THE INTERPLAY OF LAW AND POLITICS IN THE SELECTION OF ALTERNATIVE DISPUTE RESOLUTION IN THE AMERICAS: ASSESSING THE ROLE OF THE PACT OF BOGOTÁ

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Abstract

Traditional international legal scholarship often distinguishes between diplomatic and legal methods of dispute resolution. However, this article posits that this division is often artificial, as international disputes are inherently shaped by intertwined legal and political dimensions, influencing strategic choices of states in dispute resolution. Framed by the concept of *politique juridique extérieur*, the study explores how states navigate various factors to align their dispute resolution strategies with their broader foreign policy objectives.

Focusing on the Americas, this research examines the utilization of alternative dispute resolution (ADR) mechanisms within the context of the American Treaty on Pacific Settlement (Pact of Bogotá). The article addresses two primary research questions: (i) whether political factors influence the decision to resort to ADR, and (ii) the role of legal instruments establishing ADR in

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the Americas, specifically whether their existence determines or influences the choice of a given ADR mechanism.

The article is structured in two main parts. Part I analyzes the interplay of law and politics in the selection of dispute resolution mechanisms, examining the conventional distinctions between diplomatic and adjudicatory means, the embeddedness of legal disputes in political contexts, and the complex factors guiding choices of the states. Part II focuses on the selection of ADR mechanisms in the Americas, specifically analyzing the dispute resolution provisions of the Pact of Bogotá and the observed infrequent direct use of its ADR procedures.

The main argument presented is that the choice of dispute resolution strategy in the Americas, including ADR, is significantly context-dependent and driven by political considerations and foreign legal policy objectives, rather than solely by the availability of legal instruments. While the Americas boast a history of including ADR in treaties, the practical application, particularly of the Pact of Bogotá, reveals a preference for political mechanisms within the Organization of American States (OAS) and, notably, the use of the Pact to establish jurisdiction before the International Court of Justice (ICJ), over direct reliance on its ADR provisions.

In conclusion, the article finds that political factors do indeed influence the decision to utilize ADR. While legal instruments establishing ADR exist in the Americas, their mere presence does not guarantee their active use. Instead, the more readily accessible and politically established frameworks of the OAS often provide the primary avenues for peaceful dispute settlement, with the Pact of Bogotá being more frequently employed for accessing the ICJ. Furthermore, the research acknowledges that the often-primary role of political mechanisms over treaty-based ADR methods may stem from the inflexible structure of the Pact's provisions, which can limit the scope for states to employ ADR means.

Keywords: International Dispute Settlement. Alternative Dispute Resolution (ADR). Americas. Pact of Bogotá.

O IMBRICAMENTO ENTRE DIREITO E POLÍTICA NA SELEÇÃO DE MECANISMOS ALTERNATIVOS DE RESOLUÇÃO DE DISPUTAS NAS AMÉRICAS: AVALIANDO O PAPEL DO PACTO DE BOGOTÁ

Resumo

A doutrina frequentemente distingue entre meios político-diplomáticos e jurídicos de resolução de disputas internacionais. No entanto, este artigo postula que essa divisão é muitas vezes artificial, uma vez que as disputas internacionais são inerentemente moldadas por dimensões jurídicas e políticas, que influenciam a estratégia de escolha dos Estados na resolução de disputas. À luz do conceito de politique juridique extérieure, o estudo explora como os Estados consideram diferentes fatores ao harmonizar a resolução de disputas com seus objetivos mais amplos de política externa. Com foco nas Américas, este artigo examina a utilização de mecanismos alternativos de resolução de disputas (ADR) no contexto do Tratado Americano de Soluções Pacíficas ("Pacto de Bogotá"). O artigo endereça duas perguntas de pesquisa: (i) se fatores políticos influenciam a decisão de recorrer aos mecanismos ADR e (ii) o papel dos instrumentos legais que preveem ADR nas Américas, especificamente se sua existência determina ou influencia a escolha do método específico de ADR. O artigo está estruturado em duas partes. A Parte I analisa a interação entre direito e política na resolução de disputas internacionais, examinando as distinções entre meios diplomáticos e adjudicatórios, a inter-relação entre disputas jurídicas e políticas e os diferentes fatores que podem influenciar as escolhas dos Estados. A Parte II concentra-se na seleção de mecanismos de ADR nas Américas, analisando especificamente as disposições de resolução de disputas do Pacto de Bogotá e o uso infrequente de seus mecanismos de ADR. O principal argumento apresentado é que a seleção de métodos de resolução de disputas nas Américas, com destaque para os mecanismos de ADR, é fortemente condicionada pelo contexto, sendo moldada por considerações

políticas e por objetivos de política externa, e não meramente pela sua previsão em instrumentos legais. Embora as Américas ostentem uma trajetória de inclusão de ADR em tratados, a aplicação prática, particularmente do Pacto de Bogotá, revela uma preferência por mecanismos políticos no âmbito da Organização dos Estados Americanos (OEA) e, sobretudo, o uso do Pacto para facultar a jurisdição perante a Corte Internacional de Justiça (CIJ), em detrimento da referência expressa às suas disposições de ADR. Em conclusão, o artigo constata que fatores políticos, de fato, influenciam a decisão de utilizar métodos de ADR. Embora existam instrumentos legais que estabelecem métodos ADR nas Américas, sua mera previsão não garante seu uso. Em vez disso, as estruturas politicamente consolidadas da OEA parecem fornecer as principais vias para a solução pacífica de controvérsias no hemisfério, sendo o Pacto de Bogotá mais frequentemente empregado para acessar a CIJ. Além disso, a pesquisa reconhece que o papel, por vezes prioritário, dos mecanismos políticos sobre os métodos ADR fundamentados em tratados pode decorrer da estrutura inflexível de suas disposições, que podem limitar a margem de atuação dos Estados para empregar meios ADR.

Palavras-chave: Resolução de Disputas Internacionais. Métodos Alternativos de Resolução de Disputa (ADR). Américas. Pacto de Bogotá.

LA INTERRELACIÓN ENTRE EL DERECHO Y LA POLÍTICA EN LA SELECCIÓN DE MECANISMOS ALTERNATIVOS DE RESOLUCIÓN DE CONTROVERSIAS EN LAS AMÉRICAS: EVALUACIÓN DEL PAPEL DEL PACTO DE BOGOTÁ

Resumen

La doctrina suele distinguir entre los medios político-diplomáticos y jurídicos para la resolución de controversias internacionales. Sin embargo, este artículo postula que esta división es a menudo artificial, ya que las controversias internacionales están intrínsecamente moldeadas por dimensiones jurídicas y políticas, que influyen en la estrategia que eligen los Estados para resolverlas. A la luz del concepto de politique juridique extérieure, el estudio explora cómo los Estados tienen en cuenta diferentes factores a la hora de armonizar la resolución de controversias con sus objetivos más amplios de política exterior. Centrándose en las Américas, este artículo examina el uso de mecanismos alternativos de resolución de controversias (ADR) en el contexto del Tratado Americano de Soluciones Pacíficas («Pacto de Bogotá»). El artículo aborda dos preguntas de investigación: (i) si los factores políticos influyen en la decisión de recurrir a los mecanismos ADR y (ii) el papel de los instrumentos jurídicos que prevén el ADR en las Américas, concretamente si su existencia determina o influye en la elección del método específico de ADR. El artículo se estructura en dos partes. La Parte I analiza la interacción entre el derecho y la política en la resolución de controversias internacionales, examinando las distinciones entre los medios diplomáticos y adjudicatorios, la interrelación entre las controversias jurídicas y políticas y los diferentes factores que pueden influir en las elecciones de los Estados. La Parte II se centra en la selección de mecanismos de ADR en las Américas, analizando específicamente las disposiciones de solución de controversias del Pacto de Bogotá y el uso poco frecuente de sus mecanismos de ADR. El argumento principal que se presenta es que la selección de métodos de resolución de controversias en las Américas,

con especial atención a los mecanismos de ADR, está fuertemente condicionada por el contexto y moldeada por consideraciones políticas y objetivos de política exterior, y no meramente por su previsión en instrumentos jurídicos. Aunque las Américas cuentan con una trayectoria de inclusión de la ADR en los tratados, la aplicación práctica, en particular del Pacto de Bogotá, revela una preferencia por los mecanismos políticos en el ámbito de la Organización de los Estados Americanos (OEA) y, sobre todo, el uso del Pacto para facultar la jurisdicción ante la Corte Internacional de Justicia (CIJ), en detrimento de la referencia expresa a sus disposiciones de ADR. En conclusión, el artículo constata que los factores políticos influyen, de hecho, en la decisión de utilizar métodos de ADR. Aunque existen instrumentos jurídicos que establecen métodos de ADR en las Américas, su mera previsión no garantiza su uso. Por el contrario, las estructuras políticamente consolidadas de la OEA parecen proporcionar las principales vías para la solución pacífica de controversias en el hemisferio, siendo el Pacto de Bogotá el más utilizado para acceder a la CIJ. Además, la investigación reconoce que el papel, a veces prioritario, de los mecanismos políticos sobre los métodos ADR basados en tratados puede derivarse de la estructura inflexible de sus disposiciones, que pueden limitar el margen de maniobra de los Estados para emplear medios ADR.

Palabras clave: Resolución de controversias internacionales. Métodos alternativos de resolución de controversias (ADR). Américas. Pacto de Bogotá.

Introduction

Traditional international legal scholarship distinguishes between *diplomatic*—negotiation, mediation, conciliation—and *legal*—arbitration and adjudication—procedures as the two primary categories of conflict resolution techniques. However, international disputes frequently intertwine political and legal considerations as a consequence of strategy, context, or power dynamics, revealing a less clear separation between these two spheres. Accordingly, while distinguishing between these means of dispute resolution may be useful, both operate within a fundamentally political context. The often praised "judicialization" of international politics remains a fruit of foreign legal policy (*politique juridique extérieure*), to borrow the renowned Lacharrière's expression (Lacharrière, Coulée and Alabrune 2022).

The concept of foreign legal policy recognizes that national interests in legal aspects of international relations are intrinsically related and critical, even when not explicitly acknowledged (Lacharrière, Coulée And Alabrune 2022). It addresses the way in which states strategically engage with international law to advance their national interests (Mégret 2021). In this sense, foreign legal policy encompasses judicial strategies employed by states to advance national interests on the international stage, while acknowledging that such practices are not always guided by strict adherence to legal norms (Lacharrière, Coulée and Alabrune 2022). This does not imply a complete disregard for international law but rather suggests that states frequently adjust their foreign policy practices to align with evolving interests, occasionally relying on legal ambiguities during negotiations (Lacharrière, Coulée and Alabrune 2022). Therefore, States form policies on international law, guided by the objective of securing their national interests, and often engage in strategic handling of international norms to align legal outcomes with their political needs (Cazala 2013). While the international legal system is not ignored, it may be selectively mobilized, with constraints and incentives, to ensure the interest of those pursuing a certain foreign legal action (Cazala 2013). Applying foreign legal policy does not require denying the existence of international law, nor asserting its primacy; it considers the concrete dimension of international law as applied by states to justify their actions or to avoid inconvenient outcomes (Coutau-Bégarie 1989).

This approach reveals that international law often seeks a balance between the international community's ambitions and the individual states' practices and interests (Klabbers 2021). Beyond the idea that international law is only a body of rules and principles that determine the rights and obligations of

the states (Lowe 2012), there is also a prospective idea that it provides a framework and a vocabulary for international politics to occur.

The entanglement between law and politics is evident in international dispute settlements, where the selection of a dispute resolution strategy is also contingent upon an interplay of political and legal factors. This article specifically examines the dynamics influencing the use of alternative dispute resolution (ADR) mechanisms in international law, which generally include non-adjudicative methods like negotiation, mediation, inquiry, and conciliation. Despite a long history of informal application in inter-state relations, often lacking a formalized, treaty-based foundation, these mechanisms have been conventionally grouped under the umbrella of *alternative* dispute resolution especially as adjudication—initially through arbitration and later by judicial settlement—became more prominent in international law.

However, modern dispute resolution theory and practice increasingly acknowledge that no single method, including court proceedings, is universally optimal for resolving all types of disputes (Alter, Helfer and Madsen 2018). This is particularly pertinent in the context of inter-state conflicts. Rooted in the decentralized and non-hierarchical nature of international politics, these disputes often benefit from third-party involvement, less adversarial approaches, outcomes tailored to the specific context, and even the preservation of confidentiality. Consequently, a key area of inquiry emerges: what factors drive the selection of a particular ADR mechanism, or the decision to pursue litigation or arbitration, when states face disagreements?

Therefore, this article aims to: (i) assess if political factors influence the decision to recourse to ADR; and (ii.a) examine the presence of legal instruments establishing ADR mechanisms in the Americas and (ii.b) whether the choice of ADR is determined or influenced by these instruments.

This article argues that the selection of a particular dispute resolution strategy in international law is, in fact, largely context-dependent, contingent upon the broader political context and intertwined with foreign legal policy objectives and strategies **(I)**. Within the Americas, the American Treaty on Pacific Settlement (Pact of Bogotá), as a regional framework dedicated to peaceful dispute resolution, must be understood within this context **(II)**. Its provisions, while outlining specific procedures, are subject to the same strategic considerations and political calculations that shape state behaviour in international law. The Pact's effectiveness, therefore, hinges not only on its legal provisions, but also on the political will of states to utilize its mechanisms in a manner that aligns with both regional stability and their own national interests. Despite its provisions for ADR mechanisms, concrete examples of their explicit use under the Pact of Bogotá remain scarce. What could be

expected to serve as a prominent framework for ADR has, in practice, become the most widely utilized regional treaty containing a compromissory clause for litigation before the International Court of Justice (ICJ).

1. The Interplay of Law and Politics in the Choice of Dispute Resolution Mechanisms

If there is a constant attempt to distinguish between diplomatic and adjudicatory means to settle international disputes **(A)**, no doubt remains that legal disputes submitted to courts are also embedded in complex political scenarios, which makes it unclear to draw a clear-cut line between the political context and legal disputes **(B)**. The choice of ADR in the Americas is also contingent upon this context, among other factors capable of influencing State's decision in this regard **(C)**.

1.1. The obligation to resolve disputes peacefully: conventional distinctions between diplomatic and adjudicatory means

The general obligation to resolve disputes peacefully stems from both Article 2(3) of the United Nations (UN) Charter and from customary international law (International Court of Justice 1986). The ICJ has recognized that States are under an "obligation to settle their disputes by peaceful means" (International Court of Justice 2000). In the same vein, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (United Nations General Assembly 1970) and the *Manila Declaration on Peaceful Settlement of Disputes between States* (United Nations General Assembly 1982) both emphasize the need to settle disputes exclusively by peaceful methods. Within the Americas, the Organization of American States (OAS) Charter,[3] the Inter-American Treaty of Reciprocal Assistance (Rio Treaty),[4] and the Pact of Bogotá[5] collectively reinforce the obligation to resolve regional disputes peacefully.

3 OAS Charter, Article 3(i). Controversies of an international character arising between two or more American States shall be settled by peaceful procedures.

4 Rio Treaty, Article 2. As a consequence of the principle set forth in the preceding Article, the High Contracting Parties undertake to submit every controversy which may arise between them to methods of peaceful settlement and to endeavor to settle any such controversy among themselves by means of the procedures in force in the Inter-American System before referring it to the General Assembly or the Security Council of the United Nations.

5 Pact of Bogotá, Article I. The High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures.

The obligation to pursue the peaceful dispute settlement is characterized by the freedom of states to choose the means by which they intend to fulfil this obligation (Pellet 2013). States' choice of means must be guided by good faith, in accordance with Article 2(3) of the UN Charter. The Charter indicates a non-exhaustive list of mechanisms for the peaceful settlement of disputes in Article 33(1), such as "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means." Dispute resolution mechanisms usually display a dichotomy: diplomatic or political means on the one hand, and adjudicative means on the other (Merrills 2017; Tanaka 2018). This division is usually justified by the bindingness of the outcome and by the distinct applicable framework to the dispute resolution mechanism.

This distinction between political or diplomatic means as opposed to adjudicatory means is also visible in the 1899 Hague Conventions and played an important role.[6] Article 38 of the 1907 Hague Convention also recognizes that whenever diplomacy has failed, arbitration may be considered as the most effective and equitable means of settling disputes. A similar provision can be found in the 1928 General Act for the Pacific Settlement of International Disputes (Article 21 refers to "any dispute"), according to which parties may recur to the procedure of conciliation, provided that the dispute has not been settled through diplomacy.

1.2. Legal disputes embedded in political contexts: the artificial distinction between political and legal disputes

The concept of "political disputes" or "matters" was developed as an exception to arbitration with treaties recognizing the distinction between legal and political disputes.[7] This distinction can also be found in the UN Charter—Articles 36(3), 96(1), and 96(2)—and in the ICJ Statute, as Article 36 confines the Court's jurisdiction to legal disputes.

6 See article 16 of the 1899 Convention for the Pacific Settlement of International Disputes (Convention I), referring to international arbitration: "In questions of legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle."

7 Some bilateral treaties in which this distinction is evident include: Arbitration Agreement between Great Britain and France (1903), which stated that only matters of "legal nature," that is, those relating to the interpretation of a treaty, should be submitted to arbitration. Those disputes that were vital to the respective parties' national interest were exempt. Other treaties containing the distinction between legal and political disputes include the Arbitration Convention between Germany and Belgium (1926) and the General Act of Arbitration (Pacific Settlement of International Disputes) (1929).

However, legal and political disputes remain inherently interconnected, as most if not all international disputes are invariably comprised of both legal and political dimensions (Sette-Camara 1992). Therefore, any attempt to delineate a "legal" dispute—containing an isolation of "justiciable issues" for judicial consideration—, as opposed to a "political" dispute—limited to factual terms—proves exceedingly challenging, if not entirely futile (Coleman 2003). Indeed, "[defining] a territorial dispute as 'legal' or 'political' is to some extent a failed exercise because all interstate disputes are by definition political" (Siniver 2024).

As the ICJ has emphasized in the case of *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned." The Court affirmed it should not decline to resolve the legal questions at issue regardless of these being embedded in a political context or dispute (International Court of Justice 1980). This view was reiterated by the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it was noted that "[T]he Court cannot accept the view [...] that it has no jurisdiction because of the 'political' character of the question posed" (International Court of Justice 2004). This tension is particularly evident in the South China Sea arbitration case, where one party (the Philippines) sought a legal settlement, whereas the other (China) maintained that the dispute involved historic rights which were outside the domain of international law and rejected the arbitral award issued by the PCA (Kardon 2018).

1.3. The complex interplay of political and juridical factors in determining the choice and appropriateness of dispute resolution methods

The determination of the choice and appropriateness of a dispute resolution strategy—whether based in unilateral action, bilateral negotiation, or based on the intervention of a third-party—is contingent upon a complex interplay of political and juridical factors. These include, *inter alia,* the mutual willingness of the parties to engage in cooperative resolution; the capacity of national governments to manage the domestic repercussions; the compatibility between domestic legal norms and international legal frameworks; the potential for escalation to violence in the absence of a settlement; and the sustained commitment to bear the costs associated with maintaining the existing state of affairs. It is crucial to recognize that these methods are not

mutually exclusive; states frequently employ hybrid approaches or develop tailored mechanisms to address specific circumstances (Siniver 2024).

These factors are assessed according to one's perspective in the conflict: (i) the perspectives of the states directly embroiled in the conflict and their designated representatives, who inevitably navigate both legal arguments and political considerations; (ii) the role of third-party mediators, whether states, international organizations, or individuals, who must balance legal principles with political realities to facilitate resolution; (iii) the influence of the institutional platforms provided by international organizations, which shape the negotiation process and its outcomes; and finally, (iv) the adjudicative function of arbitral tribunals or courts, whose decisions, while ostensibly grounded in law, are inevitably influenced by the broader political context.

In this context, the decision to activate a specific ADR mechanism, or even the fundamental choice of whether to employ any ADR at all, is inherently strategic and is based on a multifaceted assessment. Other external issues directly or indirectly related to the dispute might also be considered, such as the subject matter of the dispute, as certain issues may be more amenable to legal resolution than others; the identity of the other disputing party or parties, as states may adjust their approach based on their existing relationships and power dynamics; the selection of a specific court for initiating proceedings to the detriment of others equally competent to hear a case; the priority given by States to amicable relations with the other party, seeking to avoid actions that could damage long-term diplomatic ties; and States' desire to retain control over the outcome of the dispute, as they may prefer mechanisms that offer greater influence over the final decision.

Furthermore, the availability and accessibility of dispute resolution mechanisms influence state choices. States may opt directly for litigation, bypassing negotiation entirely, driven by considerations beyond purely legal imperatives. They may strategically decide to intervene as a third party or to participate in advisory proceedings. These decisions are all influenced by political calculations and contextual factors and are not made in a vacuum. Domestic political pressures, such as the need to address the concerns of specific interest groups, can also shape a state's approach to dispute resolution. Similarly, states may consider the interests of other involved states or international organizations, seeking to minimize potential diplomatic repercussions.

This reality is also applicable to American states. Contrary to the common perception that dispute resolution in public international law has historically prioritized adjudicative mechanisms, American states have consistently demonstrated a strong commitment to utilizing a variety of dispute resolution

methods. This includes a notable and early adoption of treaty-based ADR and arbitration practices, showcasing a regional inclination towards flexible and peaceful means of settling disagreements and challenging the long-held understanding of international law as a purely European product designed to address intra-European affairs.

2. The Selection of Alternative Dispute Resolution Mechanisms in the Americas

Latin American states share a longstanding tradition of concluding bilateral and multilateral treaties allowing for the use of arbitration and other ADR mechanisms as a means of settling regional disputes, a tradition which can be traced back to the Congress of Panama in 1826 and which developed largely independently from the 19th century and early 20th century European practice of interstate arbitration.

This unique approach to dispute resolution was evident as early as 1823, when Chile and Peru signed what appears to be one of the first modern treaties explicitly including arbitration for disagreements arising from the agreement itself. Similar *compromissory clauses*—agreements to arbitrate future disputes—followed in the 1831 treaty between Bolivia and Peru, a claims settlement between Colombia, Ecuador, and Venezuela in 1838, and three Chilean treaties with European powers in the 1850s.[8] Notably, Latin American states were party to most agreements containing such a clause signed up to 1868 (Harris 2016, 309). This proactive stance on dispute resolution, agreeing to arbitrate *beforehand*, was precisely what Britain and America were advocating for at the time, yet without success in their own contexts.

Compromissory clauses represented a commitment to arbitrate on a relatively limited range of issues. In contrast, a broader commitment, termed here a "general arbitration agreement"—a significant focus of jurists at the end of the 19th century—also saw its early adoption in Latin America. Before the first Hague Conference of 1899, 54 such agreements were signed globally, with an impressive 48 of these being between Latin American states (Harris 2016, 310).

Starting with the 1829 agreement between Colombia and Peru, one of the few general arbitration agreements from this period that did not involve two Latin American nations was an ultimately unsuccessful 1883 pact between Italy

8 See Treaty between Chile and France, June 30, 1852; Treaty between Chile and the United Kingdom, October 4, 1854; Treaty between Chile and Sardinia, June 28, 1856.

and Abyssinia (Harris 2016, 310). While the prevalence of these agreements in Latin America contrast with the frequent wars and border conflicts that marked the region up to the 1880s, it nonetheless demonstrates a persistent diplomatic inclination, at least in aspiration, towards the peaceful resolution of disputes.

The period spanning from 1890 to the outbreak of the First World War marked Latin America's ascent as a recognized global actor in international law in general, particularly in the realm of arbitration. In the early 1890s, the American States negotiated general arbitration agreements among themselves and with other states. Consequently, within just a few decades, the entire continent was interconnected by a network of bilateral arbitration treaties (Valencia-Ospina 2000, 293). The 1889 Pan-American Conference stands as a significant milestone in this development, and the prominence of Latin American states in this area contributed to their inclusion in the second Hague Peace Conference of 1907.

Building upon these trends, the conclusion of multilateral treaties focused on the arbitration of international disputes represented a logical progression (Valencia-Ospina 2000, 293). In the 1920s and 1930s, a period that laid the groundwork for the postwar regional framework, Latin American states actively embraced regional treaties that sanctioned the use of what later became broadly known as ADR mechanisms. Notably, as early as 1923, the United States and five Central American nations signed the Treaty of Washington, which established commissions empowered to conduct both conciliation and inquiry.

Also in 1923, the Fifth International Conference of American States in Santiago yielded one of its significant successes: the signing of the Treaty to Avoid or Prevent Conflicts between the American States in 1923, known as the "Gondra Treaty." This treaty required the submission of all controversies not resolved through diplomatic channels or existing arbitration treaties to a commission of inquiry (Davis, Finan and Peck 1977, 185). Under its stipulations, signatory nations were prohibited from engaging in any hostile acts for six months following the commission's report. The Gondra Treaty also established two permanent commissions, located in Montevideo and Washington, to receive and transmit requests for the activation of these commissions of inquiry. This treaty represented an initial, albeit limited, step towards the creation of an effective inter-American peace-keeping apparatus and garnered widespread ratification.

Responding to the 1928 General Act for the Pacific Settlement of International Disputes—by which all disputes between state parties should

be subject to conciliation except where the parties agreed to refer a legal dispute to judicial settlement or arbitration,—the 1929 Inter-American General Convention of Conciliation revised the Gondra Treaty, granting the commissions of inquiry, established under Article IV, broader powers of conciliation (Merrills 2017, 64). These developments progressed further in 1933 with a protocol to the 1929 General Convention, which provided for the creation of permanent bilateral commissions. Simultaneously, the 1933 multilateral Anti-war Treaty of Non-aggression and Conciliation (Saavedra Lamas Treaty) incorporated conciliation provisions inspired by the General Act, further solidifying the regional commitment to non-judicial means of dispute resolution.

Revisiting arbitration, in 1928-29, an extraordinary International Conference of American States on arbitration and conciliation took place in Washington, DC. During this conference, the American States adopted the 1929 General Treaty of Inter-American Arbitration, which stipulated that all legal disputes of an international character among the signatory states, which could not be resolved through diplomatic channels, should be submitted to arbitration (Valencia-Ospina 2000, 294). However, this obligation was weakened by several exceptions covering disputes that fall within the domestic jurisdiction of a State or that affect the interests of third parties. Further exceptions were introduced through reservations to the Convention. They also signed a Protocol of Progressive Arbitration, which established a procedure allowing a party to the General Treaty to wholly or partially renounce the exceptions or reservations made to the treaty.

At the Inter-American Conference for the Maintenance of Peace, held in Buenos Aires in 1936, three additional instruments concerning the resolution of disputes were signed. The Inter-American Treaty on Good Offices and Mediation offered parties in a dispute the option to resort to the good offices or mediation of "an eminent citizen of any other American country." The Convention to Co-ordinate, Extend and Assure the Fulfilment of the Existing Treaties between American States reaffirmed previous commitments to the peaceful resolution of conflicts. Furthermore, a Treaty on the Prevention of Controversies was concluded, establishing permanent bilateral mixed commissions to consider potential causes of future disputes.

The proliferation of these agreements posed a problem, leading to a lack of coordination among the various instruments. The numerous treaties addressing dispute settlement in the region created a fragmented legal landscape, with many states opting not to sign or ratify all of them. Although this concern was already evident at the Montevideo Conference of 1933 (Godio 2019), the

creation of an organized and harmonious unified instrument materialized in the post-war era. The Inter-American Committee of Jurists presented a draft project to the Ninth International Conference of American States in Bogotá in 1948, which subsequently resulted in the adoption of the American Treaty on Pacific Settlement, known as the Pact of Bogotá.

The Pact emerged as a relevant step towards a cohesive approach. It offers a unified framework for the peaceful settlement of disputes within the region, working in concert with the OAS Charter and the Rio Treaty to strengthen the regional peace and security architecture **(A)**. While the Pact of Bogotá offers a comprehensive, at least in theory, framework for employing ADR mechanisms, its potential in this regard remains largely underexplored in practice **(B)**.

2.1. Dispute resolution provisions under the Pact of Bogotá

The Pact of Bogotá, ratified by 15 American States,[9] establishes a mandatory obligation for signatory states to prioritize regional dispute resolution mechanisms before resorting to the UN Security Council (Article II). For this, it provides a detailed blueprint for the implementation of ADR mechanisms—good offices and mediation (Articles IX–XIV); Commission of Investigation and Conciliation (XV–XXX)—and provides a mechanism for arbitration (Articles XXXVIII–XLIX) and compulsory jurisdiction before the ICJ (Articles XXXI–XXXVII). Pursuant to Article VLIII, all previous regional peace treaties and conventions ceased to be in force for those States that became parties to the Pact.[10]

Articles III to VII offer valuable procedural rules for navigating the different mechanisms outlined in the Pact. Article III provides for significant flexibility in dispute resolution, explicitly stating that the order of procedures outlined in the treaty does not impose a strict sequence. Parties are free to select the method they deem most appropriate for a given situation, without being required to adhere to any inherent hierarchy, unless explicitly stated

9 Key absences include the United States, Argentina and Venezuela, that only signed the treaty. In 2012, Colombia withdrew from the treaty. For more information, see: https://www.oas.org/juridico/english/sigs/a-42.html.

10 Treaty to Avoid or Prevent Conflicts between the American States, of May 3, 1923; General Convention of Inter-American Conciliation, of January 5, 1929; General Treaty of Inter-American Arbitration and Additional Protocol of Progressive Arbitration, of January 5, 1929; Additional Protocol to the General Convention of Inter-American Conciliation, of December 26, 1933; Anti-War Treaty of Non-Aggression and Conciliation, of October 10, 1933; Convention to Coordinate, Extend and Assure the Fulfillment of the Existing Treaties between the American States, of December 23, 1936; Inter-American Treaty on Good Offices and Mediation, of December 23, 1936; Treaty on the Prevention of Controversies, of December 23, 1936.

otherwise. Conversely, Article IV imposes a clear prohibition against initiating any subsequent procedure while a prior one is underway. Although Articles III and IV appear to be clear, the interpretation of what constitutes the "end" of an ADR procedure, as referenced in Article IV, can be subject to dispute among parties, thereby creating ambiguity as to when subsequent ADR mechanisms or litigation become permissible.

In addition, the ADR procedures may not be applied to matters "which, by their nature, are within the domestic jurisdiction of the state" (Article V), which were already settled by arrangement between the parties or are *res judicata* (Article VI). Concerning matters already defined by the parties, *Territorial and Maritime Dispute (Nicaragua v. Colombia)* before the ICJ illustrates this provision. In this case, provisions contained in Articles VI and XXXIV were invoked by Colombia to challenge the jurisdiction of the Court. The 2007 judgment followed the approach under which "the clear purpose of this provision was to preclude the possibility of using those procedures, and in particular judicial remedies, in order to reopen such matters as were settled between the parties to the Pact, because they had been the object of an international judicial decision or a treaty" (International Court of Justice 2007a). The Court found that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina had been settled by the 1928 Treaty "within the meaning of Article VI of the Pact of Bogotá," thus considering the wording of Article I of the Treaty. Therefore, there was no need to proceed further into the interpretation of the treaty and there was nothing relating to this issue "that could be ascertained only on merits."

Furthermore, Article II stipulates that if parties deem direct diplomatic negotiations insufficient, they must resort to the treaty's procedures or mutually agreed-upon alternatives. However, this provision raises a critical issue regarding the requirement for mutual consensus on the insufficiency of negotiations. A potential conflict arises when one party wishes to persist with negotiations, while the other seeks to transition to alternative dispute resolution mechanisms. Although mentioned *en passant* by the treaty, negotiations remain the most widely used ADR mechanism in interstate disputes (Tanaka 2018).

The Pact of Bogotá mentions "direct negotiations" through "the usual diplomatic channels" as a precondition for using the ADR mechanisms provided by the Pact. It is noteworthy that the jurisprudence of the obligation to negotiate has been most significantly advanced in instances where Latin American states, having either failed to resolve their disputes through ADR, including negotiations, or not having pursued them at all, have sought

adjudication from the ICJ (Wellens 2018). These cases have allowed the Court to judicially solidify the position of negotiations within the international legal and political framework. The Court's case law, shaped by these cases, discusses the obligation to negotiate (*Border and Transborder Armed Actions*) (International Court of Justice 1988) and considers it as a key element in community interest regimes (*Pulp Mills*),[11] as well as a central point of contention (*Obligation to Negotiate Access to the Pacific Ocean, Bolivia v. Chile*) (International Court of Justice 2018).

The Court has stated that the absence both in the Charter and in general international law of "any general rule" to the effect "that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court" (International Court of Justice 1998). Negotiations "may be helpful" in "clarifying the terms of the dispute and delimiting its subject-matter," but "they as a general rule are not a mandatory precondition to be satisfied in order for the Court to be able to exercise jurisdiction" (International Court of Justice 2011).

The inclusion of a prior negotiation precondition in jurisdictional clauses or Special Agreements, a common practice among parties, renders the right to seize the Court conditional, delaying its exercise until negotiations have proven unsuccessful or a defined timeframe has passed (International Court of Justice 1998).

In both the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* and *Border and Transborder Armed Actions (Nicaragua v. Honduras)* cases, prior negotiations were established as a prerequisite for the admissibility of the claim, with both cases relying on the interpretation and application of Article XXXI of the Pact of Bogotá.

In challenging the admissibility of Nicaragua's claim, the United States argued that the Applicant "has failed to exhaust the established process for the resolution" of the conflicts, namely the Contadora process—recognized by the Security Council and the OAS as "the appropriate method" (International Court of Justice 1986). Nicaragua argued that the US could not "shelter behind negotiations between third States in a forum in which it is not participating" (International Court of Justice 1986). Moreover, neither the UN Charter nor the Charter of the OAS requires "the exhaustion of prior regional negotiations." The Court dismissed the objection as there is no requirement "of prior exhaustion of regional negotiating processes as a precondition for

11 It must be noted that Argentina is not a state party to the Pact of Bogotá, therefore it will not be discussed in this article.

the seisin of the Court" (International Court of Justice 1986). Moreover, the existence of the Contadora process in this case "is (not) an obstacle to the examination by the Court" of the Application.

In *Border and Transborder Actions*, as to the admissibility of the Application Honduras submitted *inter alia* that "an essential precondition" to the use of the procedures of the Pact of Bogota, including a reference to the ICJ, had not been fulfilled, namely that "the dispute cannot be settled by direct negotiations" (International Court of Justice 1988). Nicaragua had "failed to show that this was 'the opinion of the Parties.'" According to Honduras, both parties must share the opinion that the dispute could not be settled by direct negotiations.

Honduras further objected to the admissibility of the case, arguing that the Contadora process constituted a "special procedure" under Article II of the Pact of Bogotá (International Court of Justice 1988). Consequently, Honduras asserted that Nicaragua was prohibited from "commencing any other procedure" for peaceful settlement "until such time as the Contadora process has been concluded," as stipulated in Article IV of the Pact (International Court of Justice 1988).

The Court acknowledged that the provision of Article II establishes a "condition precedent to recourse to the pacific procedures of the Pact in all cases." Consequently, the Court proceeded to examine the specific application of this condition within the context of the case at hand (International Court of Justice 1988).

The Court, in its analysis of the Contadora process, observed that on the date of Nicaragua's Application, "no other negotiation which would meet the conditions" of Article II was "contemplated." This observation underscores the fact that even the "mere contemplation" of renewed negotiations would have fulfilled the precondition. Consequently, the Court dismissed Honduras' contention that "the dispute" remained "capable of being settled by direct negotiation through the usual diplomatic channels" when the Application was filed.

2.2. The Infrequent Use of ADR under the Pact of Bogotá

However, a far greater number of disputes have been settled outside the framework of the Pact compared to those under a direct reference to its provisions. Indeed, there exists only one clear instance in which the Pact was invoked in order to arrive at the peaceful settlement of a dispute using ADR; it concerned a dispute in Central America. Furthermore, in all found instances,

the parties did not act on their own initiative, but on the recommendation of a political organ of the Organization of American States (Valencia-Ospina 2000). An example illustrates how the Pact of Bogota's mechanisms could be effectively employed. For instance, the 1955 border incidents between Costa Rica and Nicaragua saw the OAS Council, acting provisionally, recommend the establishment of a Commission of Investigation and Conciliation, as outlined in Article XVII of the Pact. This Commission subsequently played a role in the successful resolution of the conflict by 1956 (Stoetzer 1993).

The scarcity of direct references to the Pact of Bogotá raises the argument that the mere inclusion of treaty-based ADR provisions does not inherently guarantee greater or more active employment of ADR in settling interstate disputes. This may be due to at least two primary reasons.

Firstly, the preference of member states often leans towards the politically oriented dispute settlement mechanisms available within the OAS as it has historically offered a complementary, and arguably more readily utilized, framework for facilitating ADR.

The OAS stands as the main political and diplomatic forum for the Americas. One of the main purposes of the OAS is "to ensure the pacific settlement of disputes that may arise among the Member States" (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 (Article 24). The OAS also helped 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 preventive 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.

Alongside the Meetings of Consultation of Ministers of Foreign Affairs, which address urgent matters of shared concern, the OAS Charter instituted the Permanent Council of the Organization, responsible for maintaining harmonious relations among member states. Among the tasks of the Permanent Council is helping States in reaching a peaceful settlement of their disputes (Article 84). 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 the 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, as well as 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).

Of particular interest within the OAS's institutional history is the Inter-American Peace Committee. Although formally established in 1948, its origins can be traced back to the Second Meeting of Consultation of Foreign Ministers of the American Republics in Havana in 1940, predating the formal creation of the OAS itself (Stoetzer 1993, 120). This suggests a pre-existing regional inclination towards a specific body dedicated to peaceful dispute resolution, which the OAS later formalized. As with the Meeting of Consultation of Ministers of Foreign Affairs, it was created for maintenance of peace and security. In its first years of creation, the Committee was able to deal with disputes between the Dominican Republic and Cuba (1948), a dispute between Haiti and the Dominican Republic (1949), a dispute between Cuba and Peru (1949), and the situation in the Caribbean (1949), largely due to the fact that it could act not only on petition of any party to the dispute, but also on petition of a third American State or *proprio motu*. In 1957, the Committee contributed to the settlement of a long-standing territorial dispute between Honduras and Nicaragua by helping to secure the agreement of both sides to submit their dispute to the ICJ (James 1990, 50). Cançado Trindade observed that, despite not being based on a treaty, the referenced Committee was frequently utilized. This was attributed to its operational flexibility, which bypassed the complexities associated with the Pact of Bogotá and the Rio Treaty. Furthermore, its capacity to act *motu proprio*, unencumbered by treaty-based obligations, allowed for a swiftness of action that made it a recurringly favored mechanism (Cançado Trindade 1982, 167).

A 1965 statute reform curbed the Committee's autonomy as it required prior agreement of both parties to the dispute to act. In 1967, as a product of the Protocol of Buenos Aires, the Committee was integrated into the OAS Charter as a subsidiary organ of the Permanent Council under the name of "Inter-American Committee on Peaceful Settlement." Under the revised Article 82 of the Charter, the Permanent Council had now to "effectively assist" the Member States in the peaceful settlement of disputes. In 1985,

the Cartagena Protocol amended the OAS Charter and eliminated the Inter-American Committee for Peaceful Settlement. Instead, the Permanent Council is empowered to establish special ad hoc Committees, with the consent of the parties.

Under its current format, the OAS offers a comprehensive and well-established institutional structure, encompassing a secretariat (including the significant role of the OAS Secretary General), physical infrastructure for meetings, permanent diplomatic representation, and existing organs and bodies that facilitate consultations, negotiations, as well as a general culture of dialogue and diplomacy. Bodies such as the General Assembly, the Permanent Council, the Meeting of Consultation of Ministers of Foreign Affairs, alongside various working groups and *ad hoc* committees formed for specific issues, function in a complementary manner that provides numerous avenues for dispute resolution without the need to explicitly refer to the Pact of Bogotá.

The primary point underscores the complementary relationship between political and legal strategies in resolving disputes (Valencia-Ospina 2000, 321), suggesting these are not mutually exclusive and do not necessarily depend on each other. When disagreements arise between states within a region, the influence exerted by other regional states can be a persuasive factor in encouraging the disputing parties to seek resolution through adjudication. In this context, the function of the Permanent Council of the OAS, as outlined in Article 84 of its Charter, to "assist the parties and recommend the procedures it considers suitable for peaceful settlement of the dispute," takes on particular significance. This provision highlights the role of the OAS in actively guiding states towards peaceful solutions, potentially including the referral of matters to legal bodies.

Consider the maritime boundary dispute between Honduras and Nicaragua. In December 1999, responding to a joint request, the OAS Permanent Council convened a special session to address escalating tensions stemming from a boundary disagreement in the Caribbean Sea. Over the following months, the OAS facilitated four rounds of discussions involving the foreign ministers of both Honduras and Nicaragua. Through this OAS engagement, Honduras and Nicaragua signed a series of agreements committing themselves to peaceful relations while simultaneously referring the substantive issue of their maritime boundary to the ICJ (Talamas 2011, 51). In the interim, the OAS implemented various confidence-building measures aimed at de-escalating the situation. These measures included establishing communication channels between the two countries' armed forces, imposing restrictions on military activities along their shared border, and conducting joint patrols in the Caribbean

Sea. On October 8, 2007, the ICJ delivered its ruling on the case, which was accepted by both states, effectively bringing this long-standing dispute to a close (International Court of Justice 2007b). This example illustrates the concurrent and mutually reinforcing roles that political engagement and legal adjudication can play in the peaceful settlement of international disputes.

Echoing the emphasis on the complementarity of political and legal dispute resolution methods is the need for greater flexibility in simultaneously pursuing both adjudication and non-judicial approaches, which constitutes the second argument of this article. The Pact of Bogotá's structure, with its requirement for prior exhaustion of diplomatic negotiations (Article II) and the principle of *electa una via* (Article IV), could be seen as overly rigid. The ICJ, in the already cited *Border and Transborder Armed Actions* case between Nicaragua and Honduras, clarified aspects of dispute resolution sequencing. The ICJ implied that a party should not resort to adjudication if negotiations or other peaceful procedures are ongoing. Similarly, the Pact of Bogotá prohibits using other mechanisms like good offices or conciliation while the ICJ is considering the case. The Court recognized the Esquipulas II process, initiated after Nicaragua filed its application, as a negotiation rather than a mediation, which allowed the parties to continue parallel negotiations. Following the achievement of an agreement through this process, Nicaragua requested the discontinuance of the ICJ proceedings before the merits phase.

The case suggests it may be advantageous to allow parties to continue negotiations and even other peaceful procedures while resorting to the Court. Furthermore, if simultaneous negotiations and adjudication are permissible, it seems inconsistent to exclude other dispute settlement methods that also foster dialogue between the parties. While the legal proceedings address the specific points of contention brought before the Court, ongoing diplomatic efforts might explore broader underlying issues and offer opportunities for creative, politically viable settlements that go beyond what a purely legal judgment can provide.

Achieving a higher degree of such flexibility within the Pact of Bogotá would be beneficial, allowing for the concurrent operation of judicial and non-judicial procedures. This would empower parties to maintain some level of control over the dispute even while it is before a judicial body. Furthermore, it could expedite the overall settlement process, as parties could continue to address non-legal aspects of the issue while the legal dimensions are being adjudicated, potentially leading to a resolution even before the judicial proceedings conclude.

Rather, the focus appears to be on utilizing the Pact to establish ICJ jurisdiction rather than pursuing ADR. This is reflected in the high number of cases submitted to the ICJ based on Article XXXI of the Pact, such as: *Border and Transborder Armed Actions (Nicaragua v Honduras; Nicaragua v Costa Rica); Territorial and Maritime Dispute Case (Nicaragua v Colombia); Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile); Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia);* and *Embassy of Mexico in Quito (Mexico v. Ecuador)*. Indeed, the Pact of Bogotá has become the most widely utilized regional treaty containing a compromissory clause to the ICJ.

Conclusion

Given that virtually all international disputes share inseparable legal and political dimensions, states strategically navigate various factors—such as the nature of the dispute, the identity of the other party, available *fora*, the desire for amicable relations, and the need to retain control of the outcome—when determining which dispute resolution strategy best aligns with their foreign policy objectives.

Focusing on the Americas, this research has shown that American states share a history of resolving regional disputes through legal mechanisms—though not always precluding the use of force—often including ADR, arbitration, and litigation in their bilateral and multilateral treaties. This tradition developed either in advance of or at least separately from European legal practices in the same area. However, as this article demonstrated, the practical application of the Pact reveals a preference for certain mechanisms over others, notably a greater reliance on the ICJ through its compromissory clause than on the ADR procedures outlined within the same treaty. This suggests that the mere existence of institutional frameworks for ADR, even within a dedicated treaty, does not automatically guarantee their widespread or prioritized use. The choice of dispute resolution strategy remains contingent upon a complex interplay of political will, strategic calculations, and the specific context of the dispute, echoing the broader principles of foreign legal policy. The limited number of ratifications of the Pact also contributes to its infrequent use.

Two primary reasons may account for this. Firstly, member states often prefer the politically oriented dispute settlement mechanisms within the OAS. The OAS, as the main political and diplomatic forum in the Americas, offers a well-established infrastructure, including the Permanent Council, capable of actively assisting in peaceful settlements through good offices, mediation, and the establishment of *ad hoc* committees. This politically driven framework has often been more readily utilized than the legalistic procedures of the Pact. The example of the Honduras-Nicaragua maritime boundary dispute, where OAS facilitation led to ICJ referral alongside confidence-building measures, illustrates the complementary role of political engagement.

Secondly, the structure of the Pact itself, with its emphasis on the prior exhaustion of diplomatic negotiations and the principle of *electa una via*, may be perceived as less flexible than the concurrent pursuit of both political and legal avenues facilitated by the OAS. While the Pact aims to provide a legal pathway, the practical inclination has been to either bypass its ADR provisions in favor of the OAS's political mechanisms or, notably, to utilize it primarily as a basis for establishing ICJ jurisdiction. The numerous cases brought before the ICJ citing Article XXXI of the Pact underscore this trend, positioning the Pact as a key regional treaty for accessing the Court rather than a frequently employed framework for ADR.

A valuable further step in this research would involve examining specific instances where states have employed ADR to advance their foreign policy objectives. This analysis would focus on how such uses manifest—or fail to manifest—within the institutional frameworks to which the state has consented to, whether they are established by bilateral or multilateral treaties, integrated within the structure of an international organization, or operate through standard diplomatic channels.

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