

# The Role of the Organization of American States in Peaceful Settlement of Disputes

El papel de la Organización de Estados Americanos en la resolución pacífica de conflictos

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## Summary

This article analyzes the role of the OAS in creating political and adjudicative frameworks for the peaceful settlement of the disputes between American states. The article suggests that while the OAS has succeeded in creating strong political frameworks for the pacific settlement of regional disputes, it fell short of designing equally successful adjudicative frameworks. Revitalizing the OAS frameworks for the pacific settlement of disputes would enhance regional peace and stability; it is also necessary if the OAS wishes to remain *the* prominent regional organization in the Western Hemisphere.

## Keywords

Peaceful settlement of disputes / The Charter of the OAS / The Pact of Bogota / Competence of the ICJ.

## Resumen

Este artículo analiza el papel de la OEA en la creación de marcos políticos y adjudicativos para el arreglo pacífico de las disputas entre los Estados americanos. El artículo sugiere que, si bien la OEA ha logrado crear sólidos marcos políticos para el arreglo pacífico de disputas regionales, no logró diseñar marcos adjudicativos igualmente exitosos. La revitalización de los marcos de la OEA para el arreglo pacífico de las controversias mejoraría la paz y la estabilidad regionales; pero también es necesario si la OEA desea seguir siendo la organización regional prominente en el hemisferio occidental.

## Palabras clave

Solución pacífica de controversias / La Carta de la OEA / El Pacto de Bogotá / Competencia de la CIJ.

## 1. Introduction

Latin America is the second most peaceful region in the world (Melander et. al., 2016). This fact is astonishing given the abundance of territorial disputes in the Western Hemisphere. Only in the last couple of decades, such disputes have resulted in five instances of the use of force and two instances of force deployment. These incidents involved ten out of the nineteen States of Central and South America (Dominguez et. al., 2003).

One could attribute the success in maintaining regional peace in the Americas to the Organization of the American States (OAS). For years, the OAS has played an important role in preventing the escalation of existing conflicts, and in creating normative and political frameworks for the peaceful settlement of disputes (Herz, 2008). This article surveys the role



of the OAS in promoting mechanisms for the peaceful settlement of disputes in the Americas. It begins with a brief introduction of the normative framework for the peaceful settlement of disputes in international law. Then it analyzes the role of the OAS in creating political and legal frameworks for the pacific settlement of the disputes at the regional level. The article suggests that while the OAS had succeeded in creating strong political frameworks for the peaceful resolution of regional conflicts, it fell short of designing strong frameworks for the legal or adjudicative settlement of conflicts between American States. Revitalizing the OAS frameworks for the settlement of disputes is vital for the future maintenance of peace and security in the region; but it is also crucial if the OAS wishes to remain a relevant player. The emergence of myriad sub-regional initiatives could erode the power and relevance of the OAS even if they lack the same capacity to serve the regional peace. To maintain its own prominence in the region, the OAS must enhance its capabilities to do what it does best, and this includes its role in facilitating the pacific settlement of disputes in the Americas.

## **2. Peaceful settlement of disputes in international law**

In international law a dispute is defined as “a disagreement on a point of law or fact” (Brownlie, 1995). Mechanisms for the peaceful settlement of disputes were always available at the international level; however, States had no legal obligation to resort to such mechanisms. Only with the adoption of the Charter of the United Nations (UN Charter), States became obliged to solve their disputes peacefully (Bosco, 1991). The principle of peaceful settlement of disputes is enshrined in Chapter VI of the UN Charter, which offers various mechanisms for resolving disputes peacefully. Article 33 of the UN Charter states:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

While States are under the obligation to settle their disputes peacefully, the UN Charter leaves them the freedom to choose the means for settling their disputes. Article 33 recognizes the role of regional organizations in promoting peaceful settlement of disputes. This role is further emphasized in Article 52 of the UN Charter, which states:

- a). Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
- b). The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
- c). The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

The role of regional organizations in promoting peaceful settlement of disputes was reemphasized in subsequent UN Declaration addressing international peace and security and the peaceful settlement of disputes. This includes the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and the Manila Declaration on the Peaceful Settlement of International Disputes (The Manila Declaration). The Manila Declaration gives priority to regional organization over the UN in settling regional disputes by stating in its Article 6 that “States parties to regional arrangements or agencies shall make every effort to achieve pacific settlement of their local disputes through such regional arrangements or agencies before referring them to the Security Council”.

The mechanisms set forth in UN Charter mirror the definition of disputes in international law as encompassing both factual and legal questions. Some mechanisms, such as negotiations and inquiry are more suitable for settling disputes on points of facts. These mechanisms are political, flexible and non-binding. Mechanisms such as arbitration and adjudication are more suitable for settling disputes on points of law. These mechanisms are legally binding and less flexible.

The methods enumerated in the UN Charter could be summarized as follows:

### **2.1. Negotiation.**

Negotiations involve direct inter-State communications. According to Brownlie, negotiations are most suitable for “social engineering” that is needed for solving major problems, such as conservation of natural resources and protecting the environment (Brownlie, 1995, p. 6). Negotiations can coexist with other mechanisms for conflict resolution, such as adjudication. According to the International Court of Justice (ICJ), international law does not require States to exhaust negotiations processes before resorting to other means for resolving their dispute<sup>1</sup>.

### **2.2. Mediation.**

Mediation is a process of negotiation in which both parties of a dispute agree on inviting a mediator to intervene and to help them find a solution that they cannot find by themselves (Zartman & Touval, 1996). The 1907 Hague Convention for the Pacific Settlement of International Disputes (The 1907 Hague Convention) defines the role of the mediator as “reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance” (Article 4). Today the role of the mediator is more complex. According to Crocker et. al, the job description of a mediator includes being “a catalyst for transformations, shepherd for holding the mediation mechanism itself together, and punching bag when efforts appear to go awry, as well as educator, inventor, stage director, mendicant, and visionary” (Crocker et. al, 2003, p. 161). Mediation is usually resorted to on an *ad hoc* basis; however, it may be based on the provisions of a treaty applicable between the contending parties (Handbook on Peaceful Settlement of Disputes between States, 1992).

Mediation can play an important preventative role by encouraging the contending parties to adopt a peaceful approach to their dispute (Handbook on Peaceful Settlement of Disputes between States, 1992). This preventative function is emphasized in Article 8 of the 1907 Hague Convention, according to which mediators should aim at preventing the rupture of pacific relations between contending States.

<sup>1</sup> See, for example, *Nicaragua v. United States* ICJ Reports (1984, pp. 382, 440). Case Concerning Land and Maritime Boundary between Cameroon and Nigeria ICJ Reports (1998, p. 275, par. 56).

At the international level, mediation could take the form of “Good offices”. This happens when the third party is authorized to take an active part in the dispute settlement process, and not merely encouraging contending parties to resume negotiations (Handbook on Peaceful Settlement of Disputes between States, 1992). The exercise of good offices is best illustrated by the UN Secretary General, who uses his prestige and the weight of the world community he represents in mediating between parties to a conflict (Cançado Trindade, 2004). States also can exercise good offices.

### 2.3. Inquiry.

Inquiry is an impartial third-party procedure for fact-finding; it is particularly useful in settling disputes over factual claims. The role of an inquiry, as stipulated in Article 9 the 1907 Hague Convention, is to investigate and elucidate the disputed facts. The work of a fact-finding inquiry usually encompasses hearing of the parties, examining witnesses or conducting visits on the spot (Handbook on Peaceful Settlement of Disputes between States, 1992).

### 2.4. Conciliation.

Conciliation is a mechanism that combines both mediation and inquiry. This dual function is reflected in the 1949 Revised Geneva General Act for the Pacific Settlement of International Disputes, according to which, the task of a conciliation committee is to

[E]lucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision (Art. 15.1).

### 2.5. Arbitration.

Arbitration is a mechanism that is used for settling legal disputes, especially regarding the interpretation or application of International Conventions<sup>2</sup>. The 1899 Hague Conventions for the Pacific Settlement of International Disputes (The 1899 Hague Convention) and 1907 Hague Convention describe the object of international arbitration as “the settlement of differences between States by judges of their own choice, and on the basis of respect for law”<sup>3</sup>. Unlike political processes for the peaceful settlement of disputes, arbitration tribunals can render binding decisions, which are final and without appeal. Arbitration usually takes place on an *ad-hoc* basis, by mutual consent of the contending parties. This enables the parties to retain a considerable control over the process through the power to appoint arbitrators of their own choice. The contending States have to negotiate a special agreement to set up the Court of Arbitration. The agreement typically addresses the composition of the arbitration Court and its procedures. They also must appoint a registrar and so forth. In other words, the *ad-hoc* arbitration court is custom built to deal with a specific conflict and is discarded after its use (Brownlie, 1995).

Arbitration can also be constituted based on existing treaties that render arbitration compulsory. For example, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), sets forth in Part XV various rules for the peaceful resolution of disputes between State Parties, arising out of the interpretation or application of the treaty. Pursuant to Article

<sup>2</sup> See for example Article 16 of the 1889 Hague Convention for the Pacific Settlement of International Disputes, and Article 38 of the 1907 Hague Convention.

<sup>3</sup> See Article 15 of the 1899 Hague Convention, and Article 37 of the 1907 Hague Convention.

287(1) of UNCLOS, when signing, ratifying, or acceding to UNCLOS, a State may make a declaration choosing one or more of the methods for settling such disputes, including, *ad-hoc* arbitration in accordance with Annex VII of UNCLOS; or a “special arbitral tribunal” constituted for certain categories of disputes, established under Annex VIII of UNCLOS.

Although arbitration is more expensive than adjudication, Brownlie claims that it is attractive to States because it is conducted in private settings (Brownlie, 1995). However, the enforcement of arbitration awards could be more challenging than enforcing decisions of the ICJ. If a State party refuses to accept the arbitration award, forcing compliance is problematic in the absence of a nexus to an international organization that can interfere. Nevertheless, contending parties do not often renege on awards since the whole process was initiated and controlled by them (Brownlie).

## 2.6. Adjudication.

State parties to a legal dispute may seek a judicial settlement of their dispute by submitting it to a pre-constituted international court composed of independent judges tasked with adjudicating disputes based on international law. The decision of the court is binding upon the parties (Brownlie, 1995). International Courts have the advantage of being user-friendly. They have a standing Registry that can guide States that have never appeared in front of the Court before.

International courts are also more attractive compared to arbitration tribunals in terms of enforcing their decisions. In the case of the ICJ, which is one of the five principal organs of the UN, its decisions are binding on the parties to the case, and the judgment is final and without appeal. Article 94 of the UN Charter states that if a state fails to comply with the decision of the ICJ, the could “make recommendations or decide upon measures to be taken to give effect to the judgment”. However, the event of a dispute regarding the meaning or scope of the judgment, the Court can construe it upon the request of either parties (Articles 59 & 60 of the Statute of the International Court of Justice).

## 3. Regional mechanisms for peaceful settlement of disputes in the Americas

The OAS is the oldest regional organization in the world. Its history dates back to the first of International Conference of the American States, held in 1889. The first conference created the International Union of American Republics, constituting one the earliest efforts to design a regional organization (Karns *et. al.*, 2010). The OAS was created in the ninth conference of 1948. One of the main purposes of the OAS is “to ensure the pacific settlement of disputes that may arise among the Member States” (OAS Charter, Article 2).

The role of the OAS in promoting the peaceful settlement of disputes is twofold. First, the OAS was among the first regional organizations to incorporate Chapters VI and VIII of the UN Charter into regional instruments (Herz, 2008). The OAS also helped in shaping normative and structural frameworks for the regional settlement of disputes. Second, the OAS itself was an active player in settling regional disputes by resort to operational preventative measures in the face of immediate crisis. This includes the involvement of the OAS in negotiations and fact finding, and resort to coercion and inducement, which may entail the use of sanctions or the deployment of observers (Jeifets & Khadorich, 2015).

Article 24 of the OAS Charter stipulates that international disputes between American States must be submitted to the peaceful procedures set forth in the Charter. Those include “direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time”. Article 27 of the OAS Charter calls for the adoption of a special treaty for the

pacific settlement of disputes, to help American States settle their disputes within a reasonable time.

The OAS Charter creates an Organ of Consultations consisting of the Meetings of Foreign Ministers. The role of this organ is to consider problems of an urgent nature and of common interest to the American States (Article 61). The Organ of Consultation is the supreme decision body for dealing with urgent matters (Herz, 2008). Another organ of the OAS that is charged with keeping vigilance over the maintenance of friendly relations among the Member States is the Permanent Council of the Organization. According to Article 84 of the Charter, among the tasks of the Permanent Council is helping States in reaching a peaceful settlement of their disputes. If a dispute erupts between two States, any of them can seek assistance from the Permanent Council and obtain its good offices. The role of Permanent Council is to recommend the procedures it considers suitable for the peaceful settlement of the dispute (Article 85). In exercising its functions, and with the consent of the parties to the dispute, the Permanent Council may establish *ad-hoc* committees (Article 86), and it can also conduct an inquiry into the facts of the dispute, and conduct onsite visits in the territory of one of the parties (Article 87). In performing its functions, the Permanent Council and any established *ad-hoc* committee must observe principles of international law and any existing treaties in force between the contending parties (Article 90). If the mechanism recommended by the Permanent Council or by the *ad-hoc* committee is rejected by one of the parties, or if one of the parties declares that the procedure has not settled the dispute, the Permanent Council must report to the General Assembly (Article 88). Decisions of the Permanent Council require an affirmative vote of two thirds of its Members, excluding the parties to the dispute (Article 89).

In 1947, American States adopted the Inter-American Treaty for Reciprocal Assistance known as the Rio Treaty, which played a role in the pacific settlement of disputes. According to Article 2 of the Rio Treaty, States must resort to methods of peaceful settlement for settling their disputes; they also must endeavor to settle their disputes through resort to procedures provided by the Inter-American System before seeking the assistance of the United Nations. The Rio Treaty establishes a consultative mechanism that consists of the Meetings of Ministers of Foreign Affairs of the American Republics which have ratified the Treaty (Article 11). This is the same consultation organ created by the OAS to deal with regional problems of an urgent nature. Article 6 of the Rio Treaty states that in cases of aggression not amounting to an armed attack, which violate the territorial integrity or the sovereignty or political independence of any American State, the Organ of Consultation must meet immediately to discuss measures to be taken to assist the victim State. Those measures could include one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force (Article 8).

The Rio Treaty was invoked numerous times in the 1950s and 1960s. September 11, 2001 marked the last time the treaty was invoked (Jeifets & Khadorich, 2015). However, the Malvinas/Falkland war of 1982 signified the death of the treaty due to the US support of the United Kingdom (Sennes *et. al.*, 2006). The role of the Rio Treaty is unclear today, especially with the withdrawal of Mexico (in 2002), Nicaragua (in 2012), Bolivia (in 2012), Venezuela (in 2013), and Ecuador (in 2014) (Jeifets & Khadorich, 2015). The emergence of sub-regional security initiatives such as the creation of a regional security council by the Union of South American Nations (UNASUR) also makes the treaty less relevant.

The OAS Charter and the Rio Treaty have worked in conjunction. When a security threat is detected, both treaties could be invoked. However, selecting the appropriate framework

depends usually on the desired political outcomes, taking into account that the Rio Treaty contains stricter set of sanctions (Herz, 2008).

In April 1948, the American Treaty on Pacific Settlement, known as the Pact of Bogota, was signed. The Pact reaffirmed the commitment of American States to the principle of peaceful settlement of disputes. While the pact introduces the same mechanisms adopted in the UN Charter and the Charter of the OAS, it sets forth the certain conditions for choosing mechanisms to settle a given dispute.

Finally, to enhance its operational capacities in the field of peaceful settlement of disputes, in 2000 the OAS established *The Fund for Peace: Peaceful Settlement of Territorial Disputes* (OAS, Resolution 1756 (XXX-O / 00)). The establishment of the fund was a response to the prevalence of territorial disputes in the Western Hemisphere. The fund provides member States with financial resources upon their request to help them bear the costs of the proceedings for the peaceful settlement of territorial disputes (Talamas, 2011). The fund endeavors to enhance the General Secretariat's knowledge and experience in the field of territorial disputes settlement (Talamas, 2011). State Parties can also make use of the technical expertise of the OAS in territorial dispute resolution, including: expertise in diplomacy; international law; geographic, cartographic and geospatial expertise, through the membership of the Pan-American Institute of History and Geography; and other range of technical experts with whom the OAS General Secretariat maintains relationships (OAS, "The OAS Peace Fund").

Indeed, the OAS was successful in reducing regional tensions and preventing conflicts from escalating. Among the successful interventions of the OAS are: The 1957 intervention in the territorial dispute between Honduras and Nicaragua regarding the Mosquito Coast (Massachusetts Institute of Technology); intervening in the invasion of Panama by a small Cuban force in 1959 (Hertz); intervening in the coup, counter-coup and US intervention in the Dominican Republic in 1965 (Hertz); the intervention in the "Soccer war" between El Salvador and Honduras in 1969 (Hertz); the 1990 intervention in the maritime boundary dispute between Honduras and Nicaragua (OAS. Honduras and Nicaragua); the involvement in demarcating the border between Honduras and El Salvador, following a 1992 ICJ decision on the matter (OAS. El Salvador and Honduras); the involvement of the OAS, starting from 2000, in resolving the territorial conflict between Belize and Guatemala (OAS. Belize and Guatemala); and the 2010 involvement of the OAS in the settlement of the territorial dispute between Costa Rica and Nicaragua over Calero Island in San Juan River (OAS. Costa Rica and Nicaragua).

#### **4. A critical appraisal of the legal framework established by the OAS**

##### **4.1. Acritical appraisal of the Pact of Bogota:**

With the adoption of the Pact of Bogota, it was hoped that the pact would coordinate into one instrument the multiple regional treaties on the pacific settlement of disputes (Fenwick, 1954). However, this goal was not achieved. According to Cañado Trindade, the abundance of regional instruments for the peaceful settlement deutes raises certain practical difficulties (Cañado Trindade, 2000). He points out that resort to arbitration was common in the practice of Latin American States even before the adoption of the Pact of Bogota. In addition, mechanisms for regional multilateral consultation for resolving disputes that threaten peace and security were adopted as early as 1936 in Inter-American Conference of Buenos Aires. The latter conference resulted in the adoption of the Convention on the Maintenance, Preservation and Reestablishment of Peace. Two years later, the Declaration of Lima was adopted. The Declaration calls upon American States to show common concern and solidarity

by means of the procedure of consultation, established by the inter-American frameworks, if the peace, security or territorial integrity of any American republic is threatened (Provision 3). The adoption of the Pact of Bogota contributed at the conceptual level; however, it did not solve all the practical issues arising from the existence of multiple regional instruments for conflict prevention (Cançado Trindade, 2000). Article LVIII of the Pact of Bogota nullified the legal effect of the following treaties for states who ratify the pact: Treaty to Avoid or Prevent Conflicts between the American States (May 3, 1923); General Convention of Inter-American Conciliation (January 5, 1929); General Treaty of Inter-American Arbitration and Additional Protocol of Progressive Arbitration (January 5, 1929); Additional Protocol to the General Convention of Inter-American Conciliation (December 26, 1933); Anti-War Treaty of Non-Aggression and Conciliation (October 10, 1933); Convention to Coordinate, Extend and Assure the Fulfillment of the Existing Treaties between the American States (December 23, 1936); Inter-American Treaty on Good Offices and Mediation (December 23, 1936); Treaty on the Prevention of Controversies (December 23, 1936). As a result, some States were bound by the Pact of Bogota and older treaties which were not directly nullified by it. States that did not ratify the Pact remain bound by older treaties to which they are parties. Some States were not bound by any treaty. This created a confusing regional framework for the settlement of disputes (Cançado Trindade, 2000).

On the normative level, the Pact of Bogota introduced some pragmatic innovations such as setting a time framework for the operation of certain methods for the settlement of disputes. For example, if the contending States have agreed on mediation, but the process did not yield a solution within five months, the parties have a duty to seek other methods for the peaceful settlement of their dispute (Article XIII). In addition, the Pact of Bogota creates an institutional role of the OAS in facilitating the peaceful settlement of disputes. For example, Article XVI states:

The party initiating the procedure of investigation and conciliation shall request the Council of the Organization of American States to convoke the Commission of Investigation and Conciliation [...]. Once the request to convoke the Commission has been received, the controversy between the parties shall immediately be suspended, and the parties shall refrain from any act that might make conciliation more difficult. To that end, at the request of one of the parties, the Council of the Organization of American States may, pending the convocation of the Commission, make appropriate recommendations to the parties.

In some respects, the Pact of Bogota is more rigid than the Charter of the OAS. For example, Article II of the Pact of Bogota requires the consent of all contending parties regarding the failure of direct negotiations in rendering a solution for their disputes before resort to other mechanism becomes obligatory. In comparison, Article 26 of the OAS Charter requires the opinion of one of the contending parties only before the duty to seek other mechanism for the settlement of the dispute arises.

The Pact of Bogota is considered impractical for two reasons: First, it establishes a complex relationship between the different mechanisms for the peaceful settlement of disputes. For example, Article IV states that once any pacific procedure has been initiated, no other procedure may be commenced until that procedure is concluded. This blocks the possibility of adjudication or arbitration, if political processes for the settlement of a dispute are still in place. And second, the attempt of signatory States to limit the scope of its application by entering multiple reservations, which only makes it less practical. For example, Article V states that the Pact of Bogota does not apply to matters “which, by their nature, are within the domestic

jurisdiction of the state. If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties". This provision was met with reservation by Argentina and Peru, claiming that domestic jurisdiction should be defined by the state itself (Fenwick, 1954).

According to Article VI, the Pact of Bogota does not apply to matters already settled by previous arrangements between the parties, or by arbitral award or by decision of an international court. The Pact does not apply also to matters that are governed by agreements or treaties in force on the date of the conclusion of the Pact. According to Infante, this Article was introduced following an initiative by Peru. The aim of the provision was to prevent the re-opening of settled disputes. At the same time, the formulation of the Article, especially the phrase "those that are governed by agreements or treaties in force", indicate that difficulties arising within the context of processes, that were already initiated or concluded, should be addressed by the same frameworks that established them (Infante, 2016). When the Inter-American System was re-evaluated in the 1970s it was acknowledged that Article VI reflects the principles of *pacta sunt servanda* and *res judicata*. However, Ecuador sought to qualify the rule with exemptions referring to the validity or *de facto* unenforceability of a treaty; the interpretation or revision of an award; or the interpretation of a decision. The suggested amendments were rejected (Infante, 2016).

The most complicated provisions of the Pact remain those concerning arbitration and adjudication. According to Article XXXI, member States recognize, in relation to any other American State, the jurisdiction of the ICJ as compulsory *ipso facto*, without the necessity of any special agreement so long as the present pact is in force, in all disputes of a juridical nature. Those include: The interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute the breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation. This Article is a contractual expression of Article 36(2) of the Statute of the International Criminal Court, according to which the "states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation". The ICJ ruled that Article XXXI of the Pact of Bogota embodies an autonomous commitment of States parties; this commitment is independent of any other commitments which the States undertook by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute. The commitment embodied in Article XXXI can be limited only by reservations to the Pact itself. Furthermore, the ICJ rejected the position that Article XXXI must be supplemented by a declaration, the absence of which bars the Court from exercising its jurisdiction (The Transborder Armed Action Case, 1986).

While Latin American States contributed greatly to the adoption of Chapter XIV of the UN Charter establishing the ICJ, none of the treaties annulled by the Pact of Bogota contained a similar provision on the mandatory adjudication in front of a world court (Infante, 2016). It is not surprising then that Article XXXI was met with unease. For example, Argentina entered a reservation limiting the application of the provision only to controversies "arising in the future and not originating in or having any relation to causes, situations or facts existing before the signing of this instrument" (The Pact of Bogota: Signatories and Ratifications). The United States also entered a reservation according to which, its acceptance of the jurisdiction of the ICJ as compulsory *ipso facto* and without special agreement, is limited by any jurisdictional or other limitations contained in any Declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court (The Pact of Bogota: Signatories and Ratifications).

The relationship between Article XXXI and other mechanisms covered by the pact of Bogota had raised several jurisdictional questions. In case of *The Transborder Armed Action*, the ICJ had to address the relationship between its own competence and Articles II and IV of the Pact of Bogota. Article II states:

[I]n the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty". Article IV states "Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded.

In this case, Honduras claimed that a special procedure known as the *Contadora* process<sup>4</sup> was in place, therefore, Nicaragua was barred from submitting the dispute to the ICJ before the conclusion of the process. The ICJ ruled that the *Contadora* process could not be regarded as direct negotiations through the usual diplomatic channels, within the meaning of Article II of the Pact of Bogota. As for Article IV, the ICJ ruled that:

No formal act is necessary before a pacific procedure can be said to be "concluded". The procedure in question does not have to have failed definitively before a new procedure can be commenced. It is sufficient if [...] the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed (para. 80).

The relationship between the compulsory jurisdiction of the ICJ and conciliation had also raised jurisdictional issues. Article XXXII of the Pact States:

When the conciliation procedure previously established [...] does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute.

The ICJ had to address the question whether its own jurisdiction was subordinate to the failure of the conciliation procedure. Eventually the ICJ ruled that Articles XXXI and XXXII provide two distinct ways by which the Court can exercise jurisdiction. The first relates to cases in which the Court can be approached directly; the second relates to cases in which the parties initially resort to conciliation (*The Transborder Armed Action Case*, 1986).

Likewise, the provisions on arbitration were met with unease by some States. According to Article XXXV of the Pact, if the ICJ declares itself to be without jurisdiction to adjudge a controversy between two members States for reasons other than those contained in Articles V, VI and VII of the Pact<sup>5</sup>, the parties to the dispute must submit their controversy to arbitration. As a matter of fact, the United States entered a reservation according to which the submission of a controversy to arbitration must be dependent upon the conclusion of

<sup>4</sup>The group of Contadora was established in the early 1980s by the foreign ministers of Colombia, Mexico, Panama and Venezuela to deal with the Central American crisis mainly concerning the military conflicts in El Salvador, Nicaragua and Guatemala, which were threatening to destabilize the entire Central American region.

<sup>5</sup> Those articles refer to respectively to matters within the domestic jurisdiction of the State; matters already settled between the parties; or matters concerning diplomatic representations by the State in order to protect its nationals, supra-note 90.

a special agreement between the parties to the case while Argentina entered a reservation limiting the application of the Articles on arbitration only to future cases. Other States did similar actions, for instance, Nicaragua entered a reservation according to which the pact and its provisions may not prejudice any position assumed by the Government of Nicaragua against the validity of arbitral decisions based on principles of international law, which permit arbitral awards to be annulled or invalidated (The Pact of Bogota: Signatories and Ratifications).

One other weakness of the Bogota Pact is the low number of ratification. Although it was signed by 21 States, only 16 States had in fact ratified it (Jeifets & Khadorich, 2015). In sum, there are different factors that make the Pact of Bogota impractical. First, the low number of ratification makes the pact less effective. Second, the existence of multiple regional treaties for the pacific settlement of disputes make the entire regime for the peaceful settlement of dispute complicated. Third, the complex relationship between the various mechanisms set forth in the pact make it less attractive. Finally, the various reservations on the pact also erode its effectiveness. In a study conducted by the General Secretariat of the OAS in 1985, it was emphasized that the Pact of Bogota did not have the impact that was hoped for when it was drafted. This could be attributed to the multiple reservations entered by member States, especially those relating to the compulsory arbitration mechanism and recourse to the ICJ. Furthermore, the study emphasized that some of the reservations are extreme to the point that they nullify the most important provisions of the pact (OEA/Ser.G cp/doc.1560/85, Part II). There were various attempts to amend or to draft a new instrument to replace the Pact of Bogota, however, these attempts were unsuccessful<sup>6</sup>.

#### 4.2. The unavailability of a regional court for the pacific settlement of disputes

In addition to the complexities of the Pact of Bogota, the absence of an inter-American court of justice could also weaken the inter-American regime for the pacific settlement of disputes. There remain two voices within the Western Hemisphere in relation to establishing a regional court, as evidenced in the 70<sup>th</sup> and 71<sup>st</sup> regular sessions on the Inter-American Juridical Committee in 2007. Some scholars emphasized that judges sitting in The Hague are not well versed in certain principles accepted in Latin America, therefore, creating a regional court of justice is needed. Others believed that establishing a regional court with a jurisdiction no broader than the jurisdiction of the ICJ is not needed. Others believed that a world court is preferable because it could examine matters with greater distance and impartiality<sup>7</sup>.

However, it seems that Latin American States are willing to utilize other regional judicial or *quasi*-judicial frameworks provided by the OAS for the pacific settlement of disputes. For example, when inter-states controversies involve the violation of inter-American human rights instruments, inter-American human rights institutions can play a role in the pacific the settlement of such disputes. Article 45 of the American Convention on Human Rights allows inter-state communications in relation to human rights violations by a member State. In one occasion, Ecuador logged a complaint against Colombia in the Inter-Commission on Human Rights (Inter-American Commission) for the 2008 bombardment of a camp belonging to the “Revolutionary Armed Forces of Colombia” in Lago Agrio in Ecuador, as part of a military action called “Operation Phoenix” (IAComHR, 2013). Ecuador claimed, *inter-alia*, that Colombia had violated the right to life, the right to a fair trial and the right to judicial protection, guaranteed

<sup>6</sup> For a survey of those attempts see Permanent Council of the Organization of American States. Committee on Hemispheric Security. Peaceful Settlement of Disputes in the Organization of American States, OEA/Ser.G CP/CSH-278/00, 13 March, 2000.

<sup>7</sup> See for example, CJI / RES.121 (LXX-O / 07), CJI / RES.134 (LXXI-O / 07), CJI / doc.283 / 07, CJI / doc.272 / 07.

by the American Convention on Human Rights, in relation to an Ecuadorian citizen, who was killed during the operation. In 2013, both parties reached a friendly settlement of their disputes under the auspices of the Inter-American Commission (IACoMHR, 2013). While the Inter-American Commission has jurisdiction over all member States of the OAS, the Inter-American Court of Human Rights can exercise jurisdiction over States that specifically accepted its jurisdiction (Pasqualucci, 2010). However, both institutions remain of a limited relevance in settling inter-State disputes because their competence is limited to disputes associated with the violation of individual human rights guaranteed by inter-American human rights instruments. It is worth noticing that some regional initiatives contemplated the establishment of a regional court to settle inter-state disputes. For example, the Andean Community established The Court of Justice of the Andean Community known as TCJA. The TCJA adjudicates disputes between member States that arise under Community law (International Justice Resource Center). While the TCJA cannot fill the void of a Pan-American court of justice due to its limited subject-matter jurisdiction and membership, its existence indicates that a regional court of justice could appeal to members States of the OAS.

### 4.3. Emergence of sub-regional initiatives in the Americas

Giving the above-mentioned complexities, many Latin American states looked for *ad-hoc* solutions outside the institutional mechanisms of the OAS. This was evidenced in the establishment of the group of *Contadora* in the early 1980s by the foreign ministers of Colombia, Mexico, Panama and Venezuela to deal with the Central American crisis concerning the military conflicts in El Salvador, and Nicaragua and Guatemala (Cañado Trindade, 2000). More recently, the emergence of new regional and sub-regional institutions, such as the Bolivarian Alliance for the Peoples of Our America (ALBA), the Union of South American Nations (UNASUR) and the Community of Latin American and Caribbean States (CELAC), casts some doubts on the relevance of the OAS today. In fact, UNASUR played the leading role in mediating institutional crises in Bolivia in 2008, in Honduras in 2009, in Ecuador in 2010 in Venezuela in 2014 (Riggirozzi et. al., 2015).

If the OAS wishes to reassert its position as the hub forum for Western Hemisphere, it must use its own history as leverage for revitalizing its own role. The OAS must build upon the most acclaimed aspects of its legacy. Typically, this include the Inter-American human rights system, which conferred prestige on the organization (Dulitzky, 2012). But no less important is role of the OAS in settling inter-State disputes successfully. The OAS was more successful than other regional organizations and even the UN in dealing with the outbreak conflicts (Jeifets & Khadorich, 2015). Therefore, the permanence of the OAS requires enhancing what it does best. The OAS must revitalize its normative and structural framework for the pacific settlement of disputes. Sanchez and Morisson claim that the OAS needs to “increase its problem-solving capacity if it is going to maintain its status among so many economic and political regional bodies” (Sanchez & Morrison, 2014). For at least two reasons, this task is challenging. First, the declining US interest in the organization, and its disinclination to subject itself to *supra*-national jurisdictions constitute a serious obstacle. Second, some states might be interested in enhancing sub-regional initiatives free from US influence, to enhance their own leading role in the region. But no matter how challenging this task might seem, it is one that is worth embarking on for the OAS to remain relevant.

## 5. Conclusions

The OAS has played a leading role in the creation of political and normative frameworks for

promoting the peaceful settlement of disputes in the Western Hemisphere. Through resort to operational preventative measures, and by providing a deliberative platform to discuss inter-State tensions, the OAS itself has become an active player in facilitating the pacific settlement of disputes. Domínguez et. al. claim that regional institutions and procedures in the Americas fostered and consolidated interstate peace, and provided effective international mediation when interstate war broke out. Moreover, the sense of a shared identity, fostered by the OAS, had a positive impact on interstate peace. However, Domínguez et. al. claim that certain procedures, the formal “freeze” of disputes for many years, and some international arbitral practices, “helped old disputes linger” (p. 27).

This paradoxical reality is the product of the gap that exist within the OAS: On the one hand, the OAS had succeeded in creating strong political frameworks for the settlements of disputes. On the other hand, it fell short of creating strong adversarial or adjudicative mechanisms, which would accelerate the elimination of lingering disputes. Revitalizing the Pact of Bogota and enhancing legal mechanisms for the pacific settlement of disputes is necessary not only for enhancing regional peace and stability, but also for OAS to remain *the* prominent regional organization in the Western Hemisphere. While new regional initiatives lack the potential, experience, and capacities of the OAS in maintaining regional peace and security, they have managed to erode its power and relevance. This could have negative implications for regional peace and security, and it must be counter-balanced by revitalizing the OAS capacities and frameworks in the area of peace and security, and the pacific settlement of disputes.

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