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SYMPOSIUM ON SARA MCLAUGHLIN MITCHELL & ANDREW P. OWSIAK, "JUDICIALIZATION OF THE SEA: BARGAINING IN THE SHADOW OF UNCLOS"

JUDICIALIZATION OF THE SEA: A JUDGE'S VIEW

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In "Judicialization of the Sea: Bargaining in the Shadow of UNCLOS," Sara Mitchell and Andrew Owsiak define "legalization" as international legal constraints, and "judicialization" of the law of the sea as states' sense that their policy options are legally bounded, and that courts have gained the authority to define the meaning of the law of the sea. The authors are generally correct that the processes of legalization and judicialization under the UN Convention on the Law of the Sea (UNCLOS) fundamentally alter interstate behavior in significant ways, whatever the choice of dispute settlement mechanisms a state party to UNCLOS has made. However, as I explain in this essay, the International Tribunal for the Law of the Sea (ITLOS) should be the most often utilized mechanism to settle UNCLOS disputes, and its potential as a dispute settlement mechanism has yet to be used to the fullest extent.

A Dialogue Between Practitioners and Social Scientists

The social science perspective broadens legal practitioners' understanding of the environment in which law actually operates. However, its usefulness depends on premises on which empirical social science research and findings are based. As Benjamin Appel's contribution to this symposium notes, the method that Owsiak and Mitchell employ can create correlations, but the causal claims are yet to be substantiated. Similarly, Theresa Squatrito's contribution to this symposium expresses a wish that the authors considered how the performance of international courts contributed to the finding that states that select a judicial dispute settlement mechanism are more likely to peacefully resolve their disagreements. My own contribution—written from the voice of a judge—concurs with these findings. In particular, I worry that the authors' omissions limit a judge's ability to generalize the conclusions their social science inquiry postulates.

Owsiak and Mitchell's study empirically evaluates UNCLOS' legalization and judicialization effects on interstate maritime diplomatic conflicts, drawing from data created for the Issue Correlates of War project, that identifies all contentious maritime claims between 1900 and 2001, involving ownership or access issues between two or more countries. The data does not include straightforward law enforcement actions, unless these actions occur within the context of a larger entitlement dispute. The limitations of the data mean that the findings may not be generalizable beyond the issue of maritime disputes. For example, any conclusion from this study may not be applicable to dispute settlement under the World Trade Organization where powerful states such as China often appear even though they do not accept binding third-party dispute settlement under UNCLOS. This difference between disputes involving trade vis-à-vis territorial disputes in the oceans is at least in part because, from time

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immemorial, interstate commerce has never been *domaine réservé* for any sovereign state; hence, interstate trade disputes are more amenable to third-party dispute settlement.

The authors contend that UNCLOS fundamentally alters interstate behavior in three ways: first, it generally reduces the likelihood that maritime claims exist, and that interstate conflict then occurs; second, it encourages the use of peaceful strategies for managing maritime claims; and finally, it incentivizes states to avoid the very courts whose jurisdiction they accept.

For a practitioner, the social scientist should take into account and elaborate the context in which such fundamental change in interstate behavior takes place. The authors' first contention is correct. Disputes as to the breadth of maritime zones have substantially decreased after the opening of UNCLOS to signature on December 10, 1982—even before most states became state parties thereto. This is because such breadth as laid down by UNCLOS quickly crystallized into customary international law.[1]

With regard to the second and third contentions, the authors further elaborate that when (potential) litigants know which court will hear their case, they can predict how a court will decide its case. This anticipatory knowledge draws on the court's known case law, procedures, judges, and reasoning. Owsiak and Mitchell suggest that this information changes their bargaining behavior, generating an out-of-court influence over interstate bargaining. This is also quite true. In the case of maritime boundary delimitation, judgments of the ICJ, ITLOS, and arbitral tribunals consistently apply the relevant rules since the unanimous ICJ judgment in *Maritime Delimitation in the Black Sea* (Romania v. Ukraine) in 2009.[2] Whether parties are determining what judges might do, or simply following what the law prescribes, one might argue that there are *objective* rules for maritime boundary delimitation for states to rely on in their maritime boundary negotiations, or, as the authors put it, that "[t]hrough case law, courts clarify legal ambiguities, demonstrate their authority, and build a record of how they decide the disputes that come before them."[3]

However, negotiating states *subjectively* apply such *objective* rules to serve their respective interests and entrenched positions. When negotiations run into a stalemate, there is always a possibility that one of the governments may decide to resort to third-party dispute settlement mechanisms under UNCLOS. This lurking possibility generates strong incentives for negotiating states to settle out of court whatever their respective bargaining power. Case law allows states to predict—albeit with some uncertainty—how a court will likely decide a given case, especially if both states have identified the same judicial forum in their Article 287 declarations. The political decision may be motivated by what the authors call "political cover against a domestically unpopular decision,"[4] where one negotiating party may be perceived by its home constituencies as yielding too much to the other negotiating party by ceding to the latter valuable natural resources and/or undue entitlement to a maritime area. An international court is consequently resorted to as an impartial body, as the method of last resort, to determine the respective rights and entitlements to be accorded to each of the disputing parties. Therefore, the authors' use of Article 287 declarations to investigate the above effect of judicialization is helpful in this regard. They are correct to conclude that states that accept the jurisdiction of international courts through optional declarations signal a commitment to judicial settlement.

[1] Martin Lishexian Lee, *The Interrelation Between the Law of the Sea Convention and Customary International Law*, 7 SAN DIEGO INT'L L.J. 405, 412 (2006); Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgment, 1982 ICJ REP. 18, paras. 47–48 (Apr. 14); Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, 1985 ICJ REP. 13, paras. 26–35 (Mar. 21).

[2] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 ICJ REP. 61 (Feb. 3).

[3] Sara McLaughlin Mitchell & Andrew P. Owsiak, *Judicialization of the Sea: Bargaining in the Shadow of UNCLOS*, 115 AJIL 579, 597 (2021).

[4] *Id.* at 600.

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Asian States' Positions

The authors' data from non-Asian states show that binding settlement occurs in only 3 percent of all peaceful efforts to resolve these disputes. The authors do not explain, however, why states in Asia, where I come from, are generally more reluctant to have recourse to third-party dispute settlement mechanisms with binding decisions. In my view, this reluctance is due to Asian states' non-litigious tradition and reluctance to allow their *domaine réservé* to be subject to supranational bodies. This is manifest from the list of states making optional declarations choosing such mechanisms under UNCLOS. Fiji is the only Asian state accepting ITLOS as its first choice for any maritime dispute settlement under UNCLOS, although Bangladesh has chosen ITLOS as its first choice for the settlement of disputes between Bangladesh and India and Myanmar, respectively, relating to the delimitation of their maritime boundary in the Bay of Bengal. No Asian state has accepted the ICJ, Annex VII arbitration or Annex VIII arbitration as their first choice for maritime dispute settlement.

However, Timor-Leste has accepted all the mechanisms listed in Article 287 of UNCLOS without preference to any of the mechanisms enumerated thereunder. My sense is that Timor-Leste was keen to have its then maritime boundary dispute with Australia, a wealthier neighbor with more bargaining power, settled by an independent third-party body as soon as possible. My assessment is in line with the authors' claim that delegating authority to international courts also neutralizes power asymmetries. By contrast, Australia declares, under Article 298(1)(a) of UNCLOS, that it does not accept any of the procedures provided for in Section 2 of Part XV with respect to disputes concerning the interpretation or application of Articles 15, 74, and 83, relating to sea boundary delimitations as well as those involving historic bays or titles. Australia's aforesaid declaration leads to the authors' question: How would countries negotiate competing maritime claims in the absence of UNCLOS and its related international courts?

In this specific instance, although international courts are excluded by Australia's declaration, Article 298(1)(a)(i) and (ii) of UNCLOS obligates both Timor-Leste and Australia to accept submission of their dispute to conciliation under Annex V, Section 2 of UNCLOS. The conciliation process commenced in April 2016 and culminated in the conclusion of the bilateral agreement between the two countries in March 2018.[5] Thus, by becoming parties to UNCLOS, and even where one of the parties to a dispute makes a declaration that does not accept maritime boundary dispute settlement by international courts, the compulsory conciliation may still be useful to assist the parties to settle their said dispute. In this sense, I agree with the authors' argument that, "[s]tates parties to UNCLOS agree to compulsory judicial processes if other peaceful tools do not resolve their maritime claim."[6]

Competing Dispute Settlement Mechanisms

The authors find some differences among Article 287 declaring and non-declaring states. They argue that civil law countries make more declarations than common law or Islamic law states—and prefer the ICJ to other courts, and that democratic countries also prefer the ICJ or ITLOS more often than non-democracies, while powerful military states select arbitration procedures if they make a declaration. While this may be a probabilistic empirical finding, I question whether civil law, common law, or Islamic law traditions are meaningfully shaping the outcome. In my mind, the overall picture is not so straightforward. For example, the authors' perspective does not take into account the general reluctance of Asian states, many of which are Muslim-majority states, to have recourse to third-party dispute settlement mechanisms with binding decisions. Meanwhile, the common law background may not explain the choices that certain states are making (see Fig. 1).

[5] In the Matter of the Maritime Boundary Between Timor-Leste and Australia, PCA Case No 2016-10 (May 9, 2018).

[6] Mitchell & Owsiak, *supra* note 3, at 597.

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First choices of UNCLOS dispute settlement mechanism (as of October 2021)					
ITLOS	ICJ	Annex VII arbitration	ITLOS, ICJ, and Annex VIII arbitration	ITLOS and ICJ	ITLOS and Annex VII arbitration
Algeria, Angola, Argentina, Austria, Bulgaria, Capo Verde, Chile, Croatia, DR Congo, Fiji, Germany, Greece, Hungary, Madagascar, Montenegro, Switzerland, Tanzania, Trinidad and Tobago, Tunisia, and Uruguay	Denmark, Honduras, Nicaragua, Norway, Sweden, and the United Kingdom	Belarus, Egypt, Russia, Slovenia, and Ukraine	Ecuador and Mexico	Australia, Belgium, Estonia, Finland, Italy, Latvia, Lithuania, Netherlands, Oman, Spain, and Togo	Canada

Figure 1

Like Timor-Leste, Portugal has chosen all the mechanisms in Article 287 without any preference. ITLOS is the first choice in specific disputes for Bangladesh, Belarus, Nigeria, Panama, Russia, Saint Vincent and the Grenadines, and Ukraine. If one looks at the six states choosing the ICJ as their sole first choice, it is true that five of them are civil law countries, and the United Kingdom is the only common law country in this group. However, there could be some other reason not related to their civil law or common law tradition. In the case of the United Kingdom, its declaration makes it clear that the United Kingdom wants to gain more confidence in ITLOS as "a new institution," whereas the ICJ is already a well-established international dispute settlement mechanism.

An additional factor shaping state decisions vis-à-vis Article 278 is that some default dispute settlement procedures preceded UNCLOS. This is the case for Honduras and Nicaragua, which accept the ICJ as their first choice for dispute settlement under UNCLOS. Nicaragua is of special interest since it has been a party to fifteen cases before the ICJ to date, including as an intervening party, six of which are against Costa Rica, five against Honduras, and three against Colombia, which is a non-state party to UNCLOS. The only other case was against the United States.[7] Some of these disputes are also "mixed disputes," comprising claims over the sovereignty of certain land territories, as in the case of *Territorial and Maritime Dispute* (Nicaragua v. Colombia)[8] and *Territorial and Maritime*

[7] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment. 1986 ICJ Rep. 14 (June 27).

[8] Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 ICJ Rep. 624 (Nov. 19).

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Dispute in the Caribbean Sea (Nicaragua v. Honduras).[9] Nicaragua, Costa Rica, Honduras, and, up to November 2012, Colombia were parties to the Organization of American States' American Treaty on Pacific Settlement,[10] Art XXXI of which provides for a default dispute settlement procedure.[11]

To date, the ICJ, but not ITLOS, has been used to adjudicate law of the sea disputes where one or more of the disputing parties is not party to UNCLOS, and/or where the dispute in question is a "mixed dispute." This is probably partly because states not party to UNCLOS may not be aware that even they may resort to ITLOS to settle their disputes thanks to Articles 20(2), 21, and 22 of the ITLOS Statute. Also, a court or tribunal referred to in Article 287 of UNCLOS has jurisdiction over any dispute concerning the interpretation or application of "an international agreement related to the purposes of [UNCLOS], which is submitted to it in accordance with the agreement,"[12] including "mixed disputes," provided the territorial dispute is necessary for the resolution of the UNCLOS dispute and is merely ancillary to the UNCLOS dispute,[13] unless, of course, the agreement expressly excludes such ancillary territorial dispute.[14] If states become aware of this, there may still be some other considerations that can influence their choice of dispute settlement mechanisms.

Choosing Dispute Settlement Mechanisms

As I have elaborated elsewhere, the authoritativeness of the chosen forum and arbitrators or judges could be a factor for disputing parties in their choice of the forum.[15] The ICJ has a longer record in international dispute settlement than ITLOS, including in the law of the sea. However, ITLOS is a more specialized body than the ICJ in relation to the interpretation and application of UNCLOS. ITLOS's twenty-one elected judges are more representative of the world's legal systems than the fifteen ICJ judges; and, unlike the ICJ, ITLOS is not elected by the Security Council and the UN General Assembly, the two principal political organs of the United Nations. To date, the ICJ, but not ITLOS, has been used to adjudicate law of the sea disputes where one or more of the disputing parties is not party to UNCLOS. In general, an Annex VII arbitration and ITLOS take relatively much shorter time to dispose of cases in their respective dockets than the ICJ does. An analysis of the cases submitted to the forums listed in Article 287(1) of UNCLOS by subject matter reveals the frequency with which different forums hear similar types of cases. ITLOS hears every law enforcement prompt release case under Article 292 because UNCLOS grants ITLOS exclusive jurisdiction over those matters. Parties with cases tangentially dealing with the detention or confiscation of ships but not covered under Article 292 also tend to choose ITLOS as a forum because of its subject-matter expertise in the field, including where the vessel is no longer detained, and

[9] Territorial and Maritime Dispute in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 ICJ Rep. 659 (Oct. 7).

[10] Organization of American States' American Treaty on Pacific Settlement, Apr. 30, 1948, OAS Treaty Series No. 17 and 61.

[11] The High Contracting Parties declare that they recognize, in relation to any other American State, the ICJ's jurisdiction as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute the breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

[12] Art. 20(2) ITLOS Statute.

[13] Peter Tzeng, *Supplemental Jurisdiction Under UNCLOS*, 38 Houston J. Int'l L. 499, 573–574 (2016); P. Chandrasekhara Rao & Philippe Gautier, The International Tribunal for the Law of the Sea: Law, Practice and Procedure 92 (2018).

[14] Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals*, 27 Int'l J. Marine & Coastal L. 59, 69–72, 91 (2012); Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 Int'l & Comp. L.Q. 37, 49 (1997).

[15] Kriangsak Kittichaisaree, The International Tribunal for the Law of the Sea 23–25 (2021).

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the applicant seeks damages for alleged violations of UNCLOS. In other matters, such as boundary delimitation, fisheries, and marine environmental protection, there is competition between the forums. Additionally, states frequently resort to the provisional measures option under Article 290 to invoke the jurisdiction of both ITLOS and an Annex VII arbitral tribunal hoping one or both will render a favorable ruling.

Conclusion

On the whole, whatever the choices selected by states, they substantiate the authors' aforesaid contention that UNCLOS fundamentally alters interstate behavior in three ways. In any case, the existence of ITLOS and the willingness of states to utilize ITLOS have played an important role in the out-of-court resolution of ongoing disputes, as in "*Chaisiri Reefer 2*" (Panama v. Yemen) (Prompt Release)[16] and the *Swordfish Stocks* case.[17] Provisional measures ordered by ITLOS under its compulsory jurisdiction pursuant to Article 290(5) have been instrumental in decreasing the tension between the parties.

[16] "Chaisiri Reefer 2" (Pan. v. Yemen), Order 2001/4, 2001 ITLOS Rep. 82 (July 13, 2001).

[17] Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/EU), Order 2003/2, 2008–10 ITLOS Rep. 13 (Dec. 16, 2009).

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