule. From Omoa, it was embarked to Havana. From there it was shipped to Sevilla, to the “Casa de la Contractacion”. There, the tax to the King of Spain was paid and the balsam was stored. When it was time to leave, another tax was paid and the balsam was sent to Puerto de Palos. And after Puerto de Palos, it was shipped to Puerto Santo Tomas de Castilla, in Guatemala. Then, on the back of a mule, the balsam was transported to Guatemala City. . . . This fractured the commerce between the Central American Republics and it explains the disintegration of the Central American Federation in the first place.¹²⁰

Gordon Mace, a political scientist, questions the very idea of unity, positing it as a myth:

Political unity [in Central America] has never been anything more than a myth. It was built mainly on a misconception about the colonial period which led many to see the Latin American provinces as entities united by a common language, a common religion, and a common political system. . . . But this kind of unity never in fact existed under colonial rule. Each province had been individually and exclusively linked with the metropolis for political, economic, and cultural affairs. Consequently, there was no previous set of interrelations upon which to build new integration schemes in the region.¹²¹

Once the colonial rule ended, these embedded social structures were no longer easily transformed and the Central American states became competitors rather than allies in the global market.¹²² The successive unifying projects, whether federal or confederal, essentially attempted to counter these fragmentation tendencies inherent in the region.¹²³ As it will be expanded upon in a subsequent section of this paper, the

120. Interview with Legal Officer of the SIECA (July 8, 2014) [hereinafter Interview No. 4].

121. Gordon Mace, *Regional Integration in Latin America: A Long and Winding Road*, 43 *Int'l J.* 404, 406 (1988).

122. See RAFAEL A. SÁNCHEZ SÁNCHEZ, *THE POLITICS OF CENTRAL AMERICAN INTEGRATION* 5 (2009) (discussing the many and, at times, harsh political divisions among the countries of the region and the difficulties concerning the regionalist enterprise).

123. Interview No. 4, *supra* note 120.

present CACJ is fundamentally pulled between these contradictory forces and the Court is marked by a discrepancy between certain legal and political elites advocating for unity and common institutions in a context that remains largely socially, politically, and economically disparate.¹²⁴ In the CACJ's current struggle to gain DFA, there is, in other words, a degree of path-dependence inherited from these original Central American politics of integration and their failures due to contextual factors.

A. THE US FOREIGN POLICY INTEREST: THE CANAL AND THE CARTAGO COURT

Another path-dependent route to the present CACJ has been shaped by the US' changing security interests in the region and their institutional implications therein.¹²⁵ The discovery of gold in California and the growing need to develop a faster connection between the East and West of the US made the construction of an inter-oceanic canal through Central America a matter of high priority in the late 19th and early 20th Centuries.¹²⁶ Furthermore, Central America was part of the sphere of American geopolitical interest and the *Roosevelt Corollary* modifying the Monroe Doctrine made the US increasingly interventionist in the region, making it a new hegemon after the retreat of European powers.¹²⁷

Reflecting these interests, the US patronized the (re)establishment of some form of regional union, hoping that a common political project would mitigate tensions and create the sought-after stability as we explain below. In 1902, the Treaty of Corinto established that the Central American States would submit their future disputes to a Central American Tribunal of *Arbitration*.¹²⁸ But, as tensions

124. See discussion *infra* Sections IV.1–2.

125. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 70 (noting that after the signing of the *Clayton-Bulwer Treaty* in 1850, the United States became Central America's sole hegemonic power that pushed the region's states to form some sort of political union).

126. See DUNKERLEY, *supra* note 87 at 17 (highlighting that the Gold Rush gave weight to proposals for a canal).

127. See Serge Ricard, *The Roosevelt Corollary*, 36 PRES. STUD. Q. 17, 25 (2006) (“The United States’ interventionist posture and practice logically resulted from this assumption of superiority and the police duties it implied.”).

128. This tribunal was based in Costa Rica and was constituted by one arbitrator

continued to rise between states,¹²⁹ the US sent the warship *Marblehead* to Central American waters in 1906, to negotiate the end of a situation which had, in the meantime, become a war.¹³⁰ On the American ship, a Convention establishing that further controversies would be submitted to Mexican and American arbitration was signed.¹³¹ Subsequently, at a peace conference in Washington, plans for the world's first IC, the Cartago Court, were outlined.¹³² The main goal of the Cartago Court was to “maintain peace and harmony inalterably . . . without being obliged to resort in any case to the employment of force,”¹³³ and ultimately to “represent the national conscience of Central America.”¹³⁴ Accordingly, the Court was granted a remarkably broad jurisdiction.¹³⁵ The Court was empowered to rule upon: i) disputes of any nature between the various States of the region;¹³⁶ ii) disputes between a government and an individual who was a national of another State, either when the case was of an international character or when it derived from the violation of a

(and a substitute) for each State. The Central American Tribunal of Arbitration was short-lived and activated only once in 1907 in a dispute between Honduras and Nicaragua (albeit with no concrete results). *See* Hudson, *supra* note 107, at 760.

129. *See* KARNES, *supra* note 83, at 180–81 (mentioning the difficulty across republics in establishing a Central American confederation).

130. *See* Hudson, *supra* note 107, at 760–61 (noting that difficulties among Guatemala, El Salvador, and Honduras led to the United States and Mexico proposing settlement, leading to a preliminary convention of July 20, 1906, signed onboard the *U.S.S. Marblehead*).

131. *See id.* at 761 (stating that the treaty “envisaged arbitration by the Presidents of the United States and Mexico”).

132. *See id.* (“Preceding the conference, a peace protocol was signed by representatives of the five states at Washington, on September 17, 1907.”); *see* WILLIAM I. BUCHANAN, *THE CENTRAL AMERICAN PEACE CONFERENCE* 5 (1908) (The goal of the Washington Peace Conference was to bring about a “lasting and durable peace between the several countries, and to make such sure provision for this for the future that a return of the unfortunate conditions that had existed between and among them would be impossible.”).

133. Convention for the Establishment of a Central American Court of Justice preamble, Dec. 20, 1907.

134. *Id.* at art. 13, Dec. 20, 1907.

135. *See* FOUNDATIONS AND AUTHORITY, *supra* note 7, at 66 (noting that CACJ's founding treaties, the *Protocol of Tegucigalpa* and the *Statute Establishing the CACJ*, granted the Court exceptionally broad jurisdiction).

136. With the only requisite that the respective Departments of Foreign Affairs had not been able to diplomatically solve the dispute. CACJ, *supra* note 6, art. 1.

Treaty of a Convention;¹³⁷ and iii) any dispute between the Central American States and a State outside the region, when they voluntarily submitted to it.¹³⁸ Finally, in an optional clause – ratified by all the States except Costa Rica – the Cartago Court was granted the power to rule upon conflicts between the legislative, executive, and judicial branches of government “when as a matter of fact the judicial decisions and resolutions of the National Congress [we]re not respected.”¹³⁹

In its active years, the Cartago Court ruled in ten cases.¹⁴⁰ The most important concerned the validity of the 1914 *Bryan-Chamorro Treaty*, by means of which the United States had bought the exclusive right to build an inter-oceanic canal through Nicaragua.¹⁴¹ On this question, two separate cases were filed by Costa Rica and El Salvador respectively.¹⁴² Costa Rica asked the Court to declare that the *Bryan-Chamorro Treaty* constituted a breach of the earlier *Cañas-Jerez Treaty*, which had established that Costa Rica enjoyed perpetual rights of navigation on the waters of the Rio San Juan and, consequently, that Nicaragua could not conclude any international agreement to establish an inter-oceanic canal in those waters.¹⁴³ Although the Court ruled that the *Bryan-Chamorro Treaty* violated the rights of Costa Rica, it did not have the power to nullify it due to lack of jurisdiction.¹⁴⁴

The case filed by El Salvador was perhaps the more salient one. El Salvador argued that, by granting the US the right to build a naval base in the Gulf of Fonseca, the *Bryan-Chamorro Treaty* had jeopardized

137. *Id.* at art. 2.

138. *Id.* at art. 4.

139. *Id.*

140. Five of these cases were filed by private parties against States (yet they were all declared inadmissible), three were inter-states disputes, while two were mediations in ongoing revolutions in Nicaragua. See GUTIERREZ G., *supra* note 33, at 47–143 (noting that five of these cases were filed by private parties against States, yet they were all declared inadmissible).

141. Interoceanic Canal (Bryan-Chamorro Treaty), U.S. – Nicar., art. 1, Aug. 5, 1914, 39 Stat. 1661.

142. See Manley O. Hudson, *The Central American Court of Justice*, 26 AM. J. INT'L L. 759, 773, 775–76 (1932).

143. Treaty of Limits between Costa Rica and Nicaragua, Costa Rica – Nicar., arts. 6, 8, Apr. 15, 1858.

144. GUTIERREZ G., *supra* note 33, at 112.

the free and autonomous life of the state as well as the primary interests of the region to not alienate part of its territories to a third state.¹⁴⁵ This, according to the Salvadoran position, disturbed the “transcendental interest” of returning to the *Patria Grande*.¹⁴⁶ In its decision, the Cartago Court ruled that the *Bryan-Chamorro Treaty* indeed constituted an unlawful alienation of part of the Central American territory to a foreign entity.¹⁴⁷ Accordingly, the Court ruled that Nicaragua was to reinstate the pre-Treaty situation.¹⁴⁸

These two rulings triggered a fierce reaction from both the United States¹⁴⁹ and Nicaragua, with Nicaragua expressing its unwillingness to execute the judgments.¹⁵⁰ In a telegram sent in 1917, Nicaragua denounced the Convention that had established the Court and thereby stating the country’s exit from it.¹⁵¹ Shortly after, the Cartago Court was left to expire under a sunset-clause and its doors were definitively closed.¹⁵²

Despite the failure of the Cartago Court, American-led attempts to pacify the region did not end here. In 1922, again under the aegis of the US, Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica ratified a *Treaty of Peace and Amity* by means of which an *International Central American Tribunal* with the power to rule over any controversy arising between the Central American States was established.¹⁵³ This Tribunal was ratified by four States (El Salvador declined), and remained in force until 1934.¹⁵⁴ The list of arbitrators was never determined, and only one preliminary question was ever referred to the tribunal in 1928, concerning a boundary dispute between Guatemala and Honduras.¹⁵⁵ In this situation, however, the panel decided to act as a special boundary tribunal and not as the

145. *Id.* at 115.

146. *Id.*

147. *Id.* at 124.

148. *Id.* at 124–28.

149. See CARLOS JOSÉ GUTIÉRREZ G., *LA CORTE DE CARTAGO* 16 (3d ed., 2009).

150. *Id.* at 134.

151. *Id.*

152. *Id.* at 137.

153. See Hudson, *supra* note 107, at 783.

154. *Id.* at 784.

155. *Id.*

Central American Tribunal.¹⁵⁶ Justice Charles Evans Hughes from the United States Supreme Court was eventually appointed as panelist,¹⁵⁷ and the tribunal decided in favor of Guatemala.¹⁵⁸ No further project of establishing an IC in the region was pursued for decades after this, but the idea of a peace-oriented regional judicial institution continued to be discussed in certain legal environments, most notably amongst high-level national judges and liberal legal elites who wanted to end the recurrent inter-state and civil conflicts that had affected the region since independence.¹⁵⁹

Although its activity ceased more than a century ago and an earthquake erased its original buildings, the Cartago Court remains central to understanding the present CACJ.¹⁶⁰ On the one hand, the present court has taken over many of the competences of the Cartago Court.¹⁶¹ On the other, the politics of the Cartago Court in terms of using ICs to pacify the region remains part and parcel of the current Court.¹⁶² In short, the current CACJ remains largely inspired by a century-old project of bringing peace to the region via international institutions.¹⁶³

B. TOWARDS REGIONAL ECONOMIC INTEGRATION: THE ODECA, THE CACM, AND THE INITIAL STEPS TOWARD AN EU-STYLE ECONOMIC COURT

In the aftermath of the Second World War, many political and legal elites across the globe started rethinking the means and forms of achieving inter-state cooperation.¹⁶⁴ Similar to other world regions,

156. *Id.*

157. *Id.*

158. See Maldonado Jordison, *supra* note 2, at 206 (noting that the decision was met with controversy but was ultimately accepted by both nations).

159. See Interview No. 14 and Interview No. 15 cited *supra* note 100.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See generally JOSEPH PINCUS, THE CENTRAL AMERICAN COMMON MARKET (1962) (arguing that the shift from political to economic integration was part of the “revolution of rising expectations” which captured the minds of men in nearly all countries of the free world since World War II).

including Europe, the route taken in Central America was that of regional economic integration.¹⁶⁵ The first step was taken in 1951, with the establishment of the ODECA,¹⁶⁶ and the second in 1962 with the creation of the CACM.¹⁶⁷ The ODECA was created as an intergovernmental organization guided by political and diplomatic goals, while the CACM was set up as a more technical institution to foster economic and industrial development through increased interactions between El Salvador, Guatemala, Nicaragua and Honduras.¹⁶⁸ Initially, these two institutions were relatively successful, generating economic change and development in all affiliated States.¹⁶⁹

Interestingly, this relative success was achieved with almost no recourse to the development of a regional system of law.¹⁷⁰ The marginal role played by law in both the ODECA and the CACM primarily reflected that both organizations were conceived – and for the most part operated – by economists rather than lawyers.¹⁷¹ Both

165. *See id.*

166. *See* Sheriff Ghali Ibrahim, et al., *An Overview of the Central American Integration System*, 5 INTL. J. RES. GRANTHAALAYAH (2017) (“ODECA played significant role in the process of integrating the Central America, achieving success in the unification of traffic signal standards, educational programs, custom procedures, cultural policies, a regime for Central American integration industries and a Central American free trade and economic integration treaty”).

167. *See* SÁNCHEZ SÁNCHEZ, *supra* note 122, at 5.

168. *See generally* THOMAS ANDREW O’KEEFE, *LATIN AMERICAN TRADE AGREEMENTS* (1997)

169. *See* JAMES D. COCHRANE, *THE POLITICS OF REGIONAL INTEGRATION: THE CENTRAL AMERICAN CASE* 225 (describing the increase in regional trade and in public and private sectors investments in the aftermath of the CACM’s establishment); Aaron Segal, *Review of The Politics of Regional Integration: The Central American Case by James D. Cochrane*, 12 CARIBB. STU. 115 (1972) (arguing that in order to correctly assess the initial years of the CACM, it is necessary to provide detailed studies of national politics in each member state, an assessment of US involvement in the project and the amount of aid provided, and, ultimately, the impact of the CACM on the lives of ordinary Central Americans as well as on local and foreign businessmen).

170. *See* COCHRANE, *supra* note 169, at 225.

171. *See* SÁNCHEZ SÁNCHEZ, *supra* note 122 at 77 (arguing that the logic of integration leading to the formation of the CACM conforms to intergovernmentalist hypotheses, which explain integration asymmetrically in terms of governments’ preferences, policy convergence, trade dependence and intergovernmental bargaining).

the ODECA and the CACM had been established under the aegis of the *Economic Commission for Latin America and the Caribbean* (ECLAC),¹⁷² whose *técnicos* viewed regional integration in terms of economic and industrial development.¹⁷³ Consequently, the decision-making mechanisms of both organizations were inspired by inter-governmentalism, meaning that they were almost entirely controlled by government representatives acting in a diplomatic forum of sovereign states seeking economic and industrial cooperation.¹⁷⁴ In 1962, however, the institutional framework of the ODECA was amended to include a Central American Community Court,¹⁷⁵ which suggests that the actors involved began to recognize the need for a more judicialized form of economic integration to create firmer commitments among participants.¹⁷⁶ This Court was composed of the Presidents of the supreme courts of each Member State, and was granted the power to rule in every juridical conflict arising between the Member States, in so far as all State parties voluntarily submitted the dispute to the Court.¹⁷⁷ In practice, the court was never called into action.¹⁷⁸

At the end of the 1960s, both the ODECA and the CACM faced deep crises.¹⁷⁹ In 1966, for instance, Honduras threatened to leave the

172. See generally RAUL PREBISH, *TOWARDS A DYNAMIC DEVELOPMENT POLICY FOR LATIN AMERICA* (1963) (arguing that Latin American states were able to achieve economic development by grouping together in order to overcome the inherent structural limitations of their economies and systems of production. A key strategy in this regard was the increase of investments in the industrial and manufacturing sectors in order to prevent the countries of the “periphery” of the world from relying on exports of primary commodities toward the former cosmopolitan powers).

173. See SÁNCHEZ SÁNCHEZ, *supra* note 122 at 54.

174. See Andrew Moravcsik, *Liberal Intergovernmentalism and Integration: A Rejoinder*, 33 J. COMMON MKT. STUD. 611, 622 (1995) (“Delegating sovereignty establishes a principal-agent relationship between member governments (multiple principals) and supranational officials, judges and representatives (multiple agents).”).

175. See SÁNCHEZ SÁNCHEZ, *supra* note 122, at 54.

176. Interview No. 1, *supra* note 21.

177. Article 14 and 15 of the *San Salvador Chart II*. The full text of the chart is available at: https://www.sica.int/documentos/carta-de-la-organizacion-de-estados-centroamericanos-odeca-segunda-carta_1_992.html (visited June 3, 2022).

178. See RAFAEL CHAMORRO MORA, *LA CORTE DE JUSTICIA DE LA COMUNIDAD CENTROAMERICANA* 15 (2000) (on file with authors).

179. See Wynia, *supra* note 91, at 319 (Citing the invasion of Honduras by the

CACM on the grounds that it had been denied special treatment under the industrial incentive agreements.¹⁸⁰ In 1967, Costa Rica precipitated a minor crisis when it enacted a dual exchange rate.¹⁸¹ In 1968, the SIECA was confronted with another serious challenge when Nicaragua defied regional accords by unilaterally promulgating internal consumption taxes on Common Market goods to relieve its fiscal problems.¹⁸² The crisis of the system peaked in 1969 with the eruption of the “Football War” between El Salvador and Honduras.¹⁸³ The war resulted in a trade blockade between El Salvador and Honduras, with Honduras putting an embargo upon transit trade between El Salvador, Nicaragua, and Costa Rica.¹⁸⁴ Following these events, Honduras left the CACM in 1970,¹⁸⁵ and the Court’s agencies were suspended.¹⁸⁶

Throughout the 1970s and 1980s, the Central American region became the site of protracted internal conflicts and civil wars, fueled, in part, by broader Cold War tensions.¹⁸⁷ This resulted in decades of violence and military regimes, which threw the region into a chaos.¹⁸⁸ During this period, it became impossible to continue the work of the established regional organizations¹⁸⁹ and consequently these effectively ceased to function.¹⁹⁰ A major structural and geopolitical

Salvadorian army to protect Salvadorian nationals residing in Honduras as a severe threat to CACM and central American integration in its totality).

180. *See id.* at 325 (describing Honduran and Cost Rican withdrawal and violations of unilateral treaties amongst Central American nations).

181. *Id.*

182. *See id.* (“Nicaraguans defied regional accords by unilaterally promulgating internal consumption taxes on Common Market goods to relieve their fiscal problems”).

183. *See generally* Toby Luckhurst, *Honduras v El Salvador: The Football Match That Kicked Off A War*, BBC, June 27, 2019, <https://www.bbc.com/news/world-latin-america-48673853> (describing the four-day conflict between Honduras and El Salvador which followed the respective countries world cup qualification matches).

184. *See* Wionczek, *supra* note 184, at 56–57 (noting that the conflict came as a surprise to neighboring nations).

185. *Id.* at 57 (citing the growing force of nationalism as reason for CACM’s demise).

186. *See* SÁNCHEZ SÁNCHEZ, *supra* note 122.

187. *Id.*

188. *See generally* Dunkerley, *supra* note 87.

189. Interview No. 1, *supra* note 21.

190. *Id.*

event was needed to bring these organizations back to life and this came in the form of the end of the Cold War, which offered the beginning of a transition toward democracy in the region¹⁹¹ and provided the impetus for reforming the dormant system of economic integration through the establishment of the SICA.¹⁹² It is also at this precise moment that the project of reestablishing a regional court became tangible as part of the broader revamping of the institutions of Central American integration.¹⁹³ Article 12 of the *Protocol of Tegucigalpa*, the founding document of the SICA, provided for the future creation of a common court in order to guarantee respect for the law in the interpretation and implementation of the Protocol and its supplementary instruments.¹⁹⁴ Two years later, the CACJ opened its doors as the main judicial organ of the SICA, with all three pathways thus far addressed combined into its mode of operation.¹⁹⁵

C. THE RESURRECTION OF THE CACJ AT THE CROSSROADS OF POLITICAL FEDERATION, INTER-STATE DISPUTE SETTLEMENT, AND ECONOMIC INTEGRATION

The three pathways towards the current CACJ are all clearly identifiable in the present court's institutional design. The federative and US foreign policy projects – with their respective focuses on political unity and inter-state dispute settlement to foster peaceful co-existence – feature centrally in the Court's function to contribute to democratic transition and pacification of the region.¹⁹⁶ In addition, the more recent project of regional economic integration, which the ODECA and the CACM gradually built on during the 1960s, was also fully institutionalized in the new CACJ.¹⁹⁷ However, as outlined, these numerous projects were conceptually different and pursued by sets of actors with divergent ideologies related to regional law and integration.¹⁹⁸ Only since the early 1990s have they suddenly merged

191. See FOUNDATIONS AND AUTHORITY, *supra* note 7, at 67.

192. *Id.*

193. *Id.*

194. Tegucigalpa Protocol, *supra* note 5, art. 12.

195. See FOUNDATIONS AND AUTHORITY, *supra* note 7.

196. See *infra* Section II.1.

197. See *infra* Section II.2.

198. See *infra* Section II.1–2.

in the context of the reformation of the regional integration project following the two declarations released by the Central American Presidents in the contexts of the peace negotiations of *Esquipulas I*¹⁹⁹ and *Esquipulas II*.²⁰⁰

The convergence of these three different pathways into the CACJ was made possible by a number of events before and during the negotiation of the new legal framework. One important event, which has largely passed under the radar of scholarship, took place early on in 1989, when the Presidents of the supreme courts of the Central American states reestablished a long-dormant yet influential institution: the Central American Judicial Council.²⁰¹ The Council's objective was to forge lasting links between the highest judicial institutions of the Central American states and propose reforms which might iron out the legal differences among them.²⁰² As suggested by many interviewees, the Council decided to place itself at the forefront of the fight for regional peace and democracy in post-(cold) war Central America.²⁰³ With this objective in mind, the task of producing a preliminary study on the establishment of a new regional court was delegated to a well-known Central American jurist – Roberto Ramirez.²⁰⁴ In his analysis, Ramirez notably drew inspiration from the Cartago Court.²⁰⁵ Like the Cartago Court, the new project foresaw a court vested with the task of: i) “representing the national conscience of Central America”; and ii) “being the depository and the guardian of the values that constitute the Central American nationality”.²⁰⁶ Moreover, and again like the Cartago Court, the report wanted to

199. Permanent Rep. of Guatemala to the U.N., Letter dated May 27, 1986 from the Permanent Representative of Guatemala to the United Nations addressed to the Secretary-General, U.N. Doc. A/40/1119 (May 28, 1986).

200. Permanent Reps. of Costa Rica, El Salvador, Guatemala and Nicaragua to the U.N., Letter dated Aug. 31, 1987 from the Permanent Reps. of Costa Rica, El Salvador, Guatemala and Nicaragua to the United Nations addressed to the Secretary General, U.N. Doc. A/42/521 (Aug. 31, 1987).

201. See Interview No. 14 and Interview No. 15 cited *supra* note 100.

202. See Mora, *supra* note 178, at 89.

203. See Interview No. 1, *supra* note 21; Interview No. 14, *supra* note 100; Interview No. 15, *supra* note 100.

204. See Mora, *supra* note 178, at 89–90.

205. See interviews cited *supra* note 203.

206. CACJ Statute, *supra* note 8, at art. 6.

empower the new court to adjudicate inter-state conflicts and separation of powers disputes between the constitutional organs of the Member States.²⁰⁷ This project was enthusiastically received by the other judges at the Council.²⁰⁸

While the judges were planning to resurrect the Cartago Court,²⁰⁹ the Presidents of the five Central American states, with the addition of Panama, initiated negotiations to reform and resurrect the existing but dormant system of economic integration.²¹⁰ This led to the 1991 establishment of the SICA,²¹¹ a new institutional framework designed to facilitate economic and political integration in Central America.²¹² Article 12 of the SICA Protocol crucially provided for the future creation of a community court to interpret and implement the Protocol and its supplementary instruments.²¹³ Interestingly, for reasons that none of our many sources managed to conclusively explain, the Heads of State delegated the task of drafting the statute of the future court to the judges at the Central American Judicial Council.²¹⁴ It is at this point that the judges integrated the project of a community court with Ramirez's prior project to create common court to pacify and democratize Central America.²¹⁵ Once agreed to by the Judicial Council, the draft of the Statute was submitted to the SICA Heads of State for final approval.²¹⁶ To the surprise of the members of Judicial Council, the Heads of State of Guatemala, El Salvador, Honduras,

207. *See id.* at art. 22(f).

208. *See* interviews cited *supra* note 203.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See* Thomas Andrew O' Keefe, *The Central American Integration System (SICA) at the Dawn of a New Century: Will the Central American Isthmus Finally Be Able to Achieve Economic and Political Unity?*, 13 FL. J. INT'L L. 243, 246–47 (2001) (stating that in 1991 the presidents of five “Central American countries plus Panama met and signed the Protocol of Tegucigalpa” to the Charter of the Organization of Central American States, establishing a new institutional framework called SICA which is designed to facilitate the economic and political integration of central America) [hereinafter *The Central American Integration System*].

213. Tegucigalpa Protocol, *supra* note 5, art. 12.

214. *See* Interview No. 14 and Interview No. 15 cited *supra* note 100.

215. Interview with Salvadoran professor of law (July 17, 2014) [hereinafter Interview No. 21].

216. *See* Interview No. 14 and Interview No. 15 cited *supra* note 100.

Nicaragua, Costa Rica, and Panama signed the Court's Statute without requesting changes a mere twenty days later.²¹⁷ The result was the formalization of the present CACJ: an IC at the crossroads of political federation, inter-state dispute settlement, and economic integration which, for these reasons, has a very broad delegated powers and formal de jure authority. The next section analyzes the transformation of these powers into DFA.

III. THE PRESENT CACJ AND THE DIFFICULT CONVERSION OF FORMAL POWERS INTO DE FACTO AUTHORITY

This analysis has so far considered the different pathways which converged to give rise to the present CACJ: the post-colonial project of politically unifying the region through a Federation,²¹⁸ the neo-imperialist US intervention seeking to establish an international tribunal to stabilize the region,²¹⁹ and the post-World War II notion of regional economic integration through law.²²⁰ This section analyzes how these different pathways, ideas, and interests related to the Court have influenced its operational context and ultimately the reception of its rulings and case law. We use a thematic approach, beginning with the Court's initial rulings in which it sought to develop Central American law as an autonomous system of community law.²²¹ We then move on to analyze the Court's most widely known – and most controversial – judgments in matters of inter-state conflicts and national separation of powers disputes.²²² Finally, we provide an account of the most recent rulings of the Court, most of which are unknown outside the region and have thus far not been subject to academic scrutiny.²²³ These recent cases, we argue, signal a potential change of direction towards the Court becoming a more politically neutral regional economic court. Throughout the analysis, we explore

217. *Id.*

218. *See supra* Section II.1.

219. *Id.*

220. *See supra* Section II.2.

221. *See supra* Section II.1–2.

222. *See infra* Section III.3.

223. *See infra* Section III.4.

why, despite its many bold and principled judgments, the CACJ has generally failed to cast a wider legal shadow in Central America.

A. THE CACJ'S INITIAL AUTHORITY OVER SICA LAW

In its initial years of operation, the CACJ faced the challenges of incomplete ratification of the Court's jurisdiction by its Member States and a general lack of supporters among national and regional institutional actors.²²⁴ Nevertheless, as we outline below the CACJ received a number of cases in quick succession, which suggests that other sectors perceive the Court as an authoritative venue with regard to matters of SICA law.²²⁵ In 1995, as we outline below several advisory opinions and contentious cases asked the Court to settle the status of Central American community law with regard to the Member States. In these first judgments and opinions, the CACJ imported a host of doctrines and principles developed by the CJEU into the SICA.²²⁶ In one advisory opinion, the CACJ stated that SICA law constitutes a "new and autonomous legal order" characterized by *direct applicability* within the legal system of the Member States.²²⁷ In another opinion, the Court established that "the *Protocol of Tegucigalpa* [. . .] is hierarchically superior [. . .] to any other Central American law".²²⁸ In this same decision, the CACJ also held that: i) SICA law creates rights and obligations on physical and juridical persons;²²⁹ and ii) national judges shall apply and interpret

224. See *Regional Integration*, *supra* note 14, at 592.

225. *Moncada v. Nicaragua*, CACJ 01-01-12-1994 (Jan. 12, 1994).

226. *Regional Integration*, *supra* note 14, at 592.

227. CACJ Advisory Opinion on Direct Applicability, CACJ 09-04-08-96 (Apr. 8, 1996); see J. A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 COMMON MKT. L. REV. 425, 428 (1972) (stating that under international law, a treaty provision is directly applicable, but "a treaty provision can never be directly applicable in the national legal order if the State has not incorporated the treaty contents"); see M. Dougan, *When Worlds Collide: Competing Visions of the Relationship between Direct Effect and Supremacy*, 44 COMMON MKT L. REV. 931, 943 (2007) (stating "the 'primacy' model seems to postulate a very different fundamental assumption that there exists a unitary legal order embracing both the community and national systems." Community is considered directly applicable and is an integral part of the domestic legal system, so community law is capable "per se" of hierarchical superiority over national law).

228. *Advisory Opinion I*, at 3.

229. *Id.*

SICA law as if they were Community judges.²³⁰ These two opinions echoed both the substance and language of the CJEU in terms of the principles of direct effect and supremacy of EU law, as established in the landmark mid-1960's cases *Costa v Enel* and *Van Gend en Loos*.²³¹

These principles were subsequently re-affirmed by the CACJ in the contentious case, *Ugarte v The University of El Salvador*.²³² In this decision, the Court stated, among other things, that SICA law is characterized by the following features: i) *Autonomy*, as it constitutes a specific legal system;²³³ ii) *Direct Applicability*, as community norms become part of the legal system of the Member States without the need for further acts of incorporation;²³⁴ iii) *Direct Effect*, as community norms create rights and obligations for individuals;²³⁵ iv) *Supremacy*, as community norms are hierarchically superior to national laws;²³⁶ and v) *State Responsibility*, as states have an obligation to compensate individuals if community norms are violated.²³⁷

These early cases demonstrated the willingness on the part of the CACJ to turn the SICA into a supranational legal system with EU-like constitutional features. This was relatively successful and the CACJ achieved both narrow and intermediate DFA in most member states, particularly as many national Supreme Courts followed the lead of the CACJ and applied these principles in their legal systems.²³⁸ Yet, for reasons that will be explored in more depth in the next sub-sections, over time these bold initial decisions and their pro-integration stance

230. *Id.*

231. Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1, 2; Case 6/64, *Costa v. Enel*, 1964 E.C.R. 600, 603.

232. *Ugarte v. University of El Salvador*, CACJ 10-05-11-96 (May 11, 1996).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Ugarte v. University of El Salvador*, CACJ 10-05-11-96 (May 11, 1996).

238. The impact of the jurisprudence of the CACJ on national courts is explored in Alejandro Daniel Perotti, *La Autoridad de la Doctrina de la Corte Centroamericana de Justicia, su Aporte a la Consolidación del Bloque Regional y la Actitud al Respecto de los Tribunales Constitucionales/Supremos de los Estados Miembros*, in *HACIA UNA CORTE DE JUSTICIA LATINOAMERICANA* 55, 55–115 (José Vidal-Beneyeto et al. eds. 2007).

only had a limited impact on the legal systems of the Member States and Central American societies more generally.²³⁹ The interest of national judges faded in conjunction with the stream of requests for preliminary references drying out.²⁴⁰ More generally, national judges lost interest in engaging in institutional dialogue with their regional counterpart.²⁴¹ This, we argue, created a disconnect between the bold and dynamic jurisprudence of the CACJ and the foot-dragging engagement with it at national level, both in the political and legal spheres. The majority of the CACJ's decisions were, therefore, essentially ignored in the legal field with a trickle-down effect into politics and society more widely. After such an initial success, the DFA of the CACJ deteriorated correlatively as we show below in subsection 2 and 3.

B. THE CACJ'S FAILURE TO BROADEN ITS AUTHORITY OVER SICA LAW

The energetic CACJ soon faced additional challenges from regional actors, notably when the Court was called upon to rule on inter-institutional conflicts among the organs of the SICA and against States that had refused to ratify the Court's Statute as we outline below in this section. In the early 2000s, two advisory opinions filed by Nicaragua and by the Secretary General of the SIECA²⁴² put the Court at the center of an institutional conflict between the newer organs of the SICA and the older Secretariat of the SIECA.²⁴³ Nicaragua, which had been scrutinized by the SIECA for having imposed supplementary taxes on goods coming from Honduras and Colombia,²⁴⁴ asked the

239. See *infra* at Section III.2–3.

240. Interview with Judge of the Supreme Court of Nicaragua (July 11, 2014) [hereinafter Interview No. 17].

241. *Id.*

242. CACJ Advisory Opinion on Authority over SICA Law, CACJ 27-07-03-03-2000 (Mar. 3, 2000) [hereinafter *Advisory Opinion II*]; CACJ Advisory Opinion on Authority over SICA Law, CACJ 30-10-18-07-2000 (Oct. 18, 2000) [hereinafter *Advisory Opinion III*].

243. The Secretariat of the SIECA was the old administrative organ of the Central American integration system before the Protocol of Tegucigalpa created the SICA and transformed the Secretariat of the SIECA into a technical organ subordinated to the new Secretariat of the SICA. This in turn created hard feelings between the two institutions. Interview No. 1, *supra* note 21; Interview No. 21, *supra* note 215.

244. *Advisory Opinion II*, *supra* note 242. The tax raise was decided in the context

Court to clarify whether that organ was entitled to provide its own opinion on matters related to regional economic integration law, particularly when the same dispute was pending before the CACJ.²⁴⁵ To this question, the CACJ answered that, for the purpose of the uniform application of SICA law, no organ other than the Court was entitled to provide interpretations of SICA law.²⁴⁶

This ruling gave rise to a further advisory opinion,²⁴⁷ in which the Secretary General of the SIECA asked the CACJ to clarify the role of the former within the reformed system of Central American integration.²⁴⁸ The CACJ responded that, although the SIECA had historically played an important role, the establishment of both the SICA and the CACJ brought about a re-organization of the institutional architecture of the existing institutions of the Central American integration system.²⁴⁹ The CACJ therefore concluded that the SIECA should take a step back to only “address the matters that fall under its competences in order to avoid future ambiguities and contradictions.”²⁵⁰

The relationship between the Court and the SIECA grew tenser still when the Heads of State proposed the creation of a non-judicial mechanism of arbitration for trade matters under the aegis of the SIECA.²⁵¹ In an advisory opinion, the CACJ argued that a mechanism

of the controversy between Nicaragua and Honduras related to the contested boundaries of the Caribbean Sea. Such controversy was even brought before the ICJ. For a detailed historical description of the dispute, see See Johny Joel Ruiz, *Conflictos Territoriales Honduras y Nicaragua*, MONOGRAFÍAS, <https://www.monografias.com/trabajos96/conflictos-territoriales-hondura-y-nicaragua/conflictos-territoriales-hondura-y-nicaragua.shtml> (last visited Jan. 19, 2021) (describing the continuation of the dispute for decades after the CACJ adjudicated the issues involved) [hereinafter, *Conflictos Territoriales Honduras Y Nicaragua*].

245. *Advisory Opinion III*, *supra* note 242.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at XIV.

251. *Id.* at resulta I. The project was discussed at the XX Meeting of the heads of state and entrenched in point 9 of the Declaration of Guatemala II, according to which the States “point out to the importance of having an agile and effective system for the resolution of the commercial controversies within the institutional framework [of the SIECA].”

of this kind would be in violation of the *Protocol of Tegucigalpa*, which gave the CACJ exclusive power to rule upon controversies concerning the application and interpretation of the Protocol itself and of its complementary instruments.²⁵² This opinion was, however, completely disregarded by politicians²⁵³ and, in 2003, the Central American Council of Ministers of the Economic Integration established the SIECA Dispute Resolution System, which has been activated in twenty-eight cases to date on issues linked to trade and tariff matters and has to an extent redirected the flow of cases.²⁵⁴

As the conflict with SIECA developed, the docket of the CACJ started to fill with cases brought forward by the Central American Parliament (PARLACEN), which repeatedly sought the Court's support in its fight to gain a superior position in Central American politics. In one request for an advisory opinion, the PARLACEN asked the CACJ to clarify the competence of the Guatemalan Supreme Court to declare the PARLACEN's constitutive Treaty unconstitutional.²⁵⁵ The CACJ ruled in favor of the PARLACEN, dismissing the power of national supreme courts to invalidate any form of regional treaty.²⁵⁶ The CACJ also used the occasion to make the important clarification that SICA Member States that, like Guatemala and Costa Rica, had not ratified its Statute nevertheless fell under its jurisdiction if the relevant Heads of State had formally signed the Court's Statute.²⁵⁷ This was applicable to Guatemala and Costa Rica as both countries had obstructed the CACJ by failing to ratify the Statute and not submitting candidates to its bench.²⁵⁸

The PARLACEN's recourse to the CACJ did not end there, the CACJ was also called upon to rule on a number of cases concerning

252. *Id.*

253. Interview No. 1, *supra* note 21.

254. See *SIECA Dispute Resolution System*, SIECA, <http://www.sieca.int/Portal/Pagina.aspx?PaginaId=3036> (providing a complete list of the cases lodged under this institutional framework as of Apr. 16, 2022).

255. CACJ Advisory Opinion on the Creation of Non-Judicial Arbitration of Trade Matters, CACJ 10-21-06-2001 (June 21, 2001) [hereinafter *Advisory Opinion IV*].

256. *Id.*

257. *Id.*

258. As mentioned above in note 23, Guatemala finally ratified the Statute in 2008, but to date has not appointed its judges.

the privileges and immunities of PARLACEN deputies. The most determinative of these concerned the former President of Nicaragua, Arnaldo Alemán, who, after being convicted on charges of corruption in his own country, appealed to the CACJ in 2003, claiming immunity as a member of the PARLACEN.²⁵⁹ His claim was rejected by the Court.²⁶⁰ Moreover, in 2010, the President of the PARLACEN and a number of Panamanian deputies asked the CACJ to rule upon alleged irregularities related to the election of some Panamanian members of the PARLACEN.²⁶¹ More specifically, the CACJ was asked to nullify decisions of the Panamanian Supreme Court and Electoral Tribunal which had allowed several members of the newly elected President, Ricardo Martinelli's, *Cambio Democrático* political party to be appointed as members of the PARLACEN in place of other, regularly elected counterparts.²⁶² In all these decisions, the CACJ annulled the effects of these judgments because members of the PARLACEN could be appointed solely by means of popular elections and, consequently, declared Panama in violation of the regional Treaties.²⁶³

Finally, in this same period, the CACJ entered into a heated conflict with Costa Rica, which had, even more resolutely than Guatemala and Panama, refused to ratify the Court's Statute.²⁶⁴ In 2008, the Association of Custom Agents of Costa Rica filed a case, asking the CACJ to invalidate an act of the Costa Rican National Custom Services.²⁶⁵ In spite of the Costa Rican firm's rejection of its authority, the Court ruled that the lack of ratification of its Statute did not exonerate Costa Rica from being subject to its jurisdiction.²⁶⁶ In the Court's own words:

259. See *Perez v. Panama*, CACJ 104-01-18-02-2010 (Feb. 18, 2010); *Ruidíaz v. Panama*, CACJ 111-07-22-11-2010 (Nov. 22, 2010); *Central American Parliament v. Panama*, CACJ 120-07-07-09-2011 (Sept. 7, 2011).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. Interview No. 1, *supra* note 21. See generally FOUNDATIONS AND AUTHORITY, *supra* note 7.

265. *Ass'n of Customs Agents of Costa Rica v. Nat'l Customs Serv. of Costa Rica*, CACJ 06-08-09-2008 (Sept. 8, 2008).

266. *Id.*

Claiming, without previous agreement, that Costa Rica is exempted from one or more obligations established by the Protocol of Tegucigalpa, entails establishing in an unilateral manner a privileged situation in relation to the other Member States, a situation that is unacceptable within a political-economic community because it would allow a State to be exempted from the application of the common rules and to enjoy a special statute outside of the legal and institutional framework. . . . A situation such as the one just described would also entail a discrimination of the citizens of the different Member States and it would establish without any doubt an unacceptable regime of inequality before the law.²⁶⁷

Although the CACJ stood its legal ground in this long list of controversial cases, we argue that these rulings had an inescapably negative impact on the DFA of the Court. In fact, the majority of these rulings have not been complied with and some have even triggered outright opposition to the Court as an entity.²⁶⁸ The decisions in which the CACJ asserted its jurisdiction over Guatemala, Costa Rica, and Panama prompted particularly negative reactions from the Governments of these States.²⁶⁹ Costa Rica even denounced the CACJ in an official note sent through its Minister of Foreign Affairs, stating, “The Government of the Republic of Costa Rica consider illegal and null [the decisions of the CACJ]. Despite the fact that Costa Rica is not part of the Court, that it has not accepted its jurisdiction, and that has not even consented to the application of its bylaws as established by the Statute, this institution [the CACJ] claimed to have jurisdiction to hear cases against Costa Rica in clear violation of international law.”²⁷⁰

It is also in the aftermath of these rulings that the general attitude of the national supreme courts changed towards the CACJ.²⁷¹ Exemplary

267. *Id.*

268. *Id.*

269. *Id.*

270. See Salvatore Caserta, *Institutionalizing Regional International Courts: Creation, Authority and Power of the Central American and Caribbean Courts of Justice* (2016) (Ph.D. thesis, University of Copenhagen) (WorldCat) [hereinafter *Institutionalizing Regional International Courts*].

271. Interview with Administrative Personnel of the Central American Court of Justice (July 11, 2014) [hereinafter Interview No. 11].

in this regard is the shift in the Costa Rican Supreme Court. Initially, when the CACJ began operation, the Costa Rican Supreme Court was its outspoken supporter, openly criticizing its own Government for not having ratified the Statute.²⁷² Yet, as a result of the aforementioned judgments, the Costa Rican Supreme Court turned against the CACJ.²⁷³ In an interview with a high-level Costa Rican Supreme Court judge, the judge went so far as to state that the rulings of the CACJ “have absolutely no effect in the Costa Rican legal system.”²⁷⁴

More generally, the rulings analyzed in this section reinforced the already widespread perception within Central American political and legal elites that the CACJ was an institution pursuing a specific political and institutional agenda, rather than seeking to be an impartial arbiter of the disputes arising under SICA law or its other areas of jurisdiction.²⁷⁵ The Court’s support of the PARLACEN engendered critical reactions from many Member States.²⁷⁶ In the legal field, many lawyers found the Court to be too political to be of relevance to them.²⁷⁷ At the same time, the CACJ’s critical position on the SIECA Secretariat triggered pushback from within the regional organization itself, with the SIECA simply ignoring the CACJ and preferring to resort to other ways of solving disputes.²⁷⁸ The result, we argue, was that the initial DFA achieved by the Court in its early CJEU-style constitutional judgments was largely gone as a negative spill-over effect of judgements in other areas of its jurisdiction.

C. FURTHER POLITICIZATION OF THE CACJ: TRIAS POLITICA AND INTER-STATE CONFLICT GOES TO COURT

This criticism of the CACJ reached new highs—or lows, depending

272. Perotti et al., *supra* note 21, at 394.

273. Interview with a Costa Rican Lawyer (Nov. 13, 2015) [hereinafter Interview No. 25].

274. *Id.*

275. *Id.*

276. See Interview with Nicaraguan Professor of Law (July 9, 2014) (criticizing the CACJ’s support of PARLACEN) [hereinafter Interview No. 7].

277. See, e.g., Interview No. 18 (expressing the CACJ is too political); see also Interview No. 7, *supra* note 276 (reasserting the political nature of the CACJ).

278. See Interview No. 21, *supra* note 215 (addressing SIECA’s preference for seeking alternative remedies).

on the perspective— when the Court was called upon to adjudicate a set of megapolitical issues concerning inter-state conflicts and separation of powers.²⁷⁹ These cases are the subject of this section.²⁸⁰ The first set of issues was both directly and indirectly linked to the ratification of the *López-Ramírez Treaty*²⁸¹ by Honduras and Colombia which effectively transferred sovereignty of several islands and marine territories, as well as submarine areas, from Nicaragua and Jamaica to Honduras and Colombia.²⁸² This led Nicaragua to impose taxes on Honduran goods²⁸³ and, more drastically, suspend all bilateral commercial relations with the latter.²⁸⁴ Shortly after this decision, the two States moved troops to their respective borders in preparation for military action,²⁸⁵ with Honduras going so far as to declare a state of alert.²⁸⁶

279. See Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. OF POL. SCI. 93, 94–95, 97–99 (2008) (introducing the concept of mega-politics); see generally Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 L. & CONTEMP. PROBS. 1 (2022) (applying the mega-politics framework to international courts).

280. For an account of why the CACJ has involved into politically sensitive issues, see Salvatore Caserta, *Regional International Courts in Search of Relevance: Adjudicating Politically Sensitive Disputes in Central America and the Caribbean*, 28 DUKE J. OF COMPAR. & INT'L L. 59 (2017) [hereinafter *In Search of Relevance*] (explaining why the CACJ chooses to involve itself in political issues).

281. Christian Diemer & Amalija Šeparović, *Territorial Questions and Maritime Delimitation with Regard to Nicaragua's Claims to the San Andrés Archipelago*, 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 167, 168, https://www.zaoerv.de/66_2006/66_2006_1_b_167_186.pdf.

282. See *Nicaragua v. Honduras*, CACJ 05-29-11-1999 (1999) and *Honduras v. Nicaragua*, CACJ 06-03-12-1999 (1999) (arising out of the centuries-long conflict between Nicaragua and Honduras); Ruiz, *supra* note 244.

283. See Ruiz, *supra* note 244 (addressing the sudden end to the dispute when Nicaragua ratified the treaty in 1999).

284. See *Nicaragua v. Honduras*, CACJ 05-29-11-1999 and *Honduras v. Nicaragua*, CACJ 06-03-12-1999 (elaborating on the nature of the conflict). See Ruiz, *supra* note 244 (addressing the sudden end to the dispute when Nicaragua ratified the treaty in 1999).

285. See Ruiz, *supra* note 244.

286. See *Region: Both Nicaragua & Honduras Claim Victory After Regional Court Rules on Boundary-Tariff Issues*, NOTICEN: CENT. AM. & CARIBBEAN AFFAIRS (Dec. 6, 2001), <https://www.thefreelibrary.com/REGION%3A+BOTH+NICARAGUA+%26+HONDURAS+CLAIM+VICTORY+AFTER+REGIONAL+COURT%7B-a080643478> [hereinafter *Region*] (showing Honduras declaring a state of alert).

Following these hostile actions, Nicaragua and Honduras each respectively filed a case against the other before the CACJ in 1999: Nicaragua to ascertain the nullity of the ratification of the Lopez-Ramirez Treaty;²⁸⁷ and Honduras to invalidate the Nicaraguan economic measures which allegedly violated SICA law.²⁸⁸ Although the CACJ does not have formal compulsory jurisdiction over territorial disputes,²⁸⁹ the judges admitted the cases and ruled that: i) the Lopez-Ramirez Treaty infringed the principles and obligations of the Protocol, holding Honduras directly responsible for the violations;²⁹⁰ and ii) by imposing additional taxes on goods coming from Honduras and suspending commercial relations with the country, Nicaragua had violated SICA law.²⁹¹

These two cases failed entirely to lower the tension between the two States.²⁹² Honduras refused to implement the measures mandated by the CACJ,²⁹³ and conversely intensified its commercial relationship with Colombia in order to compensate for the shortfall from Nicaragua's economic sanctions.²⁹⁴ Honduras, on its part, chose to suspend contribution to the payment of the CACJ judges in order to demonstrate discontent with the Court's decisions.²⁹⁵ The CACJ's intervention similarly did not prevent the two States from each threatening military actions against the other, or provide a solution to the contested borders.²⁹⁶ As to the first issue, only the diplomatic

287. See *Nicaragua v. Honduras*, CACJ 05-29-11-1999 (seeking to nullify the ratification of the Lopez-Ramirez Treaty).

288. See also *Honduras v. Nicaragua*, CACJ 06-03-12-1999 (attempting to violate Nicaraguan economic measures).

289. *Honduras v. Nicaragua*, CACJ 06-03-12-1999, at art. 22 (establishing that the Court has no jurisdiction over territorial disputes between Member States, unless the two States formally agreed to submit the dispute to the CACJ).

290. *Nicaragua v. Honduras*, CACJ 05-29-11-1999. See also the dissenting opinions of Justice Adolfo Leon Gomez and of Justice Eduardo Gauggel Rivas.

291. See *id.* at I and II.

292. See Augusto Zamora, *Conflicto Honduras-Nicaragua: Claves Necesarias*, ENVÍO DIGITAL (Jan. 2000), <https://www.envio.org.ni/articulo/987> (detailing the rising tensions between the two nations).

293. *Id.*

294. *Id.*

295. See Interview No. 11, *supra* note 271 (justifying Honduras' decision to end payments to CACJ judge).

296. *Id.* (illuminating the failures of the CACJ to diffuse tensions between Honduras and Nicaragua).

intervention of the Organization of the American States helped reduce the tension.²⁹⁷ As to the second issue, in the aftermath of the CACJ's ruling, Nicaragua filed a case before the ICJ, asking the World Court to finally determine the course of the single maritime boundary;²⁹⁸ a move, which further challenged the CACJ's legitimacy and authority.²⁹⁹

In 2011, the CACJ was once again called upon to rule on legal issues arising from another highly sensitive territorial dispute, this time between Nicaragua and Costa Rica.³⁰⁰ In this case, two Nicaraguan NGOs requested the CACJ to stop the construction of a highway in the protected area of the Rio San Juan³⁰¹ – a region that has been disputed by Costa Rica and Nicaragua for centuries.³⁰² Despite the vehement protests of the Costa Rican Government, the Court admitted the case and condemned Costa Rica for having damaged the environment and for violating several international and regional treaties.³⁰³

Although Nicaragua claimed victory,³⁰⁴ Costa Rica refused to implement the ruling of the Court, and instead denounced the CACJ for being partial.³⁰⁵ The President of Costa Rica, Laura Chinchilla,

297. Zamora, *supra* note 292.

298. See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659 (Dec. 8).

299. Eventually, the ICJ decided the cases in 2007 with a controversial decision which ultimately failed to establish a clear border between Nicaragua and Honduras in the Caribbean Sea. *Nicar. v. Hondur.*, 2007 I.C.J., at 659.

300. FONARE v. Costa Rica, CACJ 12-06-12-2011 (2011).

301. *Id.*

302. The tension between the two states peaked in 2010, when Nicaragua began to build an inter-oceanic channel in the area of the Rio San Juan. In response, Costa Rica sent police officers to its borders, a move which Nicaragua reciprocated. Costa Rica then filed a case at the ICJ alleging that the Nicaraguan military activities in the area constituted a breach of treaty obligations toward Costa Rica. In 2011, the ICJ provisionally ruled that both Costa Rica and Nicaragua must refrain from sending or maintaining security forces in the area and that the Nicaraguan dredging was allowed as it had been conducted on Nicaraguan territory. See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Order on Provisional Measures, 2011 I.C.J. 6 (Nov. 18).

303. FONARE v. Costa Rica, CACJ 12-06-12-2011.

304. *Id.*

305. See José Meléndez, *Costa Rica Ignora una Orden de la Corte Centroamericana de Justicia*, EL PAIS (Jan. 18, 2012),

then suspended Costa Rica's participation in the Meetings of the Heads of State of the SICA as a direct consequence of the CACJ's decision.³⁰⁶ In an official note, Costa Rica expressed disappointment with the ruling and accused the CACJ of being "subordinated to the interests of Nicaragua, from a Court located in Nicaragua, and with a Nicaraguan president."³⁰⁷ This reaction, we argue, further eroded the already-contested DFA of the CACJ in Costa Rica.

The most controversial ruling of the CACJ was, however, delivered in the Bolaños case of 2005.³⁰⁸ The CACJ was activated to adjudicate a constitutional crisis between the Nicaraguan President at the time, Enrique Bolaños, and the Nicaraguan Parliament.³⁰⁹ The conflict started as early as 2002, when the newly elected President Bolaños began an anti-corruption campaign,³¹⁰ which led to the imprisonment of Arnoldo Alemán, his predecessor.³¹¹ In an attempt to escape the conviction, Alemán sought to politically isolate Bolaños by means of an agreement with the leftist Sandinista Party, known as *El Pacto*.³¹² Through *El Pacto*, Alemán's followers and the Sandinista Party agreed to pass constitutional reforms to disempower and potentially impeach Bolaños.³¹³ Soon after, the National Assembly of Nicaragua passed a bill revoking the President's power to directly appoint key

https://elpais.com/internacional/2012/01/18/actualidad/1326926845_688633.html (reporting that in the aftermath of the judgment the Costa Rican Ambassador to the Organization of American States repeatedly stated that in Costa Rica the rulings of the CACJ are irrelevant and completely null).

306. See *Costa Rica Rechaza Sentencia de Corte Regional y Analiza Retirarse del SICA*, PROCESO DIGITAL (July 2, 2012), <https://proceso.hn/costa-rica-rechaza-sentencia-de-corte-regional-y-analiza-retirarse-del-sica/> [hereinafter *Costa Rica Rechaza*] (describing the suspension of Chinchilla).

307. See *Costa Rica se Distanciará del SICA después de Sentencia de Corte Centroamericana*, EL FARO (July 4, 2012), <https://elfaro.net/es/201207/internacionales/9024/> [hereinafter *Costa Rica se Distanciará*] (detailing the Bolanos case).

308. *Id.*

309. *Id.*

310. See Interview with Nicaraguan Politician (July 10, 2014) [hereinafter Interview No. 13] (providing background on President Bolanos' anti-corruption campaign).

311. *Id.*

312. *Id.*

313. *Id.*

governmental figures.³¹⁴ President Bolaños then filed a case before the Nicaraguan Supreme Court, which was rejected flat out,³¹⁵ and subsequently invoked Article 22 of the Statute of CACJ as grounds to bring the Nicaraguan Parliament before the CACJ for the institution to determine whether said constitutional reforms were invalid.³¹⁶

This case put significant pressure on the CACJ and on its two Nicaraguan judges in particular, who were pressured to take a stance against either their own Supreme Court or the President.³¹⁷ Additionally, as the seat of the Court is in the center of Managua, the capital of Nicaragua,³¹⁸ demonstrators gathered in front of the Court to voice their discontent with the judges' involvement in the national controversy.³¹⁹ The situation became so fraught that a person close to the Court suggested in an interview that one of the two Nicaraguan judges avoided becoming too involved in the proceedings in order to circumvent criticisms and even retaliations.³²⁰ In the eventual ruling, the CACJ overturned the Nicaraguan Supreme Court decision, admitting the case and releasing a precautionary measure to block the reform initiated by the Nicaraguan Parliament.³²¹ Moreover, through a well-crafted reasoning based upon the constitutional theory and the separation of powers doctrine,³²² the Court declared the reforms initiated by the Legislative Assembly of Nicaragua to be in violation

314. *Id.*

315. Supreme Court of Nicaragua, sentence no. 15 of the 29/03/2005 (on file with authors).

316. Article 22(f) of the Statute empowers the CACJ to rule over separation of powers disputes between the constitutional organs of the Member States. *See* also interview with Nicaraguan legal official, July 10, 2014 (describing the particularities related to the filing of such a case and the politically tense situation surrounding the Court at the time). Available at: https://www.sica.int/documentos/estatuto-de-la-corte-centroamericana-de-justicia_1_-153.html

317. *See* Interview No. 11, *supra* note 271 (establishing the pressure placed on the Nicaraguan judges in particular).

318. *See id.* (localizing the pressure on the Nicaraguan judges because the CACJ is located in Managua).

319. *See id.* (describing the demonstrations).

320. *See* Interview No. 14 and Interview No. 15 cited *supra* note 100.

321. Enrique Bolaños v. National Assembly of the Republic of Nicaragua, CACJ 69-01-03-01-2005 (2005).

322. *Id.*

of both the Nicaraguan constitution and several overarching SICA treaties.³²³

The Bolaños case was a ticking bomb in itself and, furthermore, exposed the Court to widespread popular protests. As described by one member of the CACJ staff, “During the Bolaños case, the situation was hard. A lot of people came here. . . . I got protection from the police. . . . It was a very critical situation, you know, the Court having its permanent seat in Nicaragua and the case was between two of the branches of government of Nicaragua, it was really complicated.”³²⁴

The situation was also complicated from a legal perspective as we explain below. Prior to the CACJ’s ruling, the Nicaragua Supreme Court had in fact declared Article 22(f) of the Court’s Statute unconstitutional,³²⁵ thus placing the CACJ – and in particular its Nicaraguan judges – in the difficult institutional position of having to produce a legally (and politically) sound decision in a context where part of the Court’s jurisdiction had been declared unconstitutional.³²⁶ Finally, the Court’s conclusion in the Bolaños case confirmed the perception of those already critical of the Court: the CACJ was a politicized Court and, as such, was unable to ensure an impartial implementation of the policies of the SICA.³²⁷ Actors not directly involved in the case, such as business lawyers, nevertheless saw the case as a signal to orient their professional practices elsewhere, most notably towards international arbitration.³²⁸

323. *Id.*

324. See Interview No. 11, *supra* note 271 (illuminating the legal and political complexity of the predicament of the Nicaraguan justices).

325. Supreme Court of Nicaragua, sentence n. 15 of 29 March 2005 (on file with authors).

326. Interview No. 11, *supra* note 271.

327. Interview No. 18, *supra* note 19 (confirming the belief that the CACJ was indeed politicized).

328. *Id.* (indicating that business oriented lawyers started to shift toward other potential remedies).

D. REBUILDING THE NARROW AND INTERMEDIATE AUTHORITY OF THE CACJ: THE TURN TOWARD LEGAL-TECHNICAL ISSUES OF SICA LAW

These megapolitical cases undoubtedly put an already challenged court under significant additional pressure. By the early 2010s, the CACJ was in reality a court in dire need of a reboot. In all major areas of its jurisdiction – supranational law, separation of powers and interstate disputes – the Court was impeded by negative reactions from both its immediate and intermediate audiences.³²⁹ In terms of DFA, the achievements of the early dynamic period, in which the core notions of supranational law had been imported into the system and the basics of a constitutional order set out, were shattered by seemingly endless criticism from the Member States as we have shown above in subsections 2 and 3. In light of this, it is not surprising that the CACJ gradually changed direction and started developing new areas of jurisprudence in more low-political areas and on legal questions concerned more technical issues of community law.³³⁰ We also see indications that the court began revisiting some of its earlier decisions and retreated somewhat from the very bold and principled positions originally taken as we outline below in this section.

In 2016, a Nicaraguan citizen filed a case under Article 22 (f) of the Court's Statute, alleging the lack of implementation of a judgment of the First District Labor Court of the District of Managua.³³¹ This application gave the CACJ the opportunity to revisit and clarify one of the most controversial aspects of its jurisdiction, namely the extent to which the Court is competent to intervene in the execution of national judgments under Article 22 (f) of its Statute.³³² As detailed above, this competence had previously been a key battleground in

329. See Mikael Rask Madsen et al., *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. IN CONTEXT 197 (2018) [hereinafter *Backlash against International Courts*] (contextualizing the dire state of the CACJ after Bolanos).

330. See Interview with Salvadoran Lawyer and Judge (Apr. 9, 2020) [hereinafter Interview No. 26] (providing additional perspective on the aftermath of Bolanos).

331. Ricardo Manuel Tradencilla Barberena v. Nicaragua, CACJ 3-12-09-2016 (2016).

332. See Interview No. 26, *supra* note 330 (discussing efforts to revitalize the CACJ).

relation to the Court's authority. In a very concise decision, the Court overruled its previous practices, arguing that the competences entrenched in Article 22 (f) can only be activated if the unimplemented judicial decision concerns issues of community law and the applicant invokes SICA law.³³³ In so doing, we argue, the Court limited the reach of this controversial power in a significant way, arguably making it more palatable to the Member States.

Following this retreat with regard to the interface of the Court with the national observance of the rule of law, the CACJ started tackling a series of technical community law cases.

In the first advisory opinion, the CACJ determined that Central American Corporation of the Services of Air Navigation (COCESNA) is immune to the jurisdiction of the national courts of Honduras (and, by extension, of all other Member States, that is, Belize, the Dominican Republic, Costa Rica, Panama, Guatemala, El Salvador and Nicaragua).³³⁴ The Court further stated that COCESNA falls under the exclusive jurisdiction of the CACJ,³³⁵ as Articles 68 and 70 of its procedural laws grant exclusive competence to the Court to hear appeals against the administrative decisions of the organs of the SICA.³³⁶ Finally, the CACJ noted that the Court's future decisions concerning COCESNA are binding upon the Member States;³³⁷ this nuance indirectly entails that States such as Costa Rica, Panama, Belize, and the Dominican Republic, which to date have not accepted the Court's jurisdiction, are nevertheless bound to respect its decisions in this regard. In other words, via the vehicle of a low-politics advisory opinion from a technical agency, the CACJ restated its fundamental and exclusive role in supranational matters.

The Court released the second advisory opinion in 2019.³³⁸ COCESNA had asked a number of follow-up questions linked to its

333. *See id.*

334. *Central American Corporation of Air Navigation Services v. Honduras*, CACJ 2-24-03-2017 (2017).

335. *Id.*

336. *Id.*

337. *Id.*

338. *Central American Corporation of Air Navigation Services*, CACJ 2-24-03-2017.

legal status and the practical operationalisation of its immunity from national jurisdiction.³³⁹ The CACJ responded that COCESNA is an organ with legal capacity as it has the ability of exercising rights and contracting obligations.³⁴⁰ However, since its founding treaty grants this organ immunity from national jurisdiction, no issues concerning the interpretation and application of its juridical instruments can be adjudicated before national courts.³⁴¹ In the same opinion, the Court also argued that, since SICA law is characterized by its supremacy and direct effect in relation to national law,³⁴² the Treaty establishing COCESNA and its complimentary norms cannot be contravened by national legislation and must be respected by all the Member States.³⁴³ Thus restating its very first judgments under the “cover” of a low-politics advisory opinion, we argue that the CACJ took one more step towards rebuilding its authority, at least with regard to SICA supranational law.

During the same period, another request for an advisory opinion reached the Court, this time concerning the regional market for electricity.³⁴⁴ Among the questions presented, two revolved around the power of the Regional Commission of Electrical Interconnection to take decisions that could potentially exceed or conflict with the Protocol of Tegucigalpa.³⁴⁵ This gave the Court an opportunity to clarify the hierarchy of legal norms of the SICA. The Court responded, first and foremost, by reiterating that the Protocol of Tegucigalpa and its complimentary instruments are the most fundamental norms of the SICA and as such must prevail over other treaties or agreements ratified by the Member States.³⁴⁶ Accordingly, the Court concluded that the Regional Commission of Electrical Interconnection was not entitled to act beyond the norms of these fundamental treaties of the SICA.³⁴⁷

339. *Id.*

340. *Id.*

341. *Id.* at 4.

342. *Id.*

343. See CACJ Advisory Opinion on Regional Market for Electricity, CACJ 3-08-06-2017 (Aug. 6, 2017) [hereinafter *Advisory Opinion V*].

344. *Id.*

345. *Id.*

346. *Id.*

347. This was also established by Article 35 of the Protocol.

These recent judgments and advisory opinions from the CACJ suggest an attempted relaunch of the Court as a moderate community court and signal an attempted retreat from its role in megapolitical conflicts (including inter-state and domestic constitutional disputes). Moreover, recent statistics provided by the Court reveal that, with the exception of 2018, the Court has received a relatively sustained and steady number of new cases annually since 2016, ranging from a low of six to a high of eleven.³⁴⁸ Of particular interest are the numbers concerning the years 2019–2020, where the Court has received a total of forty-eight applications, ranging from requests for advisory opinions, appeals to national sentences, and contentious cases.³⁴⁹ While these numbers are still low, they should be read against the backdrop of the preceding analysis. In 2014, when we first visited the CACJ, the Court was at a very critical stage. Criticized from many fronts for its politicization and awaiting the appointment of the new (the third) group of judges, we were given the clear impression that the CACJ was at a critical juncture, and possibly facing a dead end. The more recent developments, which have been described in this section, however, suggest that it could be bouncing back and undergoing a change – or at least an attempted change – of direction. Since 2016, we argue that the Court does indeed seem to have adopted a mission to transform itself into a more conventional regional economic court by distancing itself from the more risky legal issues arising in relation to other aspects of its jurisdiction.

It is too early to assess whether the present Court will succeed in erasing two decades of sustained negativity from many Member States (notably Guatemala, Costa Rica, and Panama) which have repeatedly challenged its authority and credibility,³⁵⁰ but there are indications that some Member States may be willing to begin a new chapter. Recently, positive signals have come from Guatemala, suggesting that the state is now ready to fully accept the Court by finally – with some 25 years

348. As emerges from an internal administrative document provided by the Court to one of the two authors and that is only file with him. The Court has, in fact, requested not to divulgate such document.

349. Interview with Salvadoran Lawyer and Judge (Apr. 9, 2020) [hereinafter Interview No. 26].

350. See *supra* at Section III.2 and 3.

of delay – appointing its national judges to the Court.³⁵¹ While this has not yet occurred, there are strong indications that it is a possibility in the near future.³⁵² Finally, a good number of cases are pending before the Court, which suggests that litigants, notably the agencies of the SICA, have started to perceive the Court as a legitimate venue for handling issues of SICA law.³⁵³ The success of the new strategy of the Court, we argue, will depend on the settlement of these intra-institutional issues and definitive ‘ironing out’ of the organisational structure of SICA.

IV. EXPLAINING THE CHALLENGED AUTHORITY OF THE CACJ

In general terms, this analysis suggests that, its broad jurisdiction notwithstanding, the CACJ, has thus far failed to leave a significant mark on Central American law and society. In its initial years, the Court attempted to delimit the contours of a (potentially) far-reaching SICA legal system,³⁵⁴ but these pro-integration rulings were, as shown, soon overshadowed by conflicts between the Court and Member States situated in other areas of its jurisdiction,³⁵⁵ as well as intra-institutional disagreements within the SICA.³⁵⁶ In this section, we further explore why the CACJ has faced such difficulties in achieving DFA in greater detail. Building on the theory of DFA, we focus on two sets of factors: the first pertaining to ‘agency’, and the second to ‘context.’ Sub-section 1 analyzes the legal agents involved with the CACJ, their particular interests and the ideas of law which

351. This is confirmed in interviews, *see e.g.*, Interview with Salvadoran Lawyer and Judge (Apr. 9, 2020) [hereinafter Interview No. 26].

352. *Id.*

353. As emerges from an internal administrative document provided by the Court to one of the two authors and that is only file with him. The Court has, in fact, requested not to divulgate such document. One can of course notice an increase in the rulings of the Court by looking at the Court’s webpage, <http://portal.cj.org.ni/ccj/>, where the latest judgments are published, yet not in an entirely systematic way. *See* Jurisprudencia, Corte Centroamericana de Justicia, <http://portal.cj.org.ni/ccj/jurisprudencia/> (last visited Apr. 16, 2022) (evidencing an increase in the rulings by the Court).

354. *See supra* Section III.1.

355. *Id.* at Section III.

356. *Id.* at Section II.

they have pursued. Sub-section 2 explores the particularities of Central American integration and their influence on the CACJ.

A. THE CENTRAL AMERICAN LEGAL PROFESSION AND THE CAREER PATHS OF THE CACJ JUDGES

ICs, like other complex institutions, are not simply conglomerates of formal norms – they embody values, interests, and professional strategies.³⁵⁷ The establishment of a new IC therefore provides an unchartered symbolic space where social groups can seek to influence and pursue professional and political interests.³⁵⁸ The CACJ is a particularly notable institution in this regard because of its path dependence on at least three distinct social-historical processes and their inscription in its current institutional configuration.³⁵⁹ Because of the structural forces characterizing the history of the region, we argue that in practice there have ultimately been two different groupings of lawyers competing for the domination of the CACJ, resulting in competing approaches to regional law and to the Court itself. For one group, regional law was – and to a certain extent still is – a tool to politically unify and pacify a troubled region.³⁶⁰ The second group has instead pursued the development of a more technical regional economic law and accordingly imagined the CACJ as a more conventional supranational regional court with a focus on trade and tariff matters in the tradition of, for instance, the CJEU.³⁶¹

The Statute of the CACJ – the elaboration of which fell predominantly into the hands of the first grouping – put the important idea of the Court as a tool to bring political unity and peace to the region center stage,³⁶² and it reflected the influence of merging

357. See generally CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* (Random House, 3d ed. 1986) (generally on organizations and institutions); see also Philip Selznick, *Foundations of the Theory of Organization*, 13 AM. SOCIO. REV., 25, 27 (Feb. 1948) (exemplifying the theory of organizations).

358. See Mikael Rask Madsen, *Reflexivity and the Construction of the International Object: The Case of Human Rights*, 5 INT'L POL. SOC. 259, 267 (2011) [hereinafter *The Case of Human Rights*] (explaining the uniqueness of the space).

359. See *supra* Section II.

360. See Interview No. 14 and Interview No. 15 cited *supra* note 100.

361. Interview No. 21, *supra* note 215.

362. See Interview No. 14 and Interview No. 15 cited *supra* note 100.

regional economic matters with federalism and traditional public international law.³⁶³ It was, moreover, agreed during the negotiations of the Court's Statute that the future judges of the CACJ would be appointed directly by the supreme courts of the Member States,³⁶⁴ thereby guaranteeing and solidifying their standing.³⁶⁵ Throughout its history, the Court's bench has largely been dominated either by former supreme court judges or by lawyers specialized in constitutional (or to a lesser extent public international) law.³⁶⁶ Very few of the appointed CACJ judges have been or are specialized in economic law.³⁶⁷ This contradicts the widespread practice of ICs to mix different professional figures on their benches.³⁶⁸ A number of empirical studies have, in fact, demonstrated that the contemporary configuration of the agency of the international judiciary is clearly constituted by an integration of three professional figures; diplomats and other politically oriented figures, law professors, and judges.³⁶⁹ In practice, this admixing of professional categories and trajectories has in practice been central to many ICs' success.³⁷⁰ The interplay of these

363. Interview No. 1, *supra* note 21.

364. This differs quite significantly from the classic way of appointing international judges: candidates are often initially shortlisted by national governments and then appointed by regional and/or international organs. See Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 CAMBRIDGE UNIV. PRESS 669, 675 (2007) (evidencing the way in which this differs quite significantly from the classic way of appointing international judges: candidates are often initially shortlisted by national governments and then appointed by regional and/or international organs).

365. See Interview No. 14 and Interview No. 15 cited *supra* note 100.

366. Interview No. 18, *supra* note 19.

367. As reported by the Court's website where the professional profiles of the judges are presented. *Magistrados Titulares 2016–2026*, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccej.org.ni/ccj/magistrado/> (last visited Apr. 11, 2022) (listing the professional profiles of the judges). See also FOUNDATIONS AND AUTHORITY, *supra* note 7 (showing that only a few of the CACJ judges are economic law specialists).

368. See generally Mikael Rask Madsen, *Who Rules the World? The Educational Capital of the International Judiciary*, U.C. J. INT'L, TRANSNAT'L, & COMPAR. L. (2018).

369. See Mikael Rask Madsen, *The International Judiciary as Transnational Power Elite*, 8 INT'L POL. SOCIO. 332, 333 (2014) [hereinafter *The International Judiciary as Transnational Power Elite*] (explaining the tradition of mixing politicians, law professors, and judges on the bench).

370. *Id.*

different legal-professional categories has, in fact, allowed many ICs (i.e. the PCIJ, the ICJ, and the European Court of Human Rights) to wisely navigate their complex contexts by, for instance, providing rulings that were mindful of their direct and indirect socio-political consequences.³⁷¹ By being almost entirely dominated by national judges, we argue that the CACJ has far too often provided rulings that in point of law were irreproachable, but that failed to understand the broader implications for politics and society.

The first roster of CACJ judges was appointed in 1994 to serve until 2005, and comprised six magistrates, two from each of the three states that had fully ratified the Court Statute (Nicaragua, El Salvador and Honduras).³⁷² When looking at the professional background of the six judges, it is striking that the majority had previously been supreme court judges. The profiles of the two Nicaraguan judges – Orlando Trejos Somarriba and Rafael Chamorro Mora – exemplify this trend as we explain below. Prior to being appointed to the CACJ, Trejos Somarriba had been President of the Supreme Court of Nicaragua and of the Central American Judicial Council.³⁷³ Chamorro Mora had been President of the Court of Appeal, Judge of the Supreme Court of Nicaragua, as well as Secretary of the Central American Judicial Council.³⁷⁴ One of the two Honduran judges, Roberto Ramírez, should also be mentioned in this retrospective. Ramírez conducted the preliminary study on the CACJ for the Central American Judicial Council,³⁷⁵ and was, most likely, behind the idea of viewing the present Court as a revitalization of the old Cartago Court in its role as an institution aimed at pacifying the region.³⁷⁶ Similar profiles

371. *See id.*

372. *See* FOUNDATIONS AND AUTHORITY, *supra* note 7 (explaining that the remaining judge, for Honduras, was Adolfo León Gómez, Professor of Mercantile Law, Political Economy and Finances in several Honduran Universities, and a Member of the Commission for the reformation of the Honduran judiciary. Roberto Ramírez passed away in 1997 and was substituted by Dr. José Eduardo Gauggel Rivas, who had been Professor of Law at the University of San Pedro Sula and a judge of the Honduran Supreme Court. Judge Gauggel Rivas, however, quit his position in 1998).

373. *Id.* at 91.

374. *Id.*

375. *See* Interview No. 14 and Interview No. 15 cited *supra* note 100.

376. FOUNDATIONS AND AUTHORITY, *supra* note 7, at 91.

characterized the two judges from El Salvador: Jorge Antonio Giammattei Avilés had been Judge of the Supreme and Constitutional Court of El Salvador,³⁷⁷ while Fabio Hércules Pineda had been Judge at the Constitutional Law Department of the Supreme Court of El Salvador.³⁷⁸

The tendency to fill the bench with national judges continued when the second panel of judges was appointed in 2006, albeit with the addition of some more international profiles.³⁷⁹ Prior to his appointment at the CACJ, one of the new Honduran judges, Guillermo Augusto Pérez Cadalso Arias, had been a Professor of International Law at the Autonomous Nacional University of Honduras and Judge of the Supreme Court of Honduras.³⁸⁰ The second judge from Honduras, Darío Francisco Lobo Lara, had been a Professor of Law at the National Autonomous University of Honduras, Ambassador of Honduras to the United Nations, and was known as an advocate of the CACJ as an institution for pacifying the Central American region and enforcing the rule of law in its Member States.³⁸¹ The two Nicaraguan judges had backgrounds in national judiciaries: Silvia Isabel Rosales Bolaños, a criminal law and procedure specialist, had been a judge in the Criminal Law section of the Nicaraguan Supreme Court;³⁸² while Carlos Antonio Guerra Gallardo had acted as a member of the Human

377. *Id.* at 91.

378. The remaining judge, for Honduras, was Adolfo León Gómez, Professor of Mercantile Law, Political Economy and Finances in several Honduran Universities, and a Member of the Commission for the reformation of the Honduran judiciary. Roberto Ramirez passed away in 1997 and was substituted by Dr. José Eduardo Gauggel Rivas, who had been Professor of Law at the University of San Pedro Sula and a judge of the Honduran Supreme Court. Judge Gauggel Rivas, however, quit his position in 1998.

379. *See* FOUNDATIONS AND AUTHORITY, *supra* note 7, at 92 (explaining that the term for the CACJ judges is ten years, the second bench should have been appointed in 2004. However, because of the criticism received from Member States in the context the Bolaños case (as discussed above), this appointment procedure was delayed by two years); *see also* Interview No. 11, *supra* note 271; Interview No. 13, *supra* note 310.

380. FOUNDATIONS AND AUTHORITY, *supra* note 7 at 91.

381. *Id.* at 91–92.

382. *See* Silvia Isabel Rosales Bolaños, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccej.org.ni/ccj/silvia-isabel-rosales-bolanos/> (last visited Apr. 11, 2022) (containing the profile of Silvia Isabel Rosales Bolaños).

Rights Commission, the Nicaraguan Parliament, and Judge at the Nicaraguan Supreme Court.³⁸³ The Salvadoran judges were Ricardo Acevedo Peralta and Julio Enrique Acosta Baires. Peralta had an illustrious career behind him: Professor of International Law, Minister of Foreign Affairs of El Salvador (1984-1989), member of the Permanent Court of Arbitration of the United Nations (1988-1995), member of the Salvadoran Parliament (1991-1995), member of the Central American Parliament (1986-2001), and finally, agent of El Salvador before the Inter-American Court of Human Rights (2003-2005).³⁸⁴ Baires, a lawyer specialized in Mercantile Law, had been Dean of the Faculty of Law and Social Sciences at the Alberto Masferrer University of El Salvador and Judge of the Supreme Court of El Salvador.³⁸⁵

Overall, and taking into account the many supreme court judges appointed during the period 1994-2016, we argue that the Court has been dominated by jurists with expertise in constitutional law and national law more generally. While public international law also features quite prominently among the judges' competences as evident from the above provided description of the judges' professional profile, experience in issues of market law have been mostly absent in the resumes of appointees. This helps, in our view, to explain the Court's problems in achieving DFA within the broader Central American legal field.³⁸⁶ The specific expertise of the judges elucidates why the Court has become primarily associated with cases involving politically sensitive constitutional or inter-state disputes.³⁸⁷ This orientation has, however, made the institution less attractive to other sectors of the Central American legal profession, particularly those

383. See *Carlos Antonio Guerra Gallardo*, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccej.org.ni/ccj/carlos-antonio-guerra-gallardo/> (last visited Apr. 11, 2022) (containing the profile of Carlos Antonio Guerra Gallardo).

384. *Id.*

385. *Id.*

386. See *supra* Section III.

387. See generally Salvatore Caserta, *Regional International Courts in Search of Relevance: Adjudicating Politically Sensitive Disputes in Central America and the Caribbean*, 28 DUKE J. OF COMPAR. & INT'L L. 59, 79-94 (2017) [hereinafter *In Search of Relevance*] (linking the expertise of the judges with the cases the court takes on).

envisioning the CACJ as the engine for market integration and broader business matters.³⁸⁸

We also contend that the high number of former national judges on the panel of the Court has also impacted the development of its judging style. In contrast to many other ICs, which have devised diplomatic ways of addressing highly politically sensitive issues,³⁸⁹ the CACJ has been reluctant to embark upon diplomatic judicial decision making and instead favored an approach more akin to high domestic courts in civil law jurisdictions.³⁹⁰ From the very beginning, the CACJ has opted to rule in strictly legalistic and formalistic manners, resulting in bold decisions that have on occasion been difficult for member states to accept.³⁹¹ Although legally sound, many participants have viewed the CACJ's bold and formalist approach in its judgments as being detrimental to its capacities in the context of international affairs and diplomacy.³⁹² In fact, the uncompromising jurisprudential path of the CACJ has triggered strong opposition from both Member States and the Central American legal professions.³⁹³

388. See Interview No. 14 and Interview No. 15 cited *supra* note 100.

389. See MIKAEL RASK MADSEN & JONAS CHRISTOFFERSEN, *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 44 (2011) (exploring how different ICs deployed a careful and diplomatic approach in order to build their authority); see also James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 *DUKE J. COMPAR. & INT'L L.* 249, 259 (2013); Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 *AM. J. INT'L L.* 737, 739 (2013) [hereinafter *The ECOWAS Community Court*] (exploring how different ICs deployed a careful and diplomatic approach in order to build their authority); Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies*, 79 *L. & CONTEMP. PROBS.* 89, 106–07 (2016) [hereinafter *Between Community Law and Common Law*].

390. This way of judging of international courts is called 'legal diplomacy.' See generally MIKAEL RASK MADSEN, *Legal Diplomacy: Law, Politics and the Genesis of Postwar European Human Rights*, in *HUMAN RIGHTS IN THE TWENTIETH CENTURY: A CRITICAL HISTORY* 62–82 (S.L. Hoffmann ed. 2011) [hereinafter *Legal Diplomacy*] (theorizing a way of judging of international courts is called 'legal diplomacy').

391. See generally FOUNDATIONS AND AUTHORITY, *supra* note 7, at 66–67 (evidencing that CACJ has held bold decisions that are difficult for member states to accept).

392. See Interview No. 14 and Interview No. 15 cited *supra* note 100.

393. See *supra* Section III.2–3.

Some changes start to be observed in 2016, when the third panel of CACJ judges was appointed.³⁹⁴ While Nicaragua reconfirmed its choices of Silvia Isabel Rosales Bolaños and Carlos Antonio Guerra Gallardo, the remaining four judges all changed.³⁹⁵ Honduras opted to appoint members of the national judiciary who had little experience and knowledge of international and SICA law, thus continuing the established tradition and orientation of the Court.³⁹⁶ The two Honduran judges, Vera Sofía Rubí Ávila and Carlos Humberto Midence Banegas, were essentially national judges specialized respectively in space law and civil procedure and family law.³⁹⁷ El Salvador, on the other hand, changed approach and appointed lawyers with expertise on regional and SICA law. The two judges chosen were Edgar Hernán Varela Alas, a former Ambassador of El Salvador to Belgium, Luxembourg, and the European Union,³⁹⁸ and César Ernesto Salazar Grande, former legal adviser of the SICA Secretariat and, arguably, one of the leading experts on SICA law in the region.³⁹⁹ Salazar Grande's appointment, in particular, could have been expected to spark a renewed interest in the Court among SICA constituents, many of whom knew him from his prior position.⁴⁰⁰ It is, in fact, the first time since the beginning of the CACJ's operation that a lawyer with an established knowledge of SICA has been included on the CACJ's bench, and it may come as no surprise that the recent turn to

394. See *Magistrados Titulares 2016–2026*, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccj.org.ni/ccj/magistrado/> (last visited Apr. 11, 2022) (documenting the third panel of CACJ judges that were appointed in 2016).

395. *Id.*

396. See *Vera Sofía Rubí Ávila*, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccj.org.ni/ccj/vera-sofia-rubi-avila/> (last visited Apr. 11, 2022); see also *Carlos Humberto Midence Banegas*, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccj.org.ni/ccj/carlos-humberto-midence-banegas/> (last visited Apr. 11, 2022).

397. *Vera Sofía Rubí Ávila*, *supra* note 396.

398. See *Edgar Hernán Varela Alas*, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccj.org.ni/ccj/edgar-hernan-varela-alas/> (last visited Apr. 11, 2022) (containing the profile of Edgar Hernán Varlea Alas).

399. See *César Ernesto Salazar Grande*, CORTE CENTROAMERICANA DE JUSTICIA, <http://portal.ccj.org.ni/ccj/cesar-ernesto-salazar-grande/> (last visited Apr. 11, 2022) (containing the profile of César Ernesto Salazar Grande).

400. Interview with Salvadoran Lawyer and Judge (Apr. 9, 2020) [hereinafter Interview No. 26].

SICA law in the practices of the Court discussed above corresponds largely with the appointment of Salazar Grande as judge and eventually president of the CACJ.⁴⁰¹ While it is still too early to assess the influence this change of orientation may have on the DFA of the CACJ, the long-term impact of these new developments on the Court's DFA may well be positive. What is certain for the time being is that the profile of the CACJ judges is only now starting to reflect the Court's actual jurisdiction.

B. THE CACJ IN REGIONAL AND NATIONAL POLITICS

In our view, a second set of factors that contribute to explaining the CACJ's limited DFA are the specific institutional environments in which the Court operates, as well as the particular conflictual nature of politics in its Member States. Institutional specific factors impact the ways in which audiences relate to an IC, thereby affecting its DFA.⁴⁰² The comparative history of other ICs teaches us that, as a minimum standard of sorts, successful ICs enjoy the support of the other organs of the regional or international organization under which they are established.⁴⁰³ In part, as consequence of the particular historical trajectory of the SICA, the CACJ operates in a fragmented regional organization where intra-institutional competition is ripe.⁴⁰⁴ For instance, the system is currently equipped with two regional Secretariats, those of the SIECA and the SICA respectively,⁴⁰⁵ which have competing and overlapping competences in relation to the enforcement of regional treaties.⁴⁰⁶ Moreover, the PARLACEN has had a troubled history with regard to its interaction with both regional

401. See *supra* Section III.4.

402. *Context, Authority, and Power*, *supra* note 4, at 36.

403. See generally JONAS TALLBERG, MAKING STATES COMPLY: THE EUROPEAN COMMISSION, THE EUROPEAN COURT OF JUSTICE & THE ENFORCEMENT OF THE INTERNAL MARKET 5, 13 (1999) (evidencing the other organizations that support successful ICs).

404. See generally SÁNCHEZ SÁNCHEZ, *supra* note 122 (exemplifying the intra-institutional competition).

405. See generally *Avisos*, SIECA, <https://www.sieca.int/> (last visited Apr. 11, 2022) (showing one of the two regional Secretariats); see generally *Integration at a Glance*, SICA, https://www.sica.int/sica/vista_en.aspx (last visited Apr. 16, 2022) (showing the other one of the two regional Secretariats).

406. Interview No. 1, *supra* note 21.

organs and Member States.⁴⁰⁷ It is important to note that all of these tricky inter-institutional relations and conflicts have eventually been brought before the CACJ.⁴⁰⁸ We argue that these tensions have had real consequences and created reluctance towards the CACJ on the part of numerous organs.

The relationship described above between the PARLACEN and the CACJ has been quite consistently good, but has ultimately shed a bad light on the Court.⁴⁰⁹ The PARLACEN was perceived by many as a refuge for corrupt politicians rather than as a genuine regional democratic institution capable of promoting regional integration and peace.⁴¹⁰ We argue that the perceived proximity between the Court and the PARLACEN, as well as the Court's rulings on matters related to the PARLACEN have contributed to a perception that the CACJ has sided (and may continue to side) with questionable political actors thus making it unable to deliver impartial adjudication. From the interviews, it became apparent that these views were most commonly expressed by actors in the fields of market and business law who, overall, have felt excluded from the SICA project.⁴¹¹

Comparative studies of ICs suggest that the broader political environments surrounding an IC significantly influence its ability to develop DFA.⁴¹² For example, ICs that continuously face mega-political questions⁴¹³ or operate more generally in highly polarized

407. See, e.g., *Cómo el Parlacen pasó de ser un órgano regional a un refugio de lo peor de la política de Centroamérica*, LA PRENSA (Jan. 29, 2022), <https://www.laprensani.com/2022/01/29/politica/2943251-como-el-parlacen-paso-de-ser-un-organo-regional-a-un-refugio-de-lo-peor-de-la-politica-de-centroamerica> [hereinafter *Parlacen*] (evidencing the troubled history of the PARLACEN and its interaction with regional organs and Member States).

408. See *supra* Section III.2.

409. Interview No. 21, *supra* note 215.

410. See Marco Julio Ochoa, *Parlacen, a Den of Corruption?*, UPI (Feb. 12, 2004), <https://www.upi.com/Defense-News/2004/02/12/Analysis-Parlacen-a-den-of-corruption/75531076595162> (explaining how the PARLACEN is perceived).

411. Interview No. 18, *supra* note 19.

412. See generally *Context, Authority, and Power*, *supra* note 4.

413. On mega-politics, see Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. OF POL. SCI. 93, 98–106 (discussing the judicialization of politics, where many depend on courts to deal with political controversies).

societies may find it particularly hard to achieve DFA.⁴¹⁴ Political instability has marked Central America both in the past and continues to (to a degree) today.⁴¹⁵ Regardless of the many attempts to create a politically unified Central America, the region has seen its share of both inter-state conflict and civil wars.⁴¹⁶ There has been, and still is, a discrepancy between the lofty ideas and ideals of regional integration through the SICA and the CACJ in comparison to the socio-economic and political realities on the ground.

Guatemala, in this regard, is exemplary: despite being a founding member of the Court,⁴¹⁷ Guatemala only ratified the Statute of the CACJ in 2008⁴¹⁸ and has yet to appoint its judges to the Court.⁴¹⁹ Our interviewees and other sources suggest that Guatemala's reluctance to join the court has primarily been due to the maintained influence of political leaders from the civil war era.⁴²⁰ Despite the CACJ neither being a human rights nor a criminal court, many Guatemalan actors perceive the CACJ to be a potential threat to the amnesty laws that have secured their impunity from crimes committed during the civil war.⁴²¹ Issues of high politics have also arisen in Nicaragua –President Enrique Bolaños case filed before the CACJ to try to prevent a constitutional crisis in 2005, as previously mentioned⁴²² – and in Panama, when members of the PARLACEN filed cases at the CACJ in 2010, asking the Court to stop newly elected President Ricardo Martinelli from manipulating the results of the regional elections.⁴²³ The CACJ's continuous struggle to achieve DFA, we argue, is largely linked to its place within these extremely challenging political

414. See generally Salvatore Caserta & Pola Cebulak, *The Limits of International Adjudication: Authority and Resistance of Regional Economic Courts in Times of Crisis*, 14 INT'L J. L. CONTEXT 275, 277, 282–90 (2018).

415. See generally SÁNCHEZ SÁNCHEZ, *supra* note 122.

416. *Id.*

417. See METCALF & PAPAGEORGIOU, *supra* note 23, at 98.

418. *Id.*

419. *Id.*

420. Interview No. 1, *supra* note 21.

421. *Id.*

422. See *supra* Section III.3.

423. See *Perez v. Panama*, CACJ 104-01-18-02-2010 (Feb. 18, 2010); see also *Ruidíaz v. Panama*, CACJ 111-07-22-11-2010 (Nov. 22, 2010); see also *Central American Parliament v. Panama*, CACJ 120-07-07-09-2011 (Sept. 7, 2011).

environments.

A final, interconnected contextual challenge to the Court has been, in our view, the weakness of the domestic legal institutions in member states. To a certain extent, it is a precondition for the effective operation of an IC that there are some commonly accepted ideas of the rule of law and functioning legal systems in place in domestic settings to operationalize those ideas.⁴²⁴ To secure compliance with international judgments, ICs depend on governments, national judges, administrative agencies, NGOs, and other national legal elites.⁴²⁵ These various actors form what Karen Alter has termed the “compliance partners” of ICs; that is, they are the practical infrastructure for giving life to international judgments.⁴²⁶ In the theory of DFA, similar observations can be made with regard to the different levels of authority.⁴²⁷ In the Central American contexts, we argue, the dominance of politics has limited the ability of these actors to perform crucial functions in the operationalization of the CACJ’s judgments. The result has largely been that the CACJ been left alone to enforce its own rulings. But, as suggested by the theory of DFA, courts cannot self-generate their own de facto authority – this process fundamentally requires the involvement of their constituencies and audiences.⁴²⁸ Across Central America, the weakness of local institutions and private actors in relation to powerful political classes with unfinished, historical business has made the transformation of formal authority into DFA very difficult.

V. CONCLUSION

Although remarkably powerful on paper, the CACJ has thus far failed to achieve DFA reaching any further than scattered audiences

424. See Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in *OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 464, 476–80 (Karen J. Alter et al. eds., 2014) (discussing and providing examples of international courts effectiveness in relation to the laws that are in their purview).

425. See generally *How Context Shapes the Authority*, *supra* note 25.

426. See *THE NEW TERRAIN*, *supra* note 13, at 7.

427. See generally *INTERNATIONAL COURT AUTHORITY* (Karen J. Alter et al. eds., 2018).

428. *Id.*

in the contexts of singular judgments. The Court's community law rulings have, at least until recently, largely failed to impact the legal systems of either the SICA or its constituent Member States.⁴²⁹ At the same time, the Court's decisions on inter-state and separation of powers disputes have generally not been complied with and have even triggered pushback or backlash from Central American Member States and legal professions alike.⁴³⁰ This article has argued that the CACJ's trouble in achieving DFA needs to be understood in light of the Court's protracted genesis at the crossroads of several – and at times conflicting – ideas of law further complicated by the professional interests that have characterized Central American integration over time. We argued that the present Court is the product of three broad structural developments in Central American law and politics – two broadly related to the pacification of the region, and one linked to the development of the idea of regional integration through law.

Through historical re-construction seen through the lens of the theory of DFA, the article identified several factors that help explain the status of the Court in terms of de facto authority. The first set of factors relates to the agency and professional interests of the actors chosen to sit on the bench of the Court. We observe that, since its establishment, the Court has been dominated by a particular social grouping of judges, which has been more concerned with enforcing the rule of law than with the technical policies of the SICA. Ultimately, the CACJ has become estranged from large sectors of the Central American legal profession, who have seen little interest in investing in the Court and therefore sought other avenues for their clients.⁴³¹ The second category of factors identified are institutional and political in nature. We analyzed the many intra-institutional frictions between the CACJ and other organs of the SICA system, as well as the particularly politicized operational contexts of the Court in the Member States. All of these factors have ultimately contributed to situating the CACJ at the margins of the Central American legal field, with the result that it has not been able to cast a significant legal shadow over law and society in the region.

429. *See supra* Section III.1–2.

430. *See supra* Section III.3.

431. *See supra* Section III.3.

The findings of the article also provide some general insights concerning the DFA of ICs, particularly of regional ICs outside Europe, which, as we have shown in the paper, are often entrenched in politically challenging contexts, which expose these institutions to overt forms of resistance. More specifically, our analysis points to the fundamental dilemma that these regional ICs often face, namely that of having to first establish and then maintain their authority *via-a-vis* reluctant constituencies, while simultaneously being presented with politically fraught cases, thus opening up the risk of backlash. Because of these constraints, these regional ICs have often struggled to become important and respected institutions and when they have delved into more high profile social and political issues, they have often triggered the ire of powerful political actors.⁴³² This dilemma is real and one that is not easily solved, as the strong backlash experienced by the Southern African Development Community Tribunal after ruling upon rights of white farmers in Zimbabwe demonstrates.⁴³³

Our analysis of the CACJ suggests that adopting a bold formalistic approach – like the one developed by the CACJ in the intermediate period of its operation (from circa 1999 to 2015) – does not seem to be the most effective way to develop DFA. In our view, by accepting to rule on politically fraught issues (i.e., territorial disputes, national constitutional crises, inter-institutional conflicts among the organs of the SICA, etc.) and adjudicating in pure point of law (often finding its Member States in flagrant violation of regional norms), the CACJ has made more enemies than allies in its various operational contexts. The result has been a general lack of DFA with regard not only to Member States but also eventually national judges, SICA lawyers, and civil society.⁴³⁴ Moreover, we argue that the choice of the CACJ to focus

432. See generally Caserta & Cebulak, *supra* note 69.

433. See Shane Meckler, *A Human Rights “Monster” that Devoured No One: The Far-Reaching Impact of Dismantling the SADC Tribunal*, 48 N.Y.U. J. OF INT’L L. & POL. 1007, 1014–21 (2016) (discussing the case before the SADC tribunal, *Mike Campbell (Pvt) Ltd. V. Republic of Zimbabwe*); see generally Karen J. Alter, James T. Gathii, & Laurence R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. OF INT’L L. 293, 294, 306–12, 314 (2021) (discussing the backlash courts faced in the Sub-Regional Courts in Africa as a result of their decisions).

434. See *supra* Section III.2–3.

on more classic public international law and structural constitutional law issues within its Member States has had detrimental effects on the Court's DFA.

One of the consequences of this approach has been a failure on the part of the Court to incorporate human and fundamental rights in its practices with the result that the Court is presently unable to provide effective remedies to individuals for violations of SICA law.⁴³⁵ This might well be because the two foundational documents of the SICA (the Tegucigalpa and the Guatemala Protocols) make no mentions of the liberties and rights of individuals in the system, which is likely the result of the overt intergovernmental approach that inspired these two legal documents. In practice, however, the Court has been asked to pronounce itself on SICA rights (or as the Court calls them "communitarian rights"); yet in those instances, the CACJ often refuses to adopt a teleological interpretation of the regional treaties and sends the question of rights back to the individual Member States. In terms of human rights, the Court has categorically held that these are the exclusive competence of the Inter-American Court of Human Rights, however, forgetting that the governing bodies of the SICA are not under the competence of this court. Moreover, when asked to regulate how states should guarantee the right to free movement of people and goods within the SICA, the Court has argued that states should pursue these rights in the legal framework of their own migratory laws.⁴³⁶ This, in our view, means that there is no benchmark of which states and institutions can be held accountable to individuals for breaching SICA law. This, in our view, also hampers the direct effect and supremacy of SICA law as established by the CACJ in its earlier case law.⁴³⁷ Rather than having developed a proactive judicial dialogue on these matters, the approach of the CACJ has resulted in resistance from many national courts, which have perceived the legal developments of the CACJ as ineffective and unnecessary intrusions

435. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights arts. 1–22, Nov. 17, 1988, O.A.S.T.S. No. 69.

436. See Advisory Opinion on the Protocol of Tegucigalpa and CACJ Statute, CACJ 5-20-08-2010 (Aug. 20, 2010).

437. See *supra* Section III.1.

into national legal issues.⁴³⁸

These findings take on even more relevance in the contemporary landscape characterized by the escalating critique of international law and courts. In this context, it is becoming increasingly clear that anti-multilateral politics are seeking to paint ICs as the creators of cosmopolitan elites and the enemies of national interests. ICs, however, may potentially avoid bipartisan political and social conflicts if they carefully balance the consequences of their judgments with the socio-political environments in which they are entrenched and if they seek to construct a rights-based system that would empower individuals and national judges to enter into a dialogue with the regional court. However, building up tenable levels of DFA remains extremely complex in situations characterized by political polarization. To survive and mediate in the face of increasingly fundamental cleavages in society, ICs must rely on interested actors and fundamental support, even if this sometimes comes at the cost of sacrificing the pure interest of justice in the short term.

438. *See supra* Section III. 2–3.