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Choosing a Forum for Peaceful Dispute Settlement

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Choosing a Forum for Peaceful Dispute Settlement

ABSTRACT

States engage in forum shopping when choosing a method for peaceful dispute settlement. As rational actors they weigh their options selecting either bilateral negotiations, a political third party or judicial means. The overarching concern of a government in combination with a forum's characteristics accounts for the specific choice in a given dispute. This paper develops an analytical framework identifying three distinct rationales guiding forum choice (1) achieving a favorable decision, (2) domestic leeway, and (3) gaining international visibility. This framework is applied to the Caribbean Sea boundary dispute between Nicaragua and Honduras. The case study clearly support the most central assumption of forum shopping that disputants choose the forum which they expect to award them a favorable decision.

CONTENT

Choosing a Forum for Peaceful Dispute Settlement

1. INTRODUCTION

International dispute settlement is currently one of the central topics in the study of international relations. Yet the question which method states choose to settle their disputes has not received much consideration so far. This paper seeks to fill this gap. What drives states to choose a specific forum of dispute settlement? For what reason do states choose one forum over another? I posit that states weigh their options before selecting a particular approach to conflict resolution. In this sense, states engage in *forum shopping*. Forum shopping implies that a disputant chooses the forum that best serves its interests. I argue which forum is best in a specific dispute depends on what concerns drive a state to approach dispute settlement. As different forums provide different benefits and pose different risks, there is not one single forum that is always the most attractive choice. Taking up the idea of forum shopping, I extend the notion to choosing between different types of settlement procedures. In a nutshell, disputing parties have three options to settle a bilateral dispute peacefully. They (1) attempt to solve the dispute bilaterally, (2) seek assistance from a political third party, or (3) hand the matter to a judicial third party. The aim of this paper is to introduce an analytical approach and develop hypotheses on what motivates states to choose either method. The plausibility of these hypotheses is then discussed in light of empirical evidence.

An empirical investigation requires specifications. I study only choices between different peaceful methods of dispute settlement and will not address the choice between military confrontation vs. peaceful means. International law compels states to pursue peaceful settlement strategies. Despite the burgeoning literature on the role of third parties in dispute settlement, surprisingly little scholarship exists on how states choose between different forums (for a review see Wiegand and Powell 2011: 34-37). My focus is on third parties from the United Nations (UN) system. While this pick certainly imposes a limit, the UN has been by far the most frequent third party in peaceful dispute settlement attempts (Bercovitch and Schneider 2000: 156-159). Due to its global reach and broad mandate, the UN Security Council is a particular interesting example of a political third party. The International Court of Justice (ICJ) will serve as possible judicial third party in this study because it is the only truly global court entitled to adjudicate interstate disputes.[1] Finally, I limit the period of investigation to the 1990s because there was

* I would like to thank Philip M. Tantow for his research assistance and encouragement.

no systematic bias against either method during this decade. While bilateral negotiations were and are frequently used by states, both the ICJ and Security Council were called upon more during the 1990s than in earlier periods.

The dispute matter selected for this study is maritime boundary disputes. Maritime boundary disputes are one of the most common dispute matters between states (Mitchell and Prins 1999). In contrast to land borders, border lines in the sea are far from being complete yet. There are approximately 420 potential maritime boundaries in the world, but only little over a third of these had been agreed in whole or in part by the end of the 1990s (Blake 2000: 57). Maritime boundary delimitation is anything but a merely technical matter. National sovereignty has been at stake since control over territory - and by extension maritime areas - lies at the heart of statehood. Such disputes involve economic benefits, strategic considerations, and often wider political interests. States can enter into bilateral negotiations to set a boundary line. Instead of diplomacy, states can also seek a legal settlement handed down from the ICJ. However, in some instances, states threaten to take control over the disputed area by a show of force or even full-scale military invasion. In light of this danger, states may also choose to ask the UN Security Council to deal with a maritime boundary dispute.

Some brief remarks on maritime boundaries are in order. Wherever claims of coastal states overlap, the maritime boundary between the parties needs to be limited. Indeed, no state in the world could claim its maximum maritime domain free from overlap (Prescott/Schofield 2005: 2). Regardless whether the disputing parties explicitly choose a legal approach or not, international law of the seas is an important point of reference for any prospective settlement. The Convention on the Law of the Sea (UNCLOS) aims to regulate all aspects of resources of the sea and uses of the ocean. The treaty standardized many aspects of setting limits in the oceans replacing disparate state practice. Worldwide states moved to establish zones of maritime jurisdiction in accordance with the Convention. Resulting claims were likely to generate new disputes over maritime boundaries and add fuel to existing ones. Coastal states may claim territorial waters up to a breadth of 12 nautical miles (nm) and an exclusive economic zone extending 200 nm from their shores. While UNCLOS anticipates conflicting claims due to geography, provisions how to delimit such claims are not very precise.[2]

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[1] There is also the International Tribunal for the Law of the Sea (ITLOS). Under certain conditions, ITLOS may enjoy jurisdiction to adjudicate maritime boundary disputes. However, during the period of investigation states did not hand a single maritime delimitation to the tribunal.

[2] Art. 15 of UNCLOS reads “Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of

The paper is organized in four sections. I first develop three competing motivations for states to choose either method of peaceful dispute settlement and develop a respective hypothesis on each (2). I then introduce the selected forums and discuss their specific advantages and disadvantages (3). In an empirical case study I put these hypotheses to test. When faced with a delimitation dispute over competing claims to areas of the Caribbean Sea, Nicaragua and Honduras brought the matter to the International Court of Justice (4). The case study substantiates the proposition that states engage in forum shopping and provides empirical evidence for all three conjectures, albeit to differing degrees. The most central notion of forum shopping assuming states choose the one forum in which they expect to win the dispute receives the strongest support.

2. MAKING THE CHOICE FOR A SPECIFIC FORUM

This section highlights three concerns governments take into account when choosing a specific forum of dispute settlement. In some disputes states seek third-party assistance, in other they do not. I argue forum choice depends on which concern drives a government. Three rivaling concerns are introduced to offer an explanation for variation in forum selection. The first concern deals with a disputing state's interest in achieving a favorable settlement. The other two concerns are derived from the notion that governments conduct foreign policy with respect to two different audiences. On the one hand, state leaders take policy decisions to secure the support of their domestic audience. On the other hand, foreign policy is also targeted at the international audience. Based on each concern, I develop a respective hypothesis. I utilize several assumptions common in rational-choice frameworks. First, states are taken to be rational actors making strategic choices among several possible options. Decision-making is based on the evaluation of expected gains and losses. Second, I assume that a state's government is the central actor in decision-making process.

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the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

Article 74 dealing with delimitation of EEZs simply states "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

2.1 Expecting a Favorable Decision

To each disputing party achieving a favorable settlement is of primary concern. States take their chances of success into account when deciding on a particular forum. I characterize an outcome as a favorable settlement for a party that grants its control over either the entire disputed maritime area or at least over a larger share than its opponent.[3] If simply settling the dispute was the paramount concern, the easiest settlement would always be to yield to the other side's requests. One side could unilaterally abandon its position and leave the terms of settlement to the other side (see Holsti 1966: 275). The matter would immediately cease to be a dispute between the parties. It is hard to conceive, though, that the matter would have developed in a dispute in the first place if one side was ready to make extensive concessions.

Theories on international relations offer substantiation for this concern. Two very influential schools of thinking, realism and institutionalism, conceptualize states as self-interested actors that seek to maximize their own welfare. Both schools also agree that the international system is anarchic in the sense of lacking a central authority. In this system, states need to find a way to advance their interests. To realists, the consequence is a self-help system that drives states to maximize power to guarantee their survival. The fundamental responsibility of statesmen is to pursue national interests. Applied to settling disputes, governments are expected to choose that strategy that promises the greatest rewards. While the institutionalist world view is less bleak, states are also taken to act egoistically. With regard to dispute settlement, institutionalists have more confidence in international procedures. In this thinking, states are expected to use international organizations and respective settlement mechanism because they offer benefits. This concern with achieving a favorable settlement reads as hypothesis ***governments choose the forum that offers the best chance to achieve a favorable decision***. To investigate this hypothesis the disputing party's expectations on likely settlement outcomes with regard to different settlement procedures need to be assessed. State expectations also arise from past experiences with different dispute settlement forums (Wiegand and Powell 2011). The likelihood to achieve a favorable settlement depends on the circumstances of a particular dispute as well as on one party's position vis-à-vis its opponent. The more powerful side will favor bilateral negotiations because it can bring its full weight to bear on a settlement (Merrills 1998: 24). I use the ratio of military capabilities and economic strength between the disputing states to assess bargaining power. Legal proceedings will be the first choice if the party is confident of the validity

[3] While I do not generally reject the notion that a disputing party may consider outcomes other than winning control over the area in question as favorable to its interest, I exclude any other gains from this specific hypothesis.

of its legal claim. Taking the matter to the UN Security Council makes most sense when the party can demonstrate its adversary posed a threat to itself and international security.

2.2 Domestic Leeway

Governments take foreign policy decisions in light of domestic politics. International disputes provide governments with an opportunity to display leadership, but they also pose the risk of losing domestic support (Smith 1998). In order to stay in power, a government strives for broad public support. This line of reasoning applies to all types of government, although different types of governments need to respond to different domestic groups to varying degrees. Democratic governments are mainly concerned with being re-elected making sufficient popular support the main concern (Foster and Palmer 2006). A government may also need to pay special attention to proposals by the opposition. While authoritarian governments do not depend on electoral support in the same manner as democratic governments, they cannot dismiss their domestic audience entirely in a foreign policy crisis (Mesquita and Siverson 1995).

The importance of domestic politics for foreign policy decisions is highlighted by liberal theories of international relations. With regard to international negotiations, linkages between the domestic and international arena determining the choices governments make have been brought to light (Putnam 1988). In handling a bilateral dispute, a government wants to demonstrate its own domestic audience that it is pursuing the country's interests to bolster domestic support. Thus, ***a government chooses the forum that assures best the government's goal to remain in office***. To test this hypothesis, the current domestic situation of the government making the choice for a specific forum of settlement is analyzed. Depending on the importance attributed to the dispute in domestic debate, a government needs to show its determination and capacity to manage the dispute. The more important the issue is, the more limited is a government's leeway in handling the matter. Domestic concerns then, not immediate foreign policy considerations, motivate the choice of forum. A government might even choose a forum without expecting a timely or adequate settlement when this choice promises to boost the government's domestic standing. For instance, if public opinion favors a tough stance towards the opponent, the government would risk losing domestic support if making concessions. In such a situation, the government would rate presenting a hard-line position over a fast settlement to maintain public approval. By taking the dispute to the UN Security Council, a government could present itself in firm defense of national interests as it can take this step without the other side's consent. In contrast, opening bilateral negotiations requires at least some concessions to achieve a settlement. If there was no public support for engaging the other party, a government would rather avoid direct talks.

Seizing the ICJ provides a viable alternative because then governments can use the Court as domestic cover for concessions (Allee and Huth 2006; Peters 2003: 7).

2.3 Gaining International Visibility

A government could be driven by yet another motivation quite different from the other two, namely to gain international visibility for a bilateral dispute it is involved in. Such a concern with internationalization serves several interrelated goals. The point of reaching a wider audience is to amplify pressure on the opponent rather than effective dispute resolution. To the extent, gaining international visibility serves as an end, a government is concerned with finding a public forum that allows advancing its view in detail. States are often less interested in settling a dispute than having their view prevail (Merrills 1998: 60). There is an advantage in being the first party to state one's case. It forces the other party to justify its actions and give an explanation. Another objective is to expose the adversary's actions to an international audience. Putting blame on the other side may either aim directly at changing policy or reducing its position in the international system (Hveem 1970: 50). Increased visibility puts pressure on the opponent to change its course of actions or at least to act under greater constraints. It is also a way to transform a bilateral matter in a multilateral issue, for instance by emphasizing the dispute's implications for regional security. A government may then garner international support for its position and is no longer on its own when seeking to advance its claims against its opponent. Next to the international community, amplified international attention sends a message to the opposing government and to the public of that state.

The hypothesis is then ***a government chooses the forum that meets its interest in international visibility best***. Assessing the plausibility of this hypothesis requires investigating whether a government was interested in gaining international visibility. The weaker disputant has a greater interest in choosing a forum that maximizes international attention. While strong parties will often prefer to deal with matters on their own, the weaker party is likely to gain from attention, as it forces foreign ministries to attend to the issue, public opinion awareness increases, and the media have stronger incentives to take up the question (Wallensteen and Johansson 2004: 24). Blaming the opponent may be a means of policy chosen due to lack of other means, as evident in the case of a small state with no means of military or economic sanctions (Hveem 1970: 53). A blaming strategy presupposes the claimant government can point to some action of its adversary that is objectionable to a wider audience. Internationalization of a dispute carries some risks, though, as resulting irritation of the opposing party is likely. If a party is in some way dependent on its adversary, for instance economically, an interest in generating more international visibility is unlikely. Such a strategy would undermine its own interests. Especially taking a dispute to a highly visible international institution like the UN

Security Council opens access to an international audience because of increased media attention. Addressees of debates are rather ‘world public opinion’, or public opinion at home than the assembled delegates (Petersen 1968: 132). In a similar vein, taking recourse to the ICJ is an instrument to “gain the weapon of world attention” (Hubbard 1985: 184). Especially when the other side refuses to accept the Court’s jurisdiction, a government can file an application to expose its opponent as disrespectful of international law. Already by appealing to either UN organ, states draw additional attention to a dispute. Bilateral negotiations may increase visibility as well when they are public but are the least likely method to do so.

3. DIFFERENT PEACEFUL DISPUTE SETTLEMENT FORUMS

Depending on a disputant’s primary concern, the specific nature of a dispute settlement forum makes it more or less attractive to choose. One forum may be more attractive because of its procedures, the body of rules informing the decision-making, or because of the composition of its members more sympathetic to the disputant’s claim (Juenger 1989). Bilateral negotiations, legal proceedings before the ICJ and fostering of conflict resolution by UN Security Council vary widely on several accounts. Next to explaining the respective procedure, possible reasons for states to decide for or against each method are presented. Each method is discussed on its own merits highlighting its specific advantages and disadvantages. This section concludes by postulating expectations on the choice of method for dispute settlement.

3.1 Opening bilateral negotiations

Negotiation is the most common procedure to settle international disputes peacefully. As a method of conflict resolution it is employed more frequently than all other techniques put together (Merrills 1998: 2). In a way, negotiation is the default option when it comes to choosing a forum fort dispute settlement. Negotiations are attractive because they appear as a straightforward approach to allay tensions. While negotiation is used quite broadly in the literature, the discussion here is limited to direct interaction between the disputing parties without any third-party assistance. As a method of dispute settlement, bilateral negotiations bring together disputing parties with a view to finding a mutually acceptable solution. A negotiated settlement requires commitment to talks and a general willingness to compromise. The disputing parties determine a settlement entirely by themselves. Negotiated settlements are quite stable as disputing parties only agree to terms they are willing to adhere to (Jackson 2000: 331).

Most of all bilateral negotiations offer great flexibility. It is the parties’ decision what types of arguments are acceptable and considered during negotiation. Each side holds a

veto to the extent it may unilaterally refuse a proposal or even the entire process. The parties keep maximum control over dispute settlement. There is virtually no risk of being faced with an unacceptable outcome because a party can simply walk away and not agree (Bilder 1989: 477). For this reason, bilateral negotiations are also attractive to states that either do not trust in international law or might even consider the relevant legal provisions not supportive to their case. In direct talks the parties are entirely free to determine the agenda. As long as both parties agree, they can link additional issues in their bilateral relations to the original dispute matter. Adding issues may create or enhance a zone of agreement (Sebenius 1983: 292-300). An outcome can then be beneficial to both sides, for instance if side payments increase the incentives to compromise. In the same way, disputing parties are free to exclude issues from negotiation and set aside a particularly contentions point. Argentina and the United Kingdom could only make progress in their talks on fishing rights in the area of the Falkland (Malvinas) Islands when they agreed in 1989 to not discuss the question of sovereignty for the time being (Evans 1991: 480-481). Such exclusion allows for maintaining some cooperation between the disputing parties even if the dispute has not been settled yet. Ideally, the parties build up enough trust to embark on final settlement.

Each party can exert pressure on the other side by threatening to leave the talks. While this threat is a powerful tool on the one hand, it is also rather blunt and may aggravate tensions. Bilateral negotiations are prone to break down when one party insists on an issue that is not negotiable for the other. In some disputes the initial positions of the disputing parties are so far from each other or mutually exclusive that there is no zone of agreement. Dead-locked negotiations may intensify territorial disputes since the respective positions harden (Hassner 2006/2007: 112-118). Successful negotiations produce outcomes that are somewhere in between the initial positions. This does not imply, however, that each party had to make concessions to the same degree (Hopmann 1995: 26). It is much more important which side is better able to advance its interests than which side had the more valid claims. The outcome is likely to be closer to the initial position of the more powerful party. It seems that power asymmetries between the parties suggest to the weaker side the need to assent to greater concessions on its part to reach an agreement at all (Jackson 2000: 335). In this sense, each disputing party can assess their chances for achieving a favorable outcome to some extent before entering into talks. Depending on the party's assessment, this party is more or less likely to prefer bilateral negotiations as method of dispute settlement.

In general, the great flexibility of negotiations is a reason for states to prefer this settlement method. Nevertheless, the method does have some disadvantages. Additional disagreements may arise before there are any talks on the actual matter. There are no definite rules of procedure that organize the exchange of positions, so procedural issues

need to be fixed. Moreover, each party is directly responsible for any outcome as a settlement requires compromise. As a result, a government will have to justify the outcome domestically. In this sense, every international negotiation is also a two level game in which domestic interests play an important role and shape the government's win-set. While a government can bolster its domestic support when reaching a favorable outcome, it also risks losing approval when making too many concessions (Fearon 1994: 580). Negotiations may also serve interests other than achieving an immediate dispute settlement (Druckman et al. 1999). Offering bilateral talks can signal a general willingness to settle the dispute peacefully or cushion a refusal to use a different method of peaceful settlement. One side may use bilateral talks as a tactical instrument to delay a final settlement for the time being.

3.2 Seizing the International Court of Justice

Another method of settling bilateral disputes peacefully is judicial settlement. This method consists of referring the dispute to a standing court with a view to receiving an authoritative legal decision. Disputing parties can either agree to task the ICJ with handing down a decision or institute proceedings unilaterally. The method is designed for each side to present its view of the dispute and to have a neutral third party pronounce a decision. As a forum of dispute settlement, recourse to the ICJ is rarely chosen. On average, roughly 2 contentious cases are brought to the Court per year. State usage of the Court seems to have increased since the mid 1980s. The incline is striking, but when adjusting for the increase of states since the ICJ commenced its work in 1946, usage during the 1990s has not matched the level of the 1950s (Posner 2004: 4-5). Decisions will be made through legal reasoning based on international law, including treaty law and customary international law. The eventual judgment is binding for the parties. Despite the lack of enforcement, compliance with ICJ judgments is good, outright defiance very rare (Paulson 2004).

The greatest obstacle to receiving a definite ruling from the ICJ in any bilateral dispute is the issue of jurisdiction. Note that being party to the Statute, which almost all states are by virtue of being United Nations members, does not automatically establish the Court's jurisdiction to adjudicate disputes between parties. Each disputing party needs to consent to litigate. There are three ways for a state to accept ICJ jurisdiction: to unilaterally consent to its compulsory jurisdiction by declaration, concluding a special ad hoc agreement with the opponent, or a respective clause in a bilateral or multilateral treaty.

The ICJ bench is composed of fifteen judges with a renewable nine year term. No two judges may share a nationality, the bench is supposed to represent all principal legal

systems of the world.[4] A state brings a dispute to the court by filing an application that states the ground of jurisdiction, the party against the claim is brought, and the subject of the dispute including the relevant facts. ICJ proceedings follow a standard pattern starting with written memorials/counter-memorials and possibly a second round of reply/rejoinder followed by oral pleadings. After the hearings, the judges will meet to discuss the case and a majority opinion will emerge and be finalized.

Litigation offers some distinct advantages to disputing parties. First of all, the method provides for a definite and legally binding decision. Written and oral proceedings provide plenty opportunities to present detailed facts and arguments. The one-sided presentations are mitigated by equal opportunities for presentation as well as by the knowledge that the judges will evaluate the claims. Consequently, neither side has to place demands directly on the adversary. Reference of a dispute to the Court provides the benefit that neither party has to take responsibility for the settlement outcome but can blame the ICJ. A government can defend concessions to the opposing party more easily to its domestic constituency when it can point to an international court ruling (Allee and Huth 2006). Taking another state to the ICJ tends to be regarded as an unfriendly move in international relations (Gross 1971: 273-274; Hubbard 1985: 168). Yet when states enjoy friendly relations and wish to maintain them, bringing a dispute jointly to court enables these governments to isolate the matter from their overall relations (Dalfen 1967: 139). The dispute between Canada and the United States serves as an illustration. Unable to delimit the continental shelf and fishery zones in the Gulf of Main through negotiations but desiring an amicable settlement, the governments agreed to submit their dispute to a Chamber of the ICJ. In addition, the outcome is predictable to the extent that procedural rules and the body of law are known to the disputing parties in advance. Previous decisions on similar disputes, academic writings as well as expert opinion can be taken into account.

The most obvious reason for governments to refer a dispute to the ICJ is to win the case. This hypothesis is widely spread throughout scholarly writings (e.g. Rovine 1976: 317; Romano 2002: 551; Shaw 1997: 832; for an opposing view see Guzman 2002). The conviction to have a good chance of winning was a crucial factor in the decision to institute proceedings (Fischer 1982: 259-261). This aspect works both ways, though. Depending on its assessment, a state may be welcome judicial settlement or shy away from the prospect. However, litigation is often depicted as a hazardous process. Some scholars point to the lack of predictability and certainty when explaining why states are reluctant to refer disputes to the ICJ (see Dalfen 1967: 127). Judges may depart from

[4] For a review of qualifications and distribution of seats see Amerasinghe 2001; for an analysis of the judges' independence see Mackenzie and Sands 2003.

precedents or simply be tasked with elaboration of vague principles. Clarification of law and specification of applicable principles in a particular dispute are one of the major strengths the ICJ has to offer. States may be unable to settle a dispute precisely because they are unsure about the applicable legal principles. States have asked the ICJ to point out the applicable principles in lieu of demarcating a boundary line. One prominent example are the North Sea Shelf cases, in which Denmark, the Netherlands, and West Germany resorted to the ICJ for clarification of the applicable principles and then based on the Court findings proceeded to draw their maritime boundaries themselves.

Another reason to go to the ICJ can arise from the exhaustion of diplomatic means of dispute settlement. Typically this means the respective governments have already tried to settle their differences in negotiations but failed to reach an agreement. Instituting proceedings can also be a tactical move by one state to exert pressure on the other party to come to the negotiation table. For example, Guinea-Bissau took Senegal twice to the ICJ in a dispute over their maritime boundary. Faced with proceedings, Senegal agreed to bilateral negotiations. When the disputants came to an agreement, Guinea-Bissau discontinued the second case.

Yet the disadvantages of legal proceedings appear so numerous to governments that they rarely take recourse to the ICJ. Besides the danger of losing a case in front of the entire world, states need to invest considerable time and effort. As settlement method, going to the ICJ is a lengthy process. The disputing parties need to be prepared and able to wait for dispute resolution because proceedings take years to produce a decision. Moreover, the parties have to bear the expenses for additional experts whose often substantial fees need to be paid. Actual costs of litigation are usually not disclosed, but amount to millions of US dollars (Romano 2002: 552).

3.3 Turning to the UN Security Council

The third option for peaceful dispute settlement under investigation is turning to the United Nations Security Council. Every state is entitled to draw the Council’s attention to a bilateral dispute that endangers international peace and security. In contrast to the two other discussed methods of dispute settlement, this option is available by unilateral decision of a disputing party. During a Security Council meeting, all fifteen Council members and the disputing parties may participate in the debate. Occasionally, such meetings are also open to other interested states. Decisions are taken with qualified majority and only possible if none of the five permanent Council members (China, France, United Kingdom, United States and Russia) vetoes the decision. Decision-making is based on political considerations, which almost always bear reference to norms of international law (Cronin 2008: 59). While Security Council recommendations adopted under Chapter VI of the UN Charter may not be binding, decisions taken under Chapter

VII are definitely binding for all member states.[5] When turning to the Security Council, states cannot be certain in advance whether the body will hand down a binding decision.

Usually states address the current President of the Security Council in a letter by their Permanent Representative to the United Nations when they wish to draw the Council's attention to a dispute.[6] The party in dispute reports the nature of the dispute, linked events along with some background information and spells out what kind of actions or measures by the other party pose a danger to international security. For example, in the Cod War of the 1970s, Iceland reported the United Kingdom warships were operating illegally in Icelandic waters.[7] This kind of letters is circulated as official document of the Security Council and thereby available to third states. In many disputes the other party counteracts by presenting its view on the matter. In response to the Icelandic allegations, the United Kingdom accused Iceland to have violated international law by unilaterally imposing restrictions on British fishing vessels making the deployment of Royal Navy vessels necessary to defend British trawlers against attacks by the Icelandic coastguard.[8]

Turning to the UN Security Council provides the benefit of creating international visibility. A disputing party attempts to initiate a highly visible dialogue on the merits of the respective positions. As illustrated by the opening claims in the Cod War, a state can use a letter to the Security Council to exert pressure on its opponent to justify its actions and clarify its position in the dispute. Seeking the attention of the Security Council is also a way to generate international support and find allies. It forces foreign ministries

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5 One commentary on the UN Charta (Simma 2002) holds that recommendations adopted under Chapter VI are not binding, but are of a merely recommendatory nature (see ‚Article 33', p. 593). However, the ICJ pointed out in its Advisory Opinion on Namibia (1971) that not only enforcement decisions of the Security Council taken under Chapter VII are binding for member states, but when the Security Council takes a decision invoking Art. 25 of the Charter (stating member states agree to carry out SC decisions) decisions taken under Chapter VI are also binding on member states (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 52-54, para. 113-116). A third view emphasizes the intention of the Security Council to take a binding decision as the crucial yardstick (Freudenschuß 1993: 33-34).

6 While the President of the Security Council is the most common addressee, some states send identical letters to the President of the Security Council and the UN Secretary-General, while others exclusively address the UN Secretary-General.

7 Letter by the Permanent Representative of Iceland to the United Nations addressed to the President of the Security Council dated 11.12.1975, S/11905.

8 Letter by the Permanent Representative of the United Kingdom to the United Nations addressed to the President of the Security Council dated 15.12.1975, S/11914.

around the globe to attend to the issue and increases the incentive for the media to take up the question (Wallensteen and Johansson 2004: 24). Especially smaller states benefit from the increased attention because their affairs tend to be overlooked. Since involving the Security Council puts the dispute in international limelight, a government will deliberate thoroughly whether it can present its own position in a favorable light. The more convincing a state can present itself as being victim of unreasonable demands or aggression by the other party, the more attractive the option becomes. At the same time, if a state is in such a position, making the actions of its adversary public helps that state to gather international support. In some instances, a state will consider turning to the UN Security Council because other third parties are not easily available.

Involving a third party also offers a temporary relieve from the pressure to take a decision in substance on how to respond in a conflict. A party in dispute may wish to gain time to weigh the options of making direct concessions to the opponent or escalating its military efforts (Kleiboer 1996: 367). On the one hand, turning to the Security Council can be a way of escalation with the intention of signaling to the adversary that the red line has been crossed. On the other hand, choosing the Security Council is a way of seeking a peaceful settlement and signals at least willingness to avoid military steps. Occasionally, seeking the attention of the Security Council is more a symbolic step than anything else. Such a step does not necessarily indicate that a disputing party is looking for a meaningful method of dispute settlement. Bringing a bilateral dispute to the Council may rather indicate the importance a state places on the issue. States value to have an item on the agenda of the Security Council independent from the action being taken on it. The fact provides some institutional acknowledgment that their problems are recognized by the international community (Hurd 2002: 41).

As a method of dispute settlement, the process of alerting the Security Council is plagued by uncertainty. At the very start, it is not even guaranteed that the Council will deal with the dispute put before it. It is up to the Security Council to call formal meetings and set the agenda. Moreover, even if a meeting takes place, the result of the debate is hard to predict for a party in dispute. The Security Council does not deal in the same manner and depth with all international conflicts (see Teixeira 2003: 26-35). The main reason is the political nature of Council decision-making. Varying interests and occasionally lack of political will produce a certain amount of arbitrariness. The interests of the disputants can be submerged by the wider interests of the international community (Richmond 1998: 714). A disputing party cannot be sure whether the Council reaches a decision at all. In case the Council does, obviously its precise content determines the value for the disputing parties. One needs to bear in mind that it is highly unlikely that the Security Council would actually delimit a maritime boundary. In maritime border disputes, it is far more likely that the Council would recommend a particular method for

settling the matter. This may or may not support the preferences of one of the disputing states. For example, if the Security Council calls for bilateral negotiations, it would be hard for either side to reject this call. The Council could also recommend the referral of the dispute to the ICJ. Yet the Council has hardly ever done so (Cronin-Furman 2006: 440). There is also the possibility that the Security Council denounces specific actions of one of the parties. Such a rebuke amounts to an important victory for the other side strengthening its position. These types of decisions would not result directly in boundary delimitation. However, the mere act of turning to the Security Council and possible debate increases the need for both sides to deal with the issue and to either follow the Council's recommendations or to seek other ways of finding a solution.

3.4 Expectations

Considering the three different concerns of governments discussed in section 2 and the specific nature of each forum, this paragraph sums up expectations on the choice between dispute settlement methods. Note that it is not one of the concerns by itself that determines the choice. Rather the specific concern determines how suitable a particular forum is to meet this concern. The combination of each hypothesis and each forum's quality generates different expectations on why a government will choose bilateral negotiations, litigation, or a political third party. The table illustrates the proposed conjectures:

Table 1: Conjectures on Forum Choice

	Bilateral Negotiations	**ICJ**	**Security Council**
Favorable Decision	Greater Bargaining Power	Better Legal Claim	Immediate Threat
Domestic Leeway	Enough Leeway for Concession	Government willing to compromise, but Domestic Opinion favors Strong Stance	No Leeway for Concessions
International Visibility	Dependency	Exposing Disregard of International Law	Exposing Hostile Acts

For each line one example is given for reading the table. When the overriding concern is to reach a favorable outcome, the choice is driven by the assessment of where a government can expect the best outcome in the dispute at hand. If the party is in the better bargaining position, it will likely choose negotiations. Should finding an adequate response to domestic pressures be the main concern, the extent of a government's leeway determines the forum of settlement. A government chooses the ICJ when it needs political cover for its willingness to compromise with the other side. Finally, one party's interest in gaining international visibility accounts for the preferred forum of dealing with

the dispute. If one side has a great interest in drawing international attention to the matter, possibly as it is weaker than its opponent, this side will alert the UN Security Council.

4. NICARAGUA-HONDURAS MARITIME BOUNDARY DISPUTE IN THE CARIBBEAN SEA

The analytical framework is now applied to an empirical case study assessing the explanatory power of each concern and respective expectations. Case selection was based on a source independent of the eventual settlement method. Any suitable dispute should be severe enough to raise security concerns to ensure a disputing party would seriously consider bringing the matter to the UN Security Council. As states quite often take recourse to the ICJ for delimiting maritime boundaries, this dispute subject is a likely case for international litigation. Therefore further selection needs to pay careful attention to identifying cases that could reach the Security Council. I have chosen the rivalry dataset developed by James P. Klein, Gary Goertz and Paul Diehl to identify possible cases during the 1990s (Klein et al. 2006). Applying a threshold of at least three militarized disputes connected to maritime claims during that period, six suitable cases were identified. Three of these were dealt with without involving either the ICJ or the Security Council, one was brought before the Council, another one addressed by an arbitration panel and the sixth was handed to the ICJ. It is this case that I analyze here.

4.1 Background information

Bilateral relations between Honduras and Nicaragua have been dogged by boundary disputes. In the Caribbean, Honduras claimed a maritime boundary along the 15th parallel, while Nicaragua claimed an area north of that parallel creating an overlap. This line had enjoyed some tacit acceptance, but was also contested on several occasions and not yet confirmed officially by both sides in the 1990s. The disputed area rich of fishing ground for shrimps and lobster was also assumed to hold hydrocarbon reserves. Relations between the Central American countries deteriorated due to the Sandinista revolution in Nicaragua. During the conflict with the Contras, frequent allegations of border violations were reported. In this tense situation, Honduras entered in negotiations with Colombia and concluded a maritime boundary treaty with Colombia in 1986. Any maritime boundary delimitation between Honduras and Colombia also affects Nicaraguan maritime claims as their maritime borders are tangent in the Caribbean Basin. This is due to the extremely curved coastlines of the states abutting the Caribbean Sea and Colombia’s claim to islands far northeast of its coastline. As said treaty implicitly imposed severe restrictions on Nicaraguan waters, Nicaragua strongly protested the act. The

Ramírez-López Treaty solely left the waters west from the 82nd longitude and south of the 15th parallel to Nicaragua.[9] However, the Honduran parliament refused to ratify the treaty with Colombia for the time being (Pratt 2001). This was not so much out of concern for relations with Nicaragua but mainly because of domestic opposition (Sandner and Ratter 1991: 299-300). When Honduras moved to finally ratify its maritime boundary treaty with Colombia in 1999, the dispute between Nicaragua and Honduras flared up. After a brief period of frenzied searching for an appropriate forum, Nicaragua instituted proceeding in front of the ICJ. As it was Nicaragua that applied to the Court more attention will be paid to its motivation to choose this particular forum.

In late November 1999, Honduras sent an envoy to notify Nicaraguan President Arnoldo Alemán that a vote on the treaty was scheduled early in the following week (Moreno 1999). President Alemán warned that he would not allow Nicaraguan's sovereignty to be violated by the maritime delimitation treaty. In a nationally broadcasted radio and television address, Alemán called Honduras' intentions deplorable and unfriendly.[10] Nicaragua's Foreign Minister Eduardo Montealegre said the treaty in question damaged Nicaragua and intended to deliver or recognize Nicaraguan territory to third countries and asked the Honduran Diet not to ratify.[11] Emotions in Nicaragua ran so high that President Alemán had to publicly rule out war as means to resolve the dispute.[12] Nicaragua instantly engaged in a flurry of diplomatic activity to prevent Honduras from ratification but without avail. In a speech to Congress prior to the vote, Honduran Foreign Minister Roberto Flores Bermudez clarified that Honduras was not trying to hurt Nicaragua or any other country, but would not permit that they harm its historically sacred sovereign rights.[13] Ratification was broadly supported by all Honduran parties and adopted on November 30, 1999.[14] Nicaragua issued a formal protest and announced legal action. Alemán accused Honduras of expansionist policies in granting Nicaraguan territory to a third country.[15]

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9 For a detailed discussion of the treaty's implications and the text itself see Nweihed 1993

10 EFE News Service in Factiva, 28.11.1999: Nicaragua Opposes Honduras-Colombia Treaty.

11 Xinhua News Agency in Factiva, 29.11.1999: Nicaragua Will Attend if Colombia and Honduras Ratify Treaty.

12 Associated Press in Factiva, 29.11.1999: Nicaragua furious at Honduran plans to recognize Colombia's claims to sea.

13 Dow Jones International News in Factiva, 01.12.1999: Honduran Congress Ratifies Ocean Treaty, Angers Nicaragua.

14 Dow Jones International News in Factiva, 01.12.1999: Honduran Congress Ratifies Ocean Treaty, Angers Nicaragua.

15 Reuters News in Factiva, 01.12.1999: Nicaragua breaks trade relations with Honduras.

4.2 Expecting a Favorable Decision

The Nicaraguan government could not expect to advance its claim to maritime zones north of the 15th parallel in direct talks with Honduras. From Nicaragua's perspective, a favorable solution would have meant at least recognition that the course of the maritime border was still subject to negotiation, if not outright recognition of its claims. Yet it was unlikely that Honduras would be willing to compromise now it had ratified the border treaty with Colombia. In addition, previous efforts at negotiations had failed to produce an agreement. Several bilateral commissions had not made any progress on the issue.[16] Considering the relative bargaining power, Nicaragua was in the weaker position at the end of 1999. While there were more personnel in the Nicaraguan armed forces, Honduran forces were better equipped, i.e. Honduras had the larger navy and enjoyed clear air superiority ("Caribbean and Latin America" 2000: 242, 245). The average GDP of Honduras was also one and a half times higher than that of Nicaragua throughout the 1990s.[17]

Nicaragua did not have a good case to expect a favorable decision from the UN Security Council either. One reason why Nicaragua could not expect a favorable Security Council decision was the fact that Honduras had not obviously done anything threatening or in breach of international law. Nicaragua could not assume the Council would denounce a bilateral boundary treaty concluded between two member states. However, handing the dispute over to the UN Security Council would have inevitably drawn attention to the tense security situation. The sequence of events suggests that Nicaragua was attempting to put military pressure on Honduras. Nicaragua had militarized the border dispute, possible to extract concession from Honduras (see Domínguez 2003: 27-28). While Honduras was first in moving troops to an area near the common border, it said deployment was unrelated to the maritime boundary dispute.[18] In order to avoid sending wrong signals to its neighbor, the Honduras Defense ministry stopped the operation after two days.[19] In the meantime, President Alemán put Nicaraguan forces on alert and vowed to "to defend the last square inch of territory they may try to subject to

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[16] See Memorial submitted by the Government of Nicaragua, Vol. 1, pp. 53-59 and Counter-Memorial submitted by the Republic of Honduras, Vol. 1, pp. 52-55.

[17] Own calculation of average based on current US$ for the years 1990-1999, figures taken from the World Bank 2010: World Development Indicators. http://data.worldbank.org/.

[18] Dow Jones International News in Factiva, 01.12.1999: Nicaragua to Tax Honduras Goods; Sea Rights Spat Heats Up.

[19] Reuters-Noticias Latinoamericanas in Factiva, 03.12.1999: Honduras pediría observadores por crisis con Nicaragua; EFE News Service in Factiva, 03.12.1999: Nicaragua-Honduras Honduras Withdraws Troops From Nicaraguan Border.

thralldom.”[20] He also announced that Nicaragua's navy would continue its regular patrols of the disputed zone and would stop any ships entering the waters illegally.[21] Nicaragua could not have wished to invite any criticism on its display of resolve.

In lieu of seeking a diplomatic settlement, the Nicaraguan government clearly framed the maritime border dispute as a legal issue. Efforts were concentrated on receiving a favorable legal ruling. Nicaragua’s court of first resort was the Central American Court of Justice (CACJ). The Court’s preliminary ruling as well as the final judgment were indeed in Nicaragua’s favor and found Honduras in violation of its SICA obligations by ratifying the maritime boundary treaty with Colombia.[22] Only Honduras ignored the ruling. Given the inability of the CACJ to obtain compliance, it was hoped that a different body was better equipped to solve the matter (O'Keefe 2001: 255-256). Nicaragua then chose the ICJ for litigation. Conditions for receiving a favorable judgment from that Court were extraordinarily encouraging for Nicaragua in the end of 1999. The often thorny issue of mutual recognition of the jurisdiction of the ICJ had been already resolved. Both Honduras and Nicaragua are party to the *Pact of Bogotá* that confers jurisdiction to the World Court. In addition, the two countries had even agreed once before to take their land border dispute to the World Court (Fenwick 1957). In light of this precedent, it would have been very hard for Honduras to deplore this option.

Nicaragua was also confident to be awarded a favorable judgment. Nicaraguan Foreign Minister Montealegre stated the he did not expect any problem before an international court “because we are certain and convinced we are right.”[23] For instance, Honduras did not appear to be able to base its claim to an already existing maritime boundary along the 15th parallel on the interpretation of a treaty (Pratt 2001: 115). On the whole the odds seemed to favor Nicaragua, even if not being certain. The benefit of hindsight allows assessing the judgment eventually handed down in 2007. The ICJ rejected Honduran arguments that a maritime boundary already existed and proceeded to delimit one. The ruling validated Nicaragua’s claim to maritime areas north of the 15th parallel. The judges employed the bisector method of delimitation proposed by Nicaragua. On the downside, the ICJ used significantly shorter sections of coastline for producing a bisec-

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[20] EFE News Service in Factiva, 03.12.1999: Honduras-Nicaragua Treaty Dispute Sours Managua-Tegucigalpa Ties.

[21] Agence France-Presse in Factiva, 01.12.1999: Nicaragua vows retaliation against Honduras-Colombia treaty.

[22] Gaceta Oficial Corte Centoramericana de Justicia, Vol. 5, no.10, pp. 7-9; Gaceta Oficial Corte Centoramericana de Justicia, Vol. 5, no.10, pp. 10-12; Gaceta Oficial Corte Centoramericana de Justicia, Vol. 6, no.13, pp. 2-30. An English translation of the CACJ preliminary ruling is provided in a letter from the Nicaraguan Representative to the UN Secretary-General, dated 03.12.1999, A/54/652.

[23] Agence France-Presse in Factiva, 09.12.1999: Honduras pleased international court to handle border dispute.

tor than proposed by Nicaragua, assigning a smaller area to Nicaragua than it had asked for.

4.3 Domestic Leeway

Since the regime change confirmed by free elections in 1990, Nicaragua is a representative democracy with a presidential system. There are multiple political parties; however, two parties stand out as main contenders for power. These are the Sandinista Party (*Frente Sandinista de Liberación Nacional*, FSLN) and the Liberal Party (*Partido Liberal Constitucionalista*, PLC). Presidential elections in Nicaragua had quickly evolved into truly competitive affairs. This meant the incumbent administration had to compete against the FSLN for maintaining domestic support. At the outbreak of the maritime border dispute, Nicaragua was governed by President Arnoldo Alemán, leader of the Liberal Alliance. Alemán's term of office was dominated by allegations of widespread corruption (Cupples and Larios 2005: 324-325). In November 1999, the Comptroller-General Agustín Jarquin was personally convicted of fraud after his office was found to have secretly paid a prominent journalist for assistance in investigating and publicizing corruption charges against the President (Rockwell and Janus 2003: 84). In an effort to defuse attention from the corruption scandals, the Alemán administration engaged in territorial disputes (Aviel 2003: 59). Another domestic issue was the restructuring of Nicaragua's extreme foreign debt. Economist Néstor Avendaño, former negotiator of Nicaragua's foreign debt, pointed out that the debt issue had been excessively politicized by the Alemán government.[24] Nicaragua had accumulated a foreign debt of 6.5 billion US$ in 1999, about three times it's GDP (Castro-Monge 2001: 446, 448). Alemán declared entering the debts reduction program for Highly Indebted Poor Countries (HIPC) would bring Nicaragua its second independence.[25] However, the announcement was premature. The IMF delayed Nicaragua's entry to the HIPC for another year because Nicaraguan government failed to meet some of the targets (Castro-Monge 2001: 424-425). As Alemán was unable to deliver the promised progress on foreign debt relief by the end of 1999, the administration had lost its credibility (Martí Puig 2004: 160).

In the face of these domestic difficulties, the Alemán government had to show that it was at least defending Nicaragua's territorial interests effectively. Throughout history, territorial claims and border disputes developed into a playground where politicians demonstrated their ability to fight verbally for national interests, and even dignity (Sandner and Ratter 1991: 293). In stark contrast to Nicaragua's economic dependence

[24] "So Poor, So Indebted, So Vulnerable", Revista Envió, no. 219 (1999).

[25] Noticen in Factiva, 23.09.1999: Nicaragua Becomes Eligible for Massive Debt Reduction.

on foreign demands as embodied by the harsh austerity programs, emphasizing claims to maritime territory could appeal to and reaffirm a sense of national dignity and independence. The matter provided a welcome opportunity for Alemán to establish himself as a competent leader. The Nicaraguan government had no domestic leeway for compromising. As all political parties attributed so much importance to the maritime claims and highlighted the theme of sovereignty, bilateral negotiations with Honduras were out of the question. The government was not willing to put itself in a position of appearing too soft on national sovereignty when already suffering so much criticism. While the Nicaraguan government could not appear to give territory away it needed to find a solution to the dispute to demonstrate its competency. In light of short-term domestic concerns the ICJ was an ideal forum. Should the ICJ refute Nicaragua's maritime claims a future government could put the blame on the Court. Moreover, Nicaragua had benefitted from the ICJ ruling in its case against the United States. This experience bolstered domestic support for taking a dispute to the World Court. As it had been the Sandinista government in that case who opted for recourse to the ICJ, it was unlikely that the major opposition party would come out against this method of settlement. Alternatively, the Nicaraguan government could have chosen to call on the UN Security Council. After all, Nicaragua felt Honduras was encroaching on its sovereignty and the party responsible for creating a situation that might endanger regional security. Only the Nicaraguan people were unlikely to see the Security Council as a forum that had Nicaraguan interests at heart due to its unresponsiveness when Nicaragua had brought allegations against US support for the Contras to it during the 1980s.

4.4 Gaining International Visibility

Nicaragua as well as Honduras sought to gain international visibility for their dispute by involving high-profile third parties. While both countries are members of the same regional organization, their relationship is not marked by dependency. Initially it seemed that Nicaragua shopped around for the third party who would be able to provide the highest international visibility before finally settling on the ICJ. Honduras was especially active in alerting the international community to the military dimension of the dispute.

Nicaraguan President Alemán personally involved the Pope on December 3, 1999. In a communication he stated that Honduras had violated Nicaraguan sovereignty and asked the Pope to intercede and to enlighten the Honduran government with a view to seeking a peaceful solution.[26] The appeal was reported by international news agencies

[26] Nota del Sr. Presidente de la República de Nicaragua a Su Santidad el Papa Juan Pablo II, solicitando intercesión ante amenaza Militar Hondureña, dated 03.12.1999, available from http://www.cancilleria.gob.ni/ diferen-

and made the headlines.[27] It served to increase the pressure on Honduras to put forward an explanation of its actions before an international audience. At the same time, appealing to a moral authority recognized in both disputing countries was an attempt to send a message to the Honduran government as well as the neighboring country's population. However, there are no records of Nicaragua proposing to Honduras to draw on the Vatican's good offices, which indicates Nicaragua was mainly interested in generating additional international visibility.

Nicaragua also turned to the UN General Assembly on the same. In its letter to the UN Secretary-General, Nicaragua emphasized that the CACJ had ordered Honduras to suspend ratification of the maritime boundary treaty with Colombia and attached the Court's preliminary ruling. Nicaragua exposed Honduras as breaching international law and ignoring a legal verdict. This letter failed to attract much attention, though. In contrast, a Honduran appeal to the United Nations generated much international visibility. The difference was that Honduras did highlight the security dimension of the dispute requesting UN military observers from the UN Secretary-General.[28] Honduras was successful to the extent most international news agencies picked up the story.[29] While the UN Secretary-General's spokesman said Kofi Annan was following the situation closely, the spokesman also pointed out it was unclear whether Honduras intended to approach the UN Security Council with such a request.[30] The fact that Honduras did not make an immediate request to that effect to the Security Council, suggests Honduras was more interested in drawing attention to its dispute with Nicaragua than in actually involving the Council as a third party in finding a settlement.[31] By virtue of being the

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dos/jpII.shtml [11.08.2009].

27 For instance by ***Agence France-Presse*** in Factiva, 04.12.1999: Nicaragua asks Pope for help in conflict with Honduras; ***EFE News Service*** in Factiva, 04.12.1999: Aleman Asks John Paul II to Intercede in Honduras Conflict.

28 Agence France-Presse in Factiva, 03.12.1999: UN offers help over Honduras-Nicaragua dispute.

29 ***Agence France-Presse*** in Factiva, 03.12.1999: UN offers help over Honduras-Nicaragua dispute; ***Dow Jones*** International News in Factiva, 03.12.1999: Annan Calls For Resolution Of Caribbean Sea Controversy; ***Reuters News*** in Factiva, 03.12.1999: Honduras seeks foreign observers in border dispute (by Lorraine Orlandi); ***Xinhua News Agency*** in Factiva, 03.12.1999: Honduras Requests Presence of Observers From UN; ***EFE News Service*** in Factiva, 03.12.1999: Honduras-Nicaragua Honduras Requests UN and OAS Observers.

30 Agence France-Presse in Factiva, 03.12.1999: UN offers help over Honduras-Nicaragua dispute.

31 A thorough search of UN Security Council documents did not produce an appeal to the Council by Honduras. The Repertoire of the Practice of the UN Security Council (1996-1999), the UN Bibliographical Information System (UNBISNET), the Official Document System of the United Nations (ODS), and the UN Daily List of Documents Issued at Headquarters (26.11.1999-31.12.1999, DL/1999/227 to DL/1999/251) were all consulted.

first conflicting party to highlight a possible militarization, Honduras put the blame on Nicaragua and presented itself as interested in a peaceful solution. Honduran Foreign Minister Roberto Flores complained about the tone of Nicaraguan statements and that Nicaragua had reacted disproportionately, raising the specter of a potential armed conflict between the two neighboring countries.[32] Both sides used the United Nations chiefly as a forum to create international visibility for the dispute and their respective positions.

Simultaneously to asking the UN for military observers, Honduras also made the same request to the Organization of American States (OAS). While Honduras may have tried in earnest to find a multilateral security forum that was willing to put the dispute on its agenda, Honduras definitely generated much international visibility with its parallel requests.[33] In the end, both Nicaragua and Honduras separately asked for an urgent OAS meeting to deal with their dispute.[34] By involving the OAS, Nicaragua and Honduras increased regional attention to their maritime boundary dispute. The OAS Permanent Council speedily responded to the requests and held two sessions on December 6 and 7, 1999. During the meeting, Nicaragua announced it was preparing to bring the case to the ICJ.[35] As the forum for the actual course of the maritime boundary was to be the ICJ, debate in the Permanent Council concentrated on the military tensions. The OAS responded by sending an envoy to mediate between Honduras and Nicaragua.[36] As Honduras and Nicaragua eventually held talks under the auspices of the OAS the question of bilateral negotiations was quickly obsolete. OAS Special Representative Luigi Einaudi met with the disputing parties in the following weeks and brokered a string of agreements on separation of military forces and patrolling the disputed area.[37]

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[32] Agence France-Presse in Factiva, 03.12.1999: Honduras-Nicaragua conflict prompts request for UN.

[33] ***EFE News Service*** in Factiva, 02.12.1999: Honduras-Nicaragua/UN Honduras to Ask for United Nations and OAS Observers; ***Inter Press Service*** in Factiva, 03.12.1999: Honduras-Nicaragua: Border Dispute has Region on Edge; ***Agence France-Presse*** in Factiva, 03.12.1999: Honduras-Nicaragua spat prompts request for UN observers; ***Xinhua News Agency*** in Factiva, 03.12.1999: Honduras Request Presence of Observer from UN.

[34] Agence France-Presse in Factiva, 05.12.1999: Nicaragua, Honduras both ask OAS to mediate maritime dispute.

[35] Minutes of meeting of the OAS Permanent Council on 06.12.1999, OEA/Ser.G/CP7ACTA 1215/99, available from http://www.summit-americas.org/asg/Honduras-Nicaragua/ACTA-DEC6-99-sp.htm [04.11.2010].

[36] Minutes of meeting of the OAS Permanent Council on 07.12.1999, OEA/Ser.G/CP/ACTA 1216/99, available from http://www.summit-americas.org/asg/Honduras-Nicaragua/ACTA-DEC7-99-sp.htm [04.11.2010].

[37] OAS Press Release, dated 30.12.1999: OAS Special Representative Meets with Honduran, Nicaraguan Foreign Ministers, available from http://www.summit-americas.org/asg/Honduras-Nicaragua/ Press%20Release-OAS-eng-dic30-99.htm [04.11.2010]. The document includes an unofficial translation of the agreement; Communiqué dated 07.02.2000 available from http://www.summit-americas.org/asg/ Honduras-Nicaragua/Communique-Feb7-

Next to the UN and the OAS, Honduras also announced to bring Nicaragua before the World Trade Organization (WTO). The Nicaraguan government had imposed a 35% ‘sovereignty tax’ on all Honduran products.[38] Honduran ministers at the WTO meeting in Seattle denounced Nicaragua's decision to impose a punitive tariff on Honduras in retaliation for its maritime boundary treaty.[39] However, Honduras did not request consultations in the framework of the WTO dispute settlement procedure until June 2006.[40] As the parties acknowledged that the real issue was territorial and therefore outside the WTO’s jurisdiction (Granger 2008: 1313), the panel has not been established. The late timing of the complaint to the WTO as well as the willingness of Honduras to eventually abandon it highlight that Honduras was mainly seeking to increase visibility for Nicaragua’s retaliatory tariff when calling on the WTO.

Like Honduras, Nicaragua used litigation before international courts to draw attention to the maritime boundary dispute. Especially involving the CACJ, a court that lacked the requisite credibility with both Honduras and Nicaragua to definitively settle the matter, was more about getting Honduras’ attention than anything else (Granger 2008: 1312). The option of seizing the ICJ had been brought up by Nicaraguan foreign minister Montealegre hinted at this avenue as early as November 28, 1999.[41] He said his government was prepared to sit down for talks, but could go to the ICJ if Honduras ratified the treaty anyway.[42] Next to sending a warning message to Honduras, raising the option also generated international visibility for Nicaragua’s maritime claims. The World Court enjoys international visibility due to its standing as the principal legal organ of the United Nations. Several international news agencies carried the story that Nicaragua considered involving the ICJ.[43] When Nicaragua eventually filed its application, the government also announced that four former foreign ministers were scheduled

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eng.htm [04.11.2010]; Memorandum of Understanding, dated 07.03.2000, available from http://www.summit-americas.org/asg/Honduras-Nicaragua/Entendimiento-7MAR00-sp.htm [04.11.2010].

38 Reuters in Factiva, 01.12.1999: Nicaragua breaks trade relations with Honduras. Nicaragua imposed the same 35% tax on Colombian products.

39 Reuters News in Factiva, 03.12.1999: Nicaragua-Honduras war of words reaches Seattle.

40 See Nicaragua - Measures Affecting Imports from Honduras and Columbia, Honduras request for consultations with Nicaragua, dated 06.06.2000, WT/DS201.

41 EFE News Service in Factiva, 28.11.1999: Honduras-Nicaragua Honduras Rules Out Conflict With Nicaragua.

42 Xinhua News Agency in Factiva, 29.11.1999: Nicaragua Will Attend If Colombia and Honduras Ratify Treaty.

43 ***EFE News Service*** in Factiva, 28.11.1999: Honduras-Nicaragua Honduras Rules Out Conflict With Nicaragua; ***Xinhua News Agency*** in Factiva, 29.11.1999: Nicaragua Will Attend If Colombia and Honduras Ratify Treaty; ***Associated Press*** in Factiva, 29.11.1999: Nicaragua furious at Honduran plans to recognize Colombia's claims to sea.

to travel abroad to inform world leaders of Nicaragua's concern that its territorial waters will be taken away.[44]

5. CONCLUSION

This paper posed the question when states choose which forum for peaceful dispute settlement. Governments faced with a bilateral dispute need to decide on how to deal with the situation. Starting from the assumption that states engage in forum shopping, I have introduced an analytical framework to address this question. The approach builds on three different concerns that motivate governments to make the choice for a specific forum and proposed three rivaling hypotheses. The most obvious concern centers on reaching a favorable outcome. Yet reaching a favorable settlement outcome is not necessarily the only factor governments are concerned with. Rather concern over bolstering domestic support may be driving a government's decision on how to deal with a dispute. The third one highlights concern with gaining international visibility for a disputant's position.

The empirical case study provides ample evidence that states indeed engage in forum shopping. The analytical framework yielded fruitful insights to forum selection. The investigation of Nicaragua's choice for bringing its maritime boundary dispute with Honduras to the ICJ finds full support for the first hypothesis, and some backing for the second and third hypotheses. The first hypothesis holds a disputing party chooses the forum that has the highest likelihood of awarding it a favorable decision. This hypothesis and its respective expectations are fully confirmed by the empirical evidence. As Nicaragua had the better claim to waters north of the 15th parallel, its best forum for a favorable settlement was indeed the ICJ. Due to its weaker bargaining position Nicaragua did not consider bilateral negotiations. The matter was far too complex for the UN Security Council to foster a definite settlement. Moreover, Nicaragua did not want to draw attention to its own bellicose rhetoric and threatening gestures like mobilization of its troops. The second hypothesis assuming a government chooses the forum that assures its goal to remain in office is supported to a certain extent. The Nicaraguan government was under strong pressure due to corruption scandals. As bilateral negotiations would have further hurt the government's credentials, this option was out of the question. Demonstrating leadership skills in a possibly inflated boundary, dispute provided a welcome diversion. The government also enjoyed domestic support for its choice of the ICJ. Yet in response to strong domestic pressures on the government's credibility, the Alemán government could also have been expected to bring the issue to the UN Security Council but did not. This finding contradictory to the expectation limits the ex-

[44] Agence France-Presse in Factiva, 09.12.1999: Honduras pleased international court to handle border dispute.

planatory power of the second hypothesis somewhat. Empirical support for the hypothesis concerned with international visibility is mixed. On the one hand, Nicaragua created international visibility as expected of the weaker side and chose a more visible forum than bilateral negotiations. On the other hand, Nicaragua could have been expected to expose Honduras as infringing on its territorial integrity in front of the Security Council. Still, Nicaragua selected the less visible ICJ and raised this complaint in a communication to the UN General Assembly rather than before the Security Council. In addition, Nicaragua could not use its application to the ICJ to expose Honduras as disrespectful of legal settlement. To the contrary, Honduras welcomed tasking the Court with maritime boundary delimitation. While Nicaragua called on several prominent third parties to generate international visibility, this concern fails to fully explain its choice for the ICJ. Apart from these shortcomings, the numerous Honduran activities to generate international visibility demonstrate that not only the weaker disputant had in interest in exposing the opponent to an international audience but that the stronger side also used this strategy.

This single case study clearly supports the most basic assumption of forum-shopping, namely that disputants choose the forum in which they expect to achieve a favorable decision. The empirical evidence further shows that the Nicaraguan government enjoyed sufficient domestic leeway to actually choose the forum in which it expected to win title to the disputed maritime area.

Further research is needed to analyze which decision governments take in situations that are characterized by greater incongruities between the different concerns. Assume, for example, a government has the stronger bargaining position towards an opponent but lacks domestic support for settling a lingering dispute. The concern with achieving a favorable outcome would point to bilateral negotiations, while the lack of domestic leeway would suggest third-party involvement. To the extent that settling a dispute in one’s favor is also likely to boost domestic support, governments would probably still choose the forum that promises to win control over the disputed maritime area. This suggests a hierarchical relationship among the three concerns with achieving a favorable decision at top, maintaining office second and an interest in international visibility being least important. Another interesting topic for future investigations would be to assess the applicability of this framework to other dispute subjects. Currently the framework is tailored to address settlement strategies of disputes in the field of international security. As maritime delimitation disputes are essentially conflicts over controlling geographical area, this approach should easily fit analysis of forum selection in any kind of territorial disputes.

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