

Forum Shopping for the Best Adjudicator: Dispute Settlement in the United Nations Convention on the Law of the Sea

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Structured Abstract

Article Type: Research Paper

Purpose—This study analyzes how countries' domestic legal traditions influence their selection of dispute settlement procedures under Article 287 (ITLOS, ICJ, Annex VII/VIII arbitration) of the 1982 UNCLOS treaty. The theory suggests that common law countries are supportive of UNCLOS generally and amenable to multiple forums of Article 287 dispute settlement. Civil law countries prefer the ICJ as a dispute settlement forum, while Islamic law states prefer arbitration approaches under Article 287.

Design, Methodology, Approach—The authors use descriptive statistics and logit models to analyze decisions by all 194 countries to (1) sign (92%) or ratify (84.5%) UNCLOS and (2) make an optional Article 287 declaration (29% of States Parties).

Findings—The results show that states' domestic legal traditions have a strong influence on states' preferred dispute resolution forum(s) in the UNCLOS regime. Common law countries are supportive of UNCLOS generally and many of the dispute resolution forums available in Article 287. Civil law countries choose the ICJ most often under Article 287, while Islamic law states prefer Annex VII/VIII arbitration.

Practical Implications—Domestic law provides clues about how countries will support international institutions and identifies which states are most amenable to out of court bargaining.

Keywords: dispute, ICJ, ITLOS, legal traditions, maritime, UNCLOS

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I. Introduction

Many international organizations, such as the United Nations Convention on the Law of the Sea (UNCLOS), call for the peaceful settlement of disputes in their charters. These provisions influence states' conflict management strategies, as states who belong to peace-promoting international organizations turn to third-party conflict management more frequently.¹ States have numerous peaceful dispute settlement procedures at their disposal for resolving competitive interstate issues, ranging from bilateral negotiations, to non-binding third party settlement such as good offices, conciliation, or mediation, to binding settlement through an arbitration panel or an international court.² Existing scholarship demonstrates that states' willingness to work through international courts or other conflict management forums depends on a variety of factors such as regime type, capabilities, issue salience, ties to potential mediators, past success rates, and state age.³ Similarities between domestic legal traditions and the legal design of international courts also influence states' willingness to work through binding forums. Civil law countries are more likely to recognize the compulsory jurisdiction of the International Court of Justice (ICJ) than common law or Islamic law countries, which results in more effective conflict management in the shadow of the ICJ for civil law dyads in conflict.^{4,5}

We analyze states' forum selection for dispute settlement procedures in the 1982 United Nations Convention on the Law of the Sea. UNCLOS has taken on increasing importance in the past several decades as the number of new competitive claims to maritime zones has increased rapidly and militarization of maritime conflicts occurs frequently,⁶ as recent clashes over the Spratly and Senkaku/Diaoyu Islands demonstrate.⁷ In fact, the proportion of the law of the sea disputes in relation to disputes dealing with other issue areas has grown rapidly.⁸ Reflective of these patterns, an unprecedentedly large part of UNCLOS deals with dispute settlement provisions.⁹ Article 287 of UNCLOS stipulates that states have a procedural choice for peaceful settlement if a dispute dealing with interpretation or application of the Convention arises. State parties can choose one of four compulsory procedures *a priori*, and they can specify their rank order of these procedures. The four dispute settlement forums include the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), and two types of arbitration.¹⁰ Third party conflict management options are utilized if states cannot come to agreement through other peaceful conflict management strategies, such as bilateral negotiations, with Annex VII arbitration serving as the default procedure for UNCLOS members. While most countries have joined UNCLOS, the use of Article 287 declarations is much less frequent, with only 29% of States Parties making them.¹¹

The wide choice of settlement procedures within the UNCLOS framework is truly unprecedented in both general international law and more specifically within the law of the sea. Generally, international agreements either do not provide for the mandatory resolution of disputes or they include reference to only one peaceful resolution venue, such as treaties with compromissory clauses recognizing the jurisdiction of the ICJ.¹² In the context of the law of the sea specifically, the corresponding rules of the 1958 Geneva Conventions on the Law of the Sea constituted "merely an optional protocol."¹³ UNCLOS dispute resolution provisions, referred to as a "cafeteria" approach to compulsory settlement, contrasts sharply with any other treaty within the substantive area of law of the sea.¹⁴ Adede suggests

the UNCLOS system for peaceful settlement should be considered as “one of the pillars of the new world order in the ocean space itself.”¹⁵

Considering the wide choice of settlement options offered by UNCLOS, what helps to explain why some states choose one venue over others or why some states make no declarations under Article 287—which in essence indicates a preference for arbitration? Why would some states explicitly commit to arbitration versus more formal in-court proceedings? Also, why are some states hesitant to resort to the court established by UNCLOS (ITLOS) in comparison with the ICJ, a pre-existing international court, while others identify ITLOS as their preferred forum for resolving maritime disputes? We argue that states engage in strategic forum shopping in order to choose a venue best suited to satisfy their foreign policy preferences.¹⁶ Familiarity with legal processes of judicial forums increases predictability of judicial outcomes, thus states are more likely to select a binding forum that uses legal rules and principles that resemble their domestic legal traditions. The four potential venues offered by the UNCLOS regime differ considerably from one another and incorporate different procedures. We argue that legal procedure and structural design of ITLOS, the ICJ, and arbitration tribunals constitute important factors that states take into consideration while navigating through the UNCLOS dispute resolution regime.

We show that the dispute resolution procedures of the UNCLOS regime incorporate common law countries’ desire for flexibility in conflict management. Common law countries prefer the multiplicity of options and the default procedure of arbitration, especially given their resistance to the use of the International Court of Justice as the primary adjudicator for resolving maritime conflicts.¹⁷ This flexibility in the UNCLOS dispute settlement procedures results in a higher level of ratification or accession of UNCLOS by common law states relative to civil law, Islamic law, and mixed law states. In contrast, civil law ratifying states are most likely to select the ICJ court as their preferred conflict management forum. This follows from our theory of strategic forum shopping, as the similarities between legal rules of the ICJ and the civil law tradition enhance civil law states’ comfort levels in working with the World Court. We also find that civil law countries are amenable to specifying the ITLOS court as an acceptable binding forum for the management of maritime disputes. Our theory and analyses show the important links between domestic law and international legal forums for dispute settlement.

II. Forum Shopping in the UNCLOS Regime

Nine years of negotiations that led to the 1982 United Nations Convention Law of the Sea were extremely complex, as over 150 states representing different cultural, geographical, and legal traditions tried to come to a bargaining outcome acceptable to most sides.¹⁸ UNCLOS negotiations were conducted by three main committees.¹⁹ The First Committee dealt with the “Area” and how resources in the open sea and deep sea beds would be handled.²⁰ The Second Committee dealt with states’ rights on a variety of issues, including the territorial sea limit, the size of exclusive economic zones (EEZs), the continental shelf, access to the sea, and coastal states’ rights. The Third Committee focused on environmental issues, such as marine preservation, scientific research, and pollution. The dispute

settlement aspects of the treaty were negotiated by many states from 1974 onward and were seen as crucial for reaching agreement on the other terms of UNCLOS.²¹

Some states including the United States, have publicly stated that agreement on compulsory dispute settlement is an essential element of an overall “package”.... There is simply too much room in the treaty for misunderstanding, abuse of power, and interference with rights on the basis of unilateral interpretation.²²

The President of the UNCLOS proceedings, Ambassador H. Shirley Amerasinghe, made a similar remark:

Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently.... Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the Convention will be interpreted both consistently and equitably.²³

Yet, while recognizing the importance of dispute resolution provisions, states could not agree on a single conflict management venue. Alongside many other factors, domestic legal traditions played a role in shaping the various states’ preferences toward UNCLOS dispute resolution procedures. As the scholarship demonstrates, states representing the different domestic legal traditions perceive international law, international treaties, and international institutions in a unique manner.²⁴ These different vantage points are shaped by the reality that international law is taught and practiced differently within the distinct municipal systems.²⁵

During negotiations, a large group of states including several civil law countries such as Denmark, Switzerland, and Sweden, pressed for the full involvement of the International Court of Justice as a long-standing, experienced international adjudicator. States representing the civil legal tradition argued that conflicting jurisdiction in the international adjudication sphere could occur if too many forums for settlement were created under UNCLOS. According to these states, the ICJ “should not be deprived the opportunity to increase its jurisdiction over such an important area as the law of the sea.”²⁶ This negotiation tactic can be understood when we consider the legal similarity between the ICJ and civil law rules and procedures. The civil legal tradition, rooted in the laws of the Roman Empire, largely relies on the written letter of law, or codes, which meticulously regulate each substantive and procedural area of law.²⁷ During the UNCLOS negotiations, some civil law states’ representatives pushed for a stipulation that would allow states a freedom of choice of the settlement venue. The Dutch representative, Professor Riphagen, proposed that each party to the UNCLOS Convention be given the ability to “select the court or tribunal it prefers.”²⁸ Unsurprisingly, however, it was civil law states who argued for a strong position of the ICJ in the UNCLOS settlement regime. While negotiating the order of settlement venues in article 287, Netherlands and Switzerland proposed that the ICJ, as the main judicial organ of the UN, be given the first place—the place of honor.²⁹

Other states, including many common law countries such as the United States and Australia, favored establishing a more specialized Law of the Sea Tribunal, which would be better able to handle the technicalities of maritime disputes.³⁰ Common law, which originated on the British Isles, is based on the *stare decisis* doctrine, whereby judges are bound by precedents established in previous judgments.³¹ As a relatively flexible legal system, common

law embraces a large degree of judicial creativity.³² In the hopes of creating a more flexible, adjudicative forum with embedded common law features, several common law states proposed that a special Law of the Sea Tribunal would be “less conservative than the International Court of Justice, would better understand the new law of the sea, and would be more representative of various legal systems and the different regions of the world.”³³ The United States advocated for “a system that will ensure ... uniform interpretation and immediate access to dispute settlement machinery in urgent situations, while at the same time preserving the flexibility of states to agree to resolve their disputes by a variety of means. The parties to a dispute should be free to choose by agreement any method of dispute settlement that they consider suitable.”³⁴ Some common law states, including the United Kingdom, spoke in favor of even more efficient and flexible international venues for settlement, especially arbitration.³⁵

Because most of the negotiations took place during the 1970s, subsequent drafts of the Convention had to accommodate wishes of the socialist states who “perceived western international tribunals as bourgeois.”^{36,37} Socialist states questioned the general ideal of binding third-party tribunals of an adjudicative nature. The USSR representative argued that disputes within states’ coastal or EEZ areas should not be subject to third party dispute settlement.³⁸ The USSR also opposed awarding standing to non-state actors in the UNCLOS court. Instead of supporting ITLOS or the ICJ, representatives of socialist states pressed for highly specialized arbitration, which would enable the disputants to freely choose the arbitrators.³⁹

Several Islamic law states such as Algeria, Iraq, and Lebanon participated in UNCLOS negotiations.⁴⁰ Islamic law, the world’s third major legal tradition, is based primarily on religious sources stipulating principles of human conduct.^{41,42} In contrast to the secular character of modern international law, the main sources of Islamic law, the Qur’an or the Sunna, are closely connected to Islamic faith.⁴³ Unlike other international treaties, many substantive provisions of UNCLOS express principles historically present in the Islamic legal tradition.⁴⁴ Indeed, law of the sea, in a form highly compatible with modern international law, occupies a relatively prominent place in original sources of Islamic law. UNCLOS dispute settlement provisions incorporate Islamic law states’ preference for flexibility in conflict management. The Convention’s emphasis on informal dispute resolution, and in particular, conciliation,⁴⁵ reflects traditional values of the Islamic legal tradition. Indeed, though courts are not forbidden altogether by the Qur’an, there is a deep-rooted belief in Islamic law that informal methods such as mediation and conciliation stand above in-court proceedings. Courts should be used as the last resort option.⁴⁶ Not surprisingly, therefore, during the Convention negotiation process, the majority of Islamic law states did not explicitly declare the ICJ or ITLOS as their forum of choice. In that sense, Islamic law states, including several African states, were generally skeptical of obligatory third-party venues that other states advocated for. These states felt uneasy with the concept of binding adjudicative proceedings, since their own legal systems traditionally relied on informal, consensus-building, and community-based dispute settlement. But, more generally, Islamic law states frequently express mistrust in the global order.⁴⁷

Article 287, the choice of procedure article, is the direct result of states’ unwillingness to agree on a single third-party forum that would render a decision should informal mechanisms fail. UNCLOS offers states a choice of different settlement venues in the event of a

dispute dealing with interpretation or application of the Convention: ITLOS, the ICJ, or an arbitral tribunal. If states choose the same forum, this forum hears their potential disputes. If states choose a different forum or make no declaration at all, then arbitration is the obligatory default forum.⁴⁸ Consequently, despite the fact that only about a quarter of the Convention's ratifying states have explicitly chosen a preferred forum, the dispute settlement system applies to all state parties. There is no ability to completely opt out.⁴⁹ Unless the disputants reach an alternative agreement, the dispute will have to be submitted to arbitration, giving arbitration a leading jurisdictional role.⁵⁰

States may select their own means of dispute settlement outside of UNCLOS.⁵¹ Moreover, states maintain the ability to attempt resolution via other venues and methods stemming from bilateral, regional, or general treaties. Diversification of settlement options was essential because many treaties regulating specific issue areas within law of the sea include their own dispute settlement provisions.⁵² Article 287 was also designed to strike a bargain in UNCLOS negotiations due to their varied preferences for dispute settlement procedures.⁵³

Considering the Convention's emphasis on states' consent, freedom of choice, and their ability to use procedures other than UNCLOS, do states' declarations matter? As in any other issue area of international law, it would be naïve to expect that all states will unconditionally agree to submit their disputes to compulsory and binding adjudication or arbitration.⁵⁴ Thus, the Convention merely echoes and confirms established state practice.⁵⁵ Indeed, in all disputes—maritime and otherwise—states are most likely to prefer bilateral negotiations over third-party resolution venues.⁵⁶ As one of our interlocutors noted, “statistically, I would say that the great majority of interstate disputes, including territorial and maritime disputes, are solved via diplomatic means of dispute settlement.”⁵⁷

The availability of several different venues for settlement within the scope of the Convention raises the possibility of forum shopping.⁵⁸ In the context of domestic litigation, forum shopping can be defined as a litigant's attempt “to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.”⁵⁹ However, it is important to note that states' search for the best international venue is somewhat different from the domestic version of forum shopping. According to Powell and Wiegand, “States' strategic quest for the best settlement venue—the gist of international forum shopping—is idiosyncratic since decisions to use binding, nonbinding, or bilateral techniques entail broad choices between types of conflict management techniques.”⁶⁰ When specifying their choice of a preferred venue for peaceful resolution in the UNCLOS regime, states can do so *a priori*, that is upon signing, ratifying, or acceding to the Convention (or later). This behavior is strategic. Article 282 of the Convention gives priority to any existing compulsory dispute settlement mechanisms that are binding on the disputants. Thus, if the disputing parties have previously agreed to give jurisdiction to a specified settlement venue that entails a binding decision, such as the ICJ or the International Maritime Organization, then neither party can object to that venue's jurisdictional powers. As such, Article 282 of the Convention is a mechanism that “precludes forum shopping as well as questions of overlapping litispence—questions that might follow from conflicting choices made by the disputing parties.”⁶¹

Forum shopping that states engage in within the UNCLOS regime is unique. Selecting the ICJ, ITLOS, or arbitration involves fairly comprehensive choices between types of settlement techniques and not choices between specific judges. In the words of Ioannis

Kostantinidis, “strategy comes in when a state decides at some point, prior to the emergence of a dispute or while a dispute erupts, to make a declaration under Article 287 of the UN Convention of the Law of the Sea.”⁶²

Nevertheless, like domestic litigants, states strategically attempt to find a venue that will most likely yield a favorable outcome in a potential maritime dispute. There are numerous principles in international law designed to restrict states’ propensity to engage in forum shopping, such as the doctrine of *lis alibi pendens* and the *res judicata* principle. The former prohibits states “to commence another set of competing proceedings concerning the same dispute before another judicial body.” The *res judicata* principle states that “the final judgment of a competent judicial forum is binding upon the parties” and therefore cannot be re-litigated.⁶³

We argue that these two rules, and the fact that the Convention includes several contingencies designed to curtail forum shopping, are unable to completely curb states’ aptitude to carefully and strategically pick and choose from among available UNCLOS venues. As early as the negotiation phase of the Convention, some states appeared to be aware of the potential for forum shopping. Several civil law states, who argued for a strong position of the ICJ, emphasized that allowing the choice of venue under Article 287 may create a “danger of having too many tribunals which might render conflicting decisions.”⁶⁴ The final version of Article 287 endows states with a choice of settlement procedures; this choice just has to be made in advance. As a result, states do forum shop—they just have an option to do it *a priori*. Several scholars openly discuss the real possibility of forum shopping among UNCLOS settlement venues. Seymour describes the ICJ and Annex VII tribunals as ITLOS’ “primary competitors.”⁶⁵ Similarly, Charney pronounces the settlement system provided by the Convention as “a system of free competition” for “business.”⁶⁶ In general, the main issue with UNCLOS settlement provisions is the availability of several appropriate forums in which substantive laws may be interpreted and applied.⁶⁷ According to Boyle, this fragmentation can leave an “empty shell which can be filled only if the parties agree on consensual submission of the dispute to whatever forum they choose.”⁶⁸

Maritime dispute resolution entails still some uncertainty over substantive provisions of international law. There is no single international judicial body endowed with the power to create and interpret the international law of the sea though quite a bit of jurisprudence has been now accumulated, which considerably alleviates states’ uncertainty vis-à-vis the law of the sea.⁶⁹ Yet, there is a need for balancing flexibility and predictability in the context of maritime law, since maritime disputes deal with an “infinite variety of geographical and non-geographical situations.”^{70, 71} The ICJ, ITLOS, and a host of arbitral ad hoc tribunals have issued substantively important judgments, yet these tribunals are not always in agreement with each other on maritime principles. States representing different legal traditions often do not view international law the same way, as, “there may be few common reference points among the many international jurists.”⁷² As a result, uncertainty over substantive interpretation of international law ensues.⁷³

This uncertainty is especially acute in the law of the sea, where different adjudicative forums have adapted divergent norms on important issues such as delimitation of the continental shelf.⁷⁴ Though considerable progress toward crystallizing maritime law has been made, as Tanaka notes, “as the law is still developing, it is difficult to identify a solid and definitive legal framework.”⁷⁵ In general, one of the most common criticisms launched

toward UNCLOS is that its provisions are in many places vague, and tend not to impose specific obligations. Yet, given its comprehensive breadth of the Convention, it was arguably never the intention for UNCLOS to provide meticulous rules and solutions regarding every single aspect of maritime law.⁷⁶ In a way, therefore, by opening themselves up to a binding form of resolution—arbitration and adjudication—states may largely lose control over the outcomes of bargaining over highly salient issues, as the costs for renegeing on judgments rendered by international courts are extremely high.⁷⁷

UNCLOS offers states an attractive way to mitigate this uncertainty. The possibility of several forums being charged with solving a dispute entails “procedural fragmentation” of international law.⁷⁸ Different forums employ different sets of procedures. Before an adjudicator or a quasi-adjudicative forum decides on a case, the facts of a particular dispute and interpretations of international norms are funneled through the venue’s institutional procedures. In particular, arbitration tribunals are “captive to their own legal design.”⁷⁹ Every tribunal, in its own way, is a “self-contained system (unless otherwise provided).”⁸⁰ These differences in procedure can have colossal effects on interpretation of substantive international law. International law would not be faced with different substantive interpretations if there was no choice between dispute resolution forums. Faced with uncertainty and at the same time driven to win cases, states strategically make commitments to specific resolution forums offered by UNCLOS. The goal is to *a priori* select a venue that will not only yield the most preferred outcome for a state, but also reduce the uncertainty caused by the resolution procedure itself. Procedural fragmentation offered by UNCLOS under Article 287 mitigates states’ uncertainty.

To increase predictability of final settlement, states simply prefer to use settlement methods that resemble their own domestic legal institutions. Uncertainty about how a forum will adjudicate in a specific maritime case is mitigated if procedures of a particular venue are familiar.⁸¹ This alignment of international and domestic procedures provides a level of comfort, confidence, and willingness to accept the outcome as legitimate. This is an important reality. Scholars argue that the authority of an institution to produce binding decisions comes about not only by the outcome and the substance of decisions, but also by the procedure employed to produce the decision.⁸² Thus, where points of procedural convergence occur between a state’s domestic legal system and a settlement venue, these can supplement legitimacy of the international legal mechanisms in the eyes of the particular state.⁸³

States can anticipate that a third-party forum will engage in a particular method of legal interpretation if the two sets of legal rules, domestic law and the legal design/procedure of an international court, align with one another. Consequently, not all international resolution venues are viewed as equally attractive by potential joining states. There are procedural or “structural biases” embedded in different resolution venues offered in the UNCLOS framework.⁸⁴ These procedural biases precondition states representing some domestic legal traditions to naturally gravitate towards specific venues. Procedural bias is quite different from a bias resulting from politics, economic pressure, or from personal preferences of the intermediaries.⁸⁵

Historical analysis reveals reasons for the implanting of structural biases into international settlement venues. The originators of new courts embed design principles from their domestic legal traditions in the rules of the court to reduce uncertainty in the future with respect to the types of cases the court will hear, the types of judgments it will render,

and the procedures that will be employed in judicial processes. For example, the originators of the Permanent Court of International Justice (PCIJ) designed the Court according to legal principles and procedures from the Roman/civil law tradition by rejecting *stare decisis* and emphasizing *bona fides* and contractual compliance. This design feature was taken into account by later joiners to the court, as civil law countries have been three times more likely to accept compulsory jurisdiction of the World Court than common law or Islamic law countries. On the other hand, the negotiated compromise in Rome that resulted in a hybrid system of legal rules for the International Criminal Court stemming from both common law and civil law, produced nearly equal rates of signature and ratification of the Rome Statute by common law and civil law states (Mitchell and Powell 2011).⁸⁶

We recognize that factors unrelated to domestic legal systems also shape states' choices of settlement venues. Power relations, strategic considerations, strength of legal claims, domestic political concerns, regime type, the cost and length of proceedings, as well as issues of future compliance influence states' decisions to pre-select dispute settlement forums and mechanisms.⁸⁷ It is also crucial to recognize that in designing a strategy of dispute resolution, each disputant is guided by their legal advisers, who usually have extensive experience in dealing with maritime law.⁸⁸ As Hans Corell noted, "First of all, in a country, there are always legal advisers in the governments."⁸⁹ Indeed, considerations such as the possibility to fashion the third party's rules of procedure, the right to appoint the adjudicator/arbitrator, the broader geopolitical background, and pertinent maritime jurisprudence shape forum choices. Legal advisors and state counsel play important role in evaluating limitations and strengths of their client's claims.⁹⁰ Nonetheless, congruence between domestic legal design and the legal design of international resolution venues exerts an important measure of influence on states' forum choices. In the next section, we elaborate on how the design of the ICJ and ITLOS align with states' domestic legal systems, and we derive several hypotheses connecting legal systems to states' Article 287 forum choices.

III. Dispute Resolution in UNCLOS

Adjudication by two distinct courts constitutes an inherent feature of UNCLOS dispute resolution. The ICJ and ITLOS are permanent, independent international courts with largely fixed composition and non-negotiable rules and procedures. Their judges are institutionally separated from disputants and have salary and tenure protection. Consequently, these courts are independent of the interests of the disputants, which may not necessarily be the case with arbitral tribunals.⁹¹ Whether a dispute goes to a more general adjudicator, the ICJ, or a more specialized judicial body, ITLOS, the parties choose a method that entails fairly strict adherence to international law by the adjudicator, strict regulation of procedure, membership, jurisdiction, and nature of disputes admitted. Collectively, these legal features make these courts formal and stringent when compared with arbitration offered in the UNCLOS regime.

There are important similarities between the institutional design of ITLOS and the ICJ. The designers of both courts drew on legal concepts and procedures of the civil legal tradition. For example, in the spirit of civil law, both courts embrace the doctrine of good faith (*bona fides*)⁹² and formally reject the doctrine of the precedent (*stare decisis*).⁹³ Additionally,

both institutions embrace a high degree of formality, thoroughly regulating the conduct of the adjudicators and the disputing parties.⁹⁴ Shared commitment to these principles is evident in the courts' statutes and jurisprudence.⁹⁵

Despite both courts' commitment to formality, the drafters of UNCLOS modified ITLOS procedures to increase the Court's effectiveness, user-friendliness, and practicality.^{96, 97} Consequently, ITLOS has unique procedural features that are absent in the ICJ.⁹⁸ These features include the setting of a fixed date for the opening of oral proceedings, the ability of judges to exchange views concerning the conduct of the case and written pleadings, a special Seabed Disputes Chamber, and the use of electronic means of communication.⁹⁹ These additional rules are informed by the practice of international adjudication and the nature of maritime disputes. Interestingly, the Tribunal's Rules were designed by the first set of the Tribunal's members, which largely accounts for their practical nature.¹⁰⁰ To sum up, although the ICJ and ITLOS share design features from the civil legal tradition, ITLOS' practical and, to some extent, flexible nature makes the Court considerably closer to the common law tradition.¹⁰¹

Arbitration featured in the UNCLOS Convention is a useful alternative to adjudication. Arbitration has many advantages such as its flexibility, speediness, and disputants' ability to retain considerable control over the tribunal's composition. Indeed, states perceive their ability to appoint the arbitrators themselves as a valuable characteristic of arbitration. The hope is that careful selection of bench members will increase a disputant's chances of a favorable outcome.¹⁰² As noted earlier, there are two arbitration options a state may use within the UNCLOS regime.¹⁰³ First, states may choose a more general Annex VII arbitration, or a special Annex VIII arbitration. The latter entails submitting the dispute to a forum that is specialized in a specific genre of dispute, such as fisheries, marine scientific research, or navigation. This type of arbitral tribunal may be composed of technical experts and members of specialized agencies whose backgrounds make them particularly well suited to decipher highly technical maritime cases.¹⁰⁴ Interestingly, the proceedings before the Annex VIII arbitral tribunal may be relatively limited, as these panels may conduct fact-finding alone that may be sufficient to settle a dispute between the parties.¹⁰⁵

In addition to Annex VII or VIII arbitration, arbitration constitutes a default resolution option in UNCLOS. As Tables 2 and 3 show, a little more than a quarter of countries ratifying or acceding to the Convention a priori choose a specific method of settlement. This suggests that an overwhelming majority of states parties to UNCLOS have *not* made a specific dispute resolution declaration under Article 287. Yet, according to the "residual rule" of Article 287, there is no option to completely opt out of the compulsory dispute settlement system. Unless the parties reach an alternative agreement, the dispute will have to be submitted to arbitration (under Annex VII). This stipulation grants arbitration a prime position within the UNCLOS framework. Treves captures this reality well by writing that "the Court and the Tribunal are in competition, together and not one against the other, with arbitration. Arbitration is the procedure that states parties can declare under Article 287, that they are presumed to prefer in the absence of a declaration, and that applies whenever two parties to a dispute have not expressed the same preference."¹⁰⁶

Interestingly, arbitration—as a much more flexible and less formal method of settlement—shares important similarities with the common legal tradition.¹⁰⁷ Whereas adjudication entails delegating a dispute to a permanent court with largely fixed composition, in arbitration, the disputants may choose the arbitrators.¹⁰⁸ Similar to common law in-court

proceedings, an arbitral tribunal is more flexible than a court in the process of reaching a decision. As a general rule, an arbitral panel can base its decision not only on international law, but also on certain principles agreed upon by the parties, equity, and sometimes principles of a domestic legal system. Finally, UNCLOS arbitration tribunals have shown remarkable enthusiasm for established jurisprudence by citing previous decisions of the ICJ, ad hoc tribunals, and ITLOS. This mirrors judicial decision-making and the practice of *stare decisis* in the common legal tradition.¹⁰⁹ Illustrative of these dynamics is the award by the arbitral tribunal in the *Barbados-Trinidad and Tobago* case¹¹⁰: “It is furthermore necessary that the delimitation be *consistent with legal principle as established in decided cases*, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention.”¹¹¹

Clearly, different dispute resolution venues available in UNCLOS bear resemblance to different domestic legal traditions. Consequently, we expect that common law states are most likely to sign onto the Convention. As a legal international document, UNCLOS allows for an unprecedented degree of flexibility in the choice of peaceful resolution venues. Moreover, arbitration tribunals provided for in the Convention resemble, to a large degree, the common law approach to dispute resolution. The privileged position of arbitration as a default option for settlement is likely to attract common law states to sign and ratify the Convention. The flexibility of arbitration and the repeated use of precedents by the UNCLOS arbitration tribunals make this default option especially attractive for common law states. At the same time, we anticipate that common law states will be unlikely to explicitly commit to either of the adjudicative forums specified in Article 287. When compared with arbitration, both the ICJ and ITLOS procedural rules largely stem from the civil legal tradition, which makes these forums less attractive to common law states. However, because ITLOS’ structure is much more flexible and amenable to judicial creativity, we expect that common law states should be slightly more amenable to ITLOS if they select a standing court for dispute settlement.

Hypothesis 1: Common law states are more likely to ratify/accede to UNCLOS than civil law, Islamic law, and mixed law states.

Hypothesis 2: Common law states that have ratified/acceded to UNCLOS are less likely to choose either of the adjudication forums (ICJ, ITLOS) under Article 287 as their preferred forums relative to civil law, Islamic law, and mixed law states. Common law states should demonstrate a preference for the ITLOS court over the ICJ under Article 287.

We also anticipate that all else equal, civil law states are most supportive of the ICJ and ITLOS, as both of these forums resemble the civil law’s approach to dispute resolution. As noted earlier, civil law states have been very supportive of the ICJ and this historically-solidified commitment should be evident within the UNCLOS framework. The relationship between states representing the civil legal tradition and ITLOS is likely to be different. Used to very formalized in-court procedure and comfortable with formal adjudicators, civil law states will be most likely to choose the ICJ as an acceptable forum within the UNCLOS regime.¹¹² Due to a high level of similarity between ITLOS and the ICJ, civil law states should also be open to ITLOS as a potential adjudicator.

Hypothesis 3: Among states ratifying/acceding to UNCLOS, civil law states are most likely to choose the ICJ or ITLOS as their preferred forums when compared with common law, Islamic law, and mixed law states.

Since informal proceedings are considered morally and ethically superior to adjudication, Islamic law states ratifying UNCLOS are likely to be hesitant to commit to either the ICJ or ITLOS. Having developed primarily from ideas of the Western world, international law embraces the view that a distinction between law and religion must be strictly observed. Neither the ICJ nor ITLOS explicitly incorporate principles of the Islamic legal tradition into their jurisprudence.¹¹³ Thus we expect that Islamic law states should be drawn towards informal dispute resolution methods while attempting to resolve their maritime disputes. Importantly, since UNCLOS allows states to seek settlement by peaceful means of their own choice regardless of the dispute resolution procedures outlined in the Convention, we expect that Islamic law states should be more willing to ratify UNCLOS relative to other international treaties.¹¹⁴ At the same time, these states should be unlikely to explicitly commit to ITLOS, the ICJ, or arbitration through Article 287 declarations. Instead, being supportive of the general idea of the peaceful settlement of disputes—largely promoted by the Qur’an—Islamic law states will try to resolve their disputes via other, more informal venues. However, if they make an optional declaration under Article 287, they should choose a form of arbitration as the most flexible approach.

Hypothesis 4: Islamic law states that ratify/accede to UNCLOS are least likely to specify any preferred forum for peaceful resolution when compared with civil law, common law, and mixed law states.

IV. Analyses

To evaluate our theoretical arguments linking domestic legal traditions and states’ preferred dispute resolution forums in UNCLOS, we collected data on states’ decisions to sign, ratify, or accede to UNCLOS. We took as our reference point any country listed on the UNCLOS website page specifying the “Status of the Convention and of the related Agreements, as of 12 December 2020.”¹¹⁵ We also included any state identified as a system member by the Correlates of War dataset from 1982 to 2020.¹¹⁶ The total number of states that meet these criteria is 194, with 92.3% signing UNCLOS. The data for ratification/accession are presented in Table 1. Among the 194 countries in the world, 164 (84.5%) have ratified or acceded to UNCLOS.

Table 1: Ratification/Accession of the UNCLOS Treaty (as of 2020)

Ratify UNCLOS	Civil law	Common law	Islamic law	Mixed law	Total
No	20 (19.8%)	2 (4.2%)	5 (19.2%)	3 (15.8%)	30 (15.5%)
Yes	81 (80.2%)	46 (95.8%)	21 (80.8%)	16 (84.2%)	164 (84.5%)
Total	101 (52.1%)	48 (24.7%)	26 (13.4%)	19 (9.8%)	194

$\chi^2 = 6.42$ (p = 0.093)

Table 1 stratifies ratification/accession decisions by states' domestic legal traditions focusing on the four major legal traditions in the world: civil law, common law, Islamic law, and mixed law.¹¹⁷ The data fit with our theoretical expectations (Hypothesis 1), showing that common law states have the highest level of support for UNCLOS. Of common law countries, 95.8% have ratified the treaty (with the United States and Bhutan being the only exceptions).¹¹⁸ This is a much higher rate of treaty ratification in comparison to states with civil law (80.2%), Islamic law (80.8%), or mixed law (84.2%) traditions. The success of common law states in the UNCLOS negotiations to push for a flexible arbitration approach to dispute resolution enhanced these states' willingness to support the institution. Moreover, the fact that arbitration constitutes the default option under the Convention constitutes an additional incentive for these states. As stipulated above, if a state fails to directly declare a forum, or if the disputing states choose different settlement venues, the residual jurisdiction belongs to an arbitral tribunal. Thus, common law states have been very open to signing onto the Convention. After all, the act of signature/ratification constitutes an important signal of their willingness to peacefully resolve their maritime disputes. What's most important, however, is the fact that they can do so via their favorable flexible venue—an arbitral tribunal.

The overall UNCLOS ratification rate is much higher for common law states when compared to these states' support for other global institutions. Less than half of all common law states have ratified the ICC's Rome Statute, while a mere one-fifth of common law states have ever recognized the compulsory jurisdiction of the World Court (PCIJ/ICJ).¹¹⁹ Common law states have also repeatedly resorted to the UNCLOS arbitration procedures without explicitly choosing Annex VII or VIII arbitration in their Article 287 declarations. Australia and New Zealand commenced arbitration proceedings against Japan under Annex VII of the UNCLOS Convention in the *Southern Bluefin Tuna Cases* despite the fact that arbitration was not the choice of procedure of either applicant.¹²⁰ A similar situation took place in the Barbados and Trinidad and Tobago dispute related to the delimitation of the Exclusive Economic Zone and Continental Shelf between them.¹²¹ Neither of these states chose Annex VII arbitration as their choice of a resolution venue. In fact, Barbados has not to this day made a choice of procedure declaration, and Trinidad and Tobago's first forum of choice is ITLOS, followed by the ICJ as a second option.

The results pertaining to UNCLOS ratification rates of Islamic law states (80.8%) are quite interesting, showing a higher ratification rate than for civil law states (80.2%). This level of support for the Law of the Sea Convention is much higher relative to Islamic law states' support for other major international courts; fewer than 25% of Islamic law countries have ratified the Rome Statute or recognized the compulsory jurisdiction of the World Court.¹²² Islamic support for UNCLOS accords with our theory because the default arbitration procedures in UNCLOS are much closer to the Islamic law approach to the peaceful resolution of disputes with its emphasis on acknowledgment, apology, and forgiveness.¹²³ As Tables 2 and 3 demonstrate, however, Islamic law states do not typically commit to formal adjudicative forums such as the ICJ (4.8%) or ITLOS (9.5%), preferring instead more informal means of settlement.¹²⁴ Particularly attractive to these states is conciliation, regulated by Article 284 of the Convention.¹²⁵ The Montreux compromise that was struck in the 1975 Geneva sessions created a dispute settlement procedure that was attractive to a much larger swathe of countries given its more flexible approach to dispute settlement, with a selection among the various binding forums.

Our second stage of data collection focuses on states' declarations under Article 287 of UNCLOS. This information comes from the UNCLOS website on the "Settlement of disputes mechanism."¹²⁶ As noted earlier, states can select among four forums (ICJ, ITLOS, Annex VII arbitration, or Annex VIII arbitration), they can rank order their preferences among the forums, and they can opt to leave a particular forum as undesignated. For example, in its 2002 declaration, Australia recognized the ITLOS or ICJ courts as acceptable adjudicators for disputes arising in the context of UNCLOS, with no rank ordering between them. Austria, on the other hand, ranks three of the forums under Article 287 with the ITLOS court first, the Annex VIII arbitration tribunal second, and the ICJ third. Some states, such as Greece, choose only a single acceptable forum (ITLOS).

We created three dummy variables to capture Article 287 declaration information. The first variable for the ITLOS court equals one if a state opts for this forum first and zero otherwise. No state rank ordered ITLOS below the first rank order. The second variable is coded one if a country notes that the ICJ is an acceptable adjudicator under Article 287 and zero otherwise; this includes the rank order of the ICJ in the first, second, or third position.¹²⁷ Our final variable captures states' selection of the arbitration procedures under either Annex VII or Annex VIII. Annex VII is the default procedure if no declaration is made, yet ten countries (such as Russia) declare this forum, nonetheless. Only 11 countries specify the Annex VIII arbitral tribunal as acceptable. Due to these small frequencies, we combine the arbitration options into a single dummy variable, with 8.25% of countries choosing one of the two arbitration options.

Table 2: Article 287 Declaration Recognizing ICJ as an Acceptable Forum

Accept ICJ as Forum	Civil law	Common law	Islamic law	Mixed law	Total
No	57 (70.4%)	43 (93.5%)	20 (95.2%)	16 (100.0%)	136 (82.9%)
Yes	24 (29.6%)	3 (6.5%)	1 (4.8%)	0 (0.0%)	28 (17.1%)
Total	81 (49.4%)	46 (28.1%)	21 (12.8%)	16 (9.8%)	164

$\chi^2 = 18.2$ ($p < 0.001$); includes only countries who have ratified UNCLOS.

Table 3: Article 287 Declaration Recognizing ITLOS as an Acceptable Forum

Accept ITLOS as forum	Civil law	Common law	Islamic law	Mixed law	Total
No	50 (61.7%)	40 (87.0%)	19 (90.5%)	16 (100.0%)	125 (76.2%)
Yes	31 (38.3%)	6 (13.0%)	2 (9.5%)	0 (0.0%)	39 (23.8%)
Total	81 (49.4%)	46 (28.0%)	21 (12.8%)	16 (9.8%)	164

$\chi^2 = 19.7$ ($p < 0.001$); includes only countries who have ratified UNCLOS.

Tables 2 and 3 present the descriptive information for ITLOS and ICJ forum selection by states' domestic legal traditions. Supportive of hypothesis 3, civil law countries have the highest preference for the International Court of Justice, with 29.6% of civil law states

recognizing this court in an Article 287 declaration (among those states that have ratified or acceded to the treaty). Consistent with hypotheses 2 and 4, only 6.5% of common law states and 4.8% of Islamic law states agree to work with the ICJ to resolve maritime disputes. This meshes well with prior findings that civil law countries are much more supportive of the World Court than states with other legal traditions due to its civil law design.¹²⁸ The ITLOS court finds a higher level of support among common law (13%) and Islamic law states (9.5%), yet civil law countries select this forum with the highest percentage (38.3%), also supporting hypothesis 3. This pattern can be explained by the similar legal design of the ITLOS and ICJ courts, as civil law countries could expect similar rules and procedures to be utilized, even though the ITLOS court is somewhat less formal in its procedures. As expected, common law states prefer ITLOS to the ICJ. More than twice as many common law states recognize ITLOS as an acceptable forum for settlement relative to the ICJ (13% versus 6.5%). Although these statistics are much smaller when compared with declarations placed by civil law states (26.9% and 38.3%), they convey an important message: the flexibility of ITLOS seems to attract common law states, which historically have been reluctant to accept jurisdiction of the civil law based, more formal ICJ.

Table 4: Forum Selection in the UNCLOS Regime under Article 287

	Model 1	Model 2	Model 3
	<i>ICJ</i>	<i>ITLOS</i>	<i>Annex VII or VIII</i>
<i>Civil Law</i>	1.626** (0.673)	1.507*** (0.552)	2.519* (1.295)
<i>Islamic Law</i>	0.652 (1.270)	0.254 (0.938)	2.788* (1.549)
<i>Capabilities</i>	-0.475 (21.585)	7.775 (13.564)	30.357* (15.546)
<i>Polity Score</i>	0.132*** (0.047)	0.053* (0.032)	0.080 (0.051)
<i>Constant</i>	-3.171*** (0.714)	-2.201*** (0.534)	-4.734*** (1.346)
<i>N</i>	132	132	132
<i>Pseudo R²</i>	0.17	0.10	0.12
<i>Wald χ^2</i>	22.72***	16.17***	11.46**

* p<.10,
**p<0.05,
*** p<0.01

In Table 4, we analyze states' selection of dispute settlement procedures under Article 287 using multivariate logit models. We control for two additional factors beyond domestic legal traditions: capabilities and regime type.¹²⁹ In their analysis of the ICJ, Mitchell and Powell (2011) found that powerful states were less supportive of compulsory jurisdiction relative to weaker states, while democratic countries were more likely to support the World

Court than autocratic states. The basic results presented in the cross-tabulations in Tables 2 and 3 find confirming support in Table 4. The coefficient for civil law is positive and significant for each type of forum under Article 287, supporting our third hypothesis.¹³⁰

Overall, the ICJ's level of activity stemming from the UNCLOS Convention is much lower than the activity on ITLOS and the Annex VII and VII arbitration. The initial hopes that the ICJ would play a leading role in the settlement of UNCLOS disputes have not yet been realized. However, states that do file their cases with the ICJ are for the most part civil law states. Prominent examples include the *Territorial and Maritime Dispute* between Nicaragua and Colombia, and *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*.¹³¹ Interestingly at the time of application, Nicaragua and Honduras had not made an Article 287 declaration. Since then, however, both of these civil law states have demonstrated a clear partiality towards the ICJ by stipulating that the Court is their first-choice venue. It is especially evident in the wording of Nicaragua's declaration, which states that Nicaragua "accepts only recourse to the International Court of Justice."¹³² Islamic law countries are similar to common law (reference category) and mixed law states (dropped due to perfect collinearity) in their support levels for the ICJ or ITLOS courts.

While we anticipated theoretically (hypothesis 4) that Islamic law states would eschew Article 287 declarations relative to countries with other legal traditions and find evidence consistent with that (Table 4, Models 1 and 2), we find nonetheless that they are more likely than common law states to prefer an arbitration forum (Table 4, Model 3). This is consistent with a more flexible approach to dispute settlement and the number of states who have made these claims is relatively small (Egypt and Tunisia). We also find that more powerful states prefer the arbitration procedures under Annex VII or Annex VIII, which is consistent with Posner and Yoo's claim that powerful actors prefer the flexibility and design specific nature of arbitration tribunals.¹³³ Less powerful states, on the other hand, value more legalized, binding third-party methods as they provide legal venues where the disputants are treated evenly, regardless of their capabilities. The divergence of views regarding UNCLOS dispute settlement between the two types of states, more and less powerful, became apparent during the UNCLOS III negotiations. Delegates from developing states believed that embedding third party dispute settlement provisions into the Convention "would counterbalance political, economic, and military pressures from powerful states." Indeed, developing states strongly favored the creation of a new tribunal with jurisdiction over maritime law cases. These states viewed the ICJ as not sufficiently representative of the evolving character of the international community in the post-colonization era.¹³⁴ Stronger states, like the U.S., argued in favor of more flexible provisions, which would "deter new unilateral state claims that had questionable legal support."¹³⁵

Democratic countries show more affinity for dispute resolution through international courts (either the ICJ or ITLOS) in comparison to less democratic states. This fits with Mitchell and Powell's findings that democracies are more likely to sign onto international courts like the ICJ and ICC and that they have more durable commitments to those courts.¹³⁶ Our results also support the arguments advanced by the democratic legalistic perspective that links the democratic commitment to the principle of rule of law to democracies' support for more legalized methods of peaceful resolution.¹³⁷ In the context of territorial disputes, Allee and Huth find that leaders of states in democratic dyads become more interested in third party legal methods when the domestic audience costs of a bilateral negotiated settlement are expected to be high.¹³⁸

Ultimately, we need more in-depth analysis of the influence of these dispute settlement choices on states' behavior in interstate maritime disputes. Other studies have examined the influence of UNCLOS ratification on peaceful and militarized settlement attempts to resolve diplomatic disagreements over maritime areas. Mitchell and Powell's empirical results suggest that states belonging to UNCLOS experience slightly more militarized disputes over maritime claims than states outside of UNCLOS (although the difference is not statistically significant).¹³⁹ On the other hand, UNCLOS members are more likely to resort to third-party dispute settlement strategies and less likely to start new diplomatic claims over maritime spaces. Considering one study's data set of maritime conflicts,¹⁴⁰ we find that only two militarized disputes ever occurred over maritime claims involving two UNCLOS members who have made Article 287 declarations, and both cases occurred in 1982, the year of treaty signature: Argentina–United Kingdom over the Falklands and Greece–Turkey over the Aegean Sea. This suggests that states can reach peaceful agreements more effectively in the shadow of UNCLOS when they have more effectively signaled their preferences for binding settlement procedures.¹⁴¹

Our results suggest that states' domestic legal traditions have a strong influence on their preferred dispute resolution forum in the UNCLOS regime. Common law states, pushing for the arbitration options and the new ITLOS tribunal in the UNCLOS negotiations, were happy with the ultimate flexible design of the institution. This resulted in nearly universal ratification of UNCLOS by common law states. Civil law states are more wary of ratifying UNCLOS as they would have preferred the ICJ as the primary dispute settlement forum given the similarities between their legal traditions and the World Court. We find, however, that among those civil law countries who ratify or accede to UNCLOS, they are much more likely to opt for the ICJ or ITLOS as their preferred forum for dispute settlement. This stems from the rules and procedures employed by the two courts, rules that uphold important principles in the civil law tradition such as *bona fides*, lack of *stare decisis*, and formality of procedures.

V. Conclusion

The recent proliferation of international courts in different substantive areas of international law gives states many incentives to forum shop for the best court when attempting to settle interstate disputes. In the arena of conflicts over maritime zones, countries have multiple choices for dispute settlement procedures. The current structure of the United Nations Law of the Sea Convention (UNCLOS) fosters states' ability to choose peaceful settlement venues that are best suited to fulfill their expectations concerning dispute resolution. This treaty is unique as it is "one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from the interpretation and application of its terms."¹⁴² States have numerous grounds for preferring one tribunal or adjudicator over another in what Noyes calls "a system of open competition" created by the UNCLOS Convention.¹⁴³

UNCLOS offers a variety of binding conflict forums (Article 287), including the International Tribunal for the Law of the Sea, the International Court of Justice, and two arbitration mechanisms (Annex VII & VIII). The flexible dispute settlement procedures in the

UNCLOS regime and the default arbitration procedures make the treaty appealing to common law countries, with close to universal ratification among all common law countries in the world. On the other hand, civil law countries have more reluctance to join UNCLOS in part because the regime did not elevate the International Court of Justice to the preferred forum for maritime dispute settlement. The civil law design of the ICJ makes this an attractive forum for civil law countries. Islamic law countries have provided a higher level of support for UNCLOS than other courts like the ICJ and have recognized arbitration forums through Article 287 more often than common law states because the flexibility of the dispute settlement procedure mimics the less formalized procedures for resolving disputes in the Islamic legal system. In short, we demonstrate that countries' legal traditions influence their preferred forums for managing maritime disputes.

These results support other research linking domestic legal traditions and international courts such as the International Court of Justice and the International Criminal Court. States push for legal design principles that are based on their domestic legal traditions when negotiating new international treaties. These design elements influence the behavior of later joiners to the court, such as states who came into existence following the 1982 signature of UNCLOS. The shadow of the court operates most effectively for countries who share its legal principles; thus, the next stage of our research entails an examination of interstate bargaining in the context of UNCLOS. Indeed, the fact that compulsory binding settlement venues exist within a regime matters. As Charney suggests, "their very availability encourages settlement by holding the promise of being invoked if voluntary methods fail."¹⁴⁴ According to our argument, pairs of common law states should be able to reach agreements and comply with them more readily than dyads with civil law, mixed law, or Islamic law states or dyads where states have different legal systems, as the acceptability of the binding arbitration default mechanism makes it a plausible option. The fact that multiplicity of forums exists within the UNCLOS regime intensifies the "out of court effects."^{145, 146}

Our paper examines the *a priori* declarations states can make under Article 287 of UNCLOS. Yet we could also take our research one step farther and examine the selection of forums once disputes arise. Future research will compare cases that go to the ITLOS, ICJ, or arbitration panels to see if states' preferences for conflict management forums carry over to their selection of courts/panels for specific disputes. We could also tap into data collected by the Issue Correlates of War (ICOW) project¹⁴⁷ which records data on diplomatic conflicts over maritime areas, which would also allow for an analysis of whether states opt for the forums they pre-designate in UNCLOS. We might determine if common law states are more successful in maritime disputes given their strong support for the UNCLOS regime. Taking our research forward will help us understand more fully the process by which countries select distinct forums for managing interstate issues and how their domestic legal traditions influence those choices.

Notes

1. The phrase "dispute settlement" is used in UNCLOS. Following the terminology in the literature, in this paper we also use the term "conflict management" to describe states' efforts to peacefully settle their contentions. Thus, the terms "dispute settlement" and "conflict management" are used interchangeably; Stephen E. Gent, and Megan Shannon, "Decision Control and the Pursuit of Binding Conflict Management: The Ties That Bind," *Journal of Conflict Resolution* 55(5) (2011), pp. 710–734, <https://doi.org/10.1177/0022002711408012>. According to Jacob Bercovitch and Patrick M. Regan, "conflict

management is widely understood to be an attempt by actors involved in conflict to reduce the level of hostility and generate some order in their relations. Successful conflict management may lead to (a) a complete resolution of the issues in conflict (a change in behavior and attitudes), or as is more common in international relations, to (b) an acceptable settlement, ceasefire or partial agreement"; "The Structure of International Conflict Management: An Analysis of the Effects on Intractability and Mediation," *International Journal of Peace Studies* 4(1) (1999) pp. 1–19. In this context it is also useful to recall Article 2(3) of the UN Charter, which requires states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered."

2. In good offices, a third party is asked to assist the disputing states in negotiating a peaceful settlement. During the process of conciliation, a third party takes into consideration all elements of the dispute and formally offers terms of a settlement. In mediation, the disputing states ask a third party to influence their perceptions or behavior in the context of the dispute, providing a more active role for the third party in the negotiating process (Jacob Bercovitch and Jeffrey Z. Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management* [New York: St. Martin's Press, 2011]; Malcolm N. Shaw, *International Law*, 5th ed. [New York: Cambridge University Press, 2003]).

3. Gary L Scott and Craig L. Carr, "The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause," *American Journal of International Law* 81(1) (1987), pp. 57–76, <https://doi.org/10.2307/2202131>; Beth A. Simmons, "See You in 'Court'? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes," in Paul F. Diehl (ed.), *A Road Map to War: Territorial Dimensions of International Conflict* (Nashville: Vanderbilt University Press, 1999).

4. Sara McLaughlin Mitchell and Emilia J. Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge: Cambridge University Press, 2011).

5. We argue that it is not only possible, but also conceptually useful to classify legal traditions into categories that share important characteristics. As most scholars agree, this process of classification should be based on identifying fundamental elements of a legal system, through which "the rules to be applied are themselves discovered, interpreted and elaborated" (Rene David and John E. Brierly, *Major Legal Systems in the World Today* [London: Stevens, 1985], 20). However, all legal scholars agree that legal traditions are internally intricate and complex. For discussion of different categorizations of domestic legal systems, and issues of increasing cross-fertilization between them, see Sara McLaughlin Mitchell and Emilia J. Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge: Cambridge University Press, 2011). For Islamic law states' preferences toward international dispute resolution, see Emilia Justyna Powell, "Islamic Law States and Peaceful Resolution of Territorial Disputes," *International Organization* 69(4) (2015), pp. 777–807, <https://doi.org/10.1017/S0020818315000156>, and Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford, UK: Oxford University Press, 2020).

6. Paul R. Hensel and Sara McLaughlin Mitchell, "From Territorial Claims to Identity Claims: The Issue Correlates of War (ICOW) Project," *Conflict Management and Peace Science* 34(2) (2017), pp. 126–140, <https://doi.org/10.1177/0738894216652160>; Sara McLaughlin Mitchell, "Clashes at Sea: Explaining the Onset, Militarization, and Resolution of Diplomatic Maritime Claims," *Security Studies* 29(4) (2020), pp. 637–670, <https://doi.org/10.1080/09636412.2020.1811458>.

7. Analyzing data from the Issue Correlates of War (ICOW) Project on diplomatic issue conflicts, the authors show that 41.8% of territorial claims, 28.7% of maritime claims, and 11.2% of river claims have experienced one or more militarized disputes over the issue in question. Thus, diplomatic disagreements over maritime zones result in militarized conflict frequently, although the average dispute severity levels are lower for disputes involving maritime issues. Hensel and Mitchell (2017). For more detailed information on maritime claims, see Mitchell (2020).

8. I.V. Karaman, *Dispute Resolution in the Law of the Sea* (Martinus Nijhoff, 2012), <https://doi.org/10.1163/9789004212015>.

9. According to Karaman (2012), provisions on dispute settlement "make up almost a quarter (22 per cent) of all of its provisions" (p. 12).

10. States can choose an arbitral tribunal with a general jurisdiction constituted under Annex VII, or a special arbitral tribunal constituted under Annex VIII of UNCLOS. For Annex VII arbitration, the members of the arbitral tribunal do not need any specific legal qualifications, while under Annex VIII arbitration, a list of experts is drawn up in several areas such as fisheries, navigation, and marine scientific research. The tribunal must have at least four of five members coming from this expert list; see Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, UK: Cambridge University Press, 2005), pp. 56–57.

11. 71% of countries (147 of 194) who have ratified or acceded to UNCLOS do not choose any specific

dispute settlement mechanisms, thus most countries accept Annex VII arbitration as the default settlement procedure if the issue cannot be resolved through negotiations. Among the 29% of countries selecting a forum, the most popular forum is the ITLOS court (N=39), followed by settlement through the International Court of Justice (N=28). Data taken from http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm. See Sara McLaughlin Mitchell and Andrew P. Owsiak, "Judicialization of the Sea: Bargaining in the Shadow of UNCLOS," *American Journal of International Law* 115(4) (2021), pp. 579–621, <https://doi.org/10.1017/ajil.2021.26>.

12. Guzman shows that out of 100 treaties registered with the United Nations Treaty Series, 80 treaties had no mandatory dispute settlement mechanism. See Andrew T. Guzman, "The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms," *Journal of Legal Studies* 31(2) (2002), pp. 303–326, <https://doi.org/10.1086/340811>.

13. J.G. Merrills, *International Dispute Settlement* (New York: Cambridge University Press, 2017), p. 197, <https://doi.org/10.1017/9781316683149>.

14. Alan E. Boyle, "Dispute Settlement and the of the Sea Convention: Problems of Fragmentation and Jurisdiction," *International and Comparative Law Quarterly* 46(1) (1997), pp. 37–54, <https://doi.org/10.1017/S0020589300060103>.

15. A.O. Adede, "Settlement of Disputes Arising Under the Law of the Sea Convention," *American Journal of International Law* 69(4) (1975), pp. 798–818, 798, <https://doi.org/10.2307/2200624>.

16. For definition of the term "forum shopping," see p. 12.

17. The United States was the key negotiating common law state in the mid–1970s arguing in favor of establishing a new court for UNCLOS. The Montreux formula that emerged in the 1975 Geneva sessions was a compromise proposed by a civil law state (Netherlands), which suggested a choice between three forums for dispute settlement: the ICJ, ITLOS, or an arbitration panel. See A.O. Adede, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea* (Boston: Martinus Nijhoff, 1987).

18. UNCLOS negotiations occurred in three stages. UNCLOS I began in 1958 and led to agreements on the territorial sea and contiguous zone, the continental shelf, the high seas, and fishing and conservation. UNCLOS II convened for a month in 1960 but produced no significant agreements. UNCLOS III began in 1973 and was voted on in 1982, with 130 states voting in favor, 4 against, and 17 abstaining. See Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, UK: Hart Publishing, 2010), p. 14.

19. John R. Stevenson and Bernard H. Oxman, "The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session," *American Journal of International Law* (69) (1975), p. 3, <https://doi.org/10.2307/2200189>.

20. The "Area" constitutes 50% of the earth's area and is "defined in Article 1(1) of the LOSC to mean 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.' These limits of national jurisdiction are either 200nm from the territorial sea baselines, or further beyond this distance out to the limits of the outer continental shelf established by states in conformity with Article 76 of the LOSC." Rothwell and Stephens 2010, 121–123.

21. See Adede (1987) for a detailed analysis of the UNCLOS dispute settlement negotiations including the 1974 Caracas session, the 1975 Geneva session, the 1976–1977 New York sessions, and the 1978 Geneva session.

22. Stevenson and Oxman 1975, p. 795.

23. Adede 1987, p. 89.

24. For in-depth discussion of comparative international law, see Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds.), *Comparative International Law* (New York: Oxford University Press, 2018), <https://doi.org/10.1093/oso/9780190697570.001.0001>; and Anthea Roberts, *Is International Law International?* (New York: Oxford University Press, 2017). Also, see Dana Zartner, *Courts, Codes, and Custom: Legal Tradition and State Policy Toward International Human Rights and Environmental Law* (Oxford: Oxford University Press, 2014), <https://doi.org/10.1093/acprof:oso/9780199362103.001.0001>; and Shintaro Hamanaka and Sufian Jusoh, "Domestic Legal Traditions and International Cooperation: Insights from Domestic and International Qualification Systems," *International Political Science Review* (August 2021), <https://doi.org/10.1177/01925121211028472>.

25. In this context, we wish to emphasize that domestic legal traditions are not monolithic, but instead hybrid. Thus, though our categorization focuses on the major legal traditions: civil, common, and Islamic, there is much diversity within each of these categories. We follow an established practice in the study of comparative law of accepting a classification that provides "an initial picture," while recognizing that no legal classification can constitute "a perfect fit to the real world." See Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014) pp. 73–74. Thus, we are keenly aware of the fact that

any classification, including that of domestic legal traditions, or legal families constitutes a relatively rough cut at critical evaluation of the world's legal topography. Furthermore, we recognize that being part of the same legal tradition does not take away the inherent complexity of each domestic jurisdiction. By way of illustration, Scotland, though part of the United Kingdom, a common law country, has a hybrid legal system which strongly influences of the civil legal tradition. The same is true for Quebec, where civil matters are regulated according to the principles of civil law. Common law governs over other substantive areas of law, including criminal law and public law. For more information, see Herbert M. Kritzer (ed.), *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* (Santa Barbara, CA: ABC-CLIO, 2002).

26. Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, Netherlands: Martinus Nijhoff, 1982), p. 41.

27. H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford, UK: Oxford, 2014).

28. Nordquist et al. 1982, p. 43.

29. This procedure was challenged by some states such as Argentina on the grounds that the ICJ had optional jurisdiction and thus it would not be appropriate to give it mandatory jurisdiction (Klein 2005, p. 15).

30. The United States held informal consultations with more than 35 delegations towards the end of 1974 and proposed a compulsory dispute settlement procedure establishing the Law of the Sea Tribunal (Adede 1987, p. 13).

31. Siems 2014.

32. Research in legal history and comparative law shows that legal systems vary in their degree of formalism and flexibility (Merryman 1985; Djankov et al. 2002; Koch 2003; and Author). Common law is more flexible than civil law. In comparison with civil law, common law is based on a more freely and dynamic interpretation of rules, as common law judges often create law that amends or builds on the preexisting legal structure. Elaborating on the differences between the civil and common law traditions, Jouannet (2006, p. 309) aptly notes that "Americans [common law] see law as an all-encompassing sociological and political phenomenon, while the French [civil law] see it exclusively as a body of rules and principles."

33. Nordquist et al. 1982, p. 42.

34. The United States also argued that the ICJ was not sufficient for settling maritime disputes because it handled only cases between countries and many maritime issues involved conflicts between private entities and states. See Adede 1987, p. 15.

35. See Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht, Netherlands: Martinus Nijhoff, 1982), pp. 41–42. Another argument for establishing ITLOS is that specializing in an area of law, such as the law of the sea, brings benefits. This argument, however, may not be advanced only regarding common law states. As legal research demonstrates, all domestic legal systems use some degree of specialization in courts. Common law states use specialized courts in areas such as small claims, traffic, tax, family issues, and bankruptcy. Civil law states, on the other hand, use specialized courts for ordinary private law matters, such as contract, property, employment law, or administrative law. See Gillian Hadfield, "The Levers of Legal Design: Institutional Determinants of the Quality of Law," *Journal of Comparative Economics* (36) (2008), pp. 43–73, <https://doi.org/10.1016/j.jce.2007.10.002>. In the Islamic legal tradition, religious sharia courts are often used to hear matters of private, family law. See Powell 2020.

36. Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, UK: Cambridge University Press, 2005), p. 56.

37. Governance in socialist states operates according to socialist law. Most comparative law scholars view socialist law "as a novel outshoot from the civil law family." See W. Partlett, and E.C. Ip, "Is Socialist Law Really Dead?" *New York University Journal of International Law and Politics* 48(2) (2016), p. 463. Socialist law embraces that idea that ownership over the means of production is to be public, relies on a substantially enlarged public law sector, and minimizes the influence of private law. As a legal system firmly anchored in Marxist philosophy of command-style market, the socialist legal system demands that much land and other property is public or belongs to collectivities instead of individuals. In addition, public law is exceedingly formal, full of meticulous rules, and the communist party, as the preserver of the socialist legal order, is largely responsible for the implementation of the legal system. See Glenn 2014.

38. Adede 1987, pp. 83–84.

39. UNCLOS became the first general treaty in which the USSR and its allies "agreed to provisions on binding third-party dispute settlement." See John E. Noyes, "The International Tribunal for the Law of the Sea," *Cornell International Law Journal* 32 (1998), pp. 109–182.

40. We define an Islamic law state "as a state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law in personal, civil, commercial, or criminal law, and where Muslims constitute at least 50 percent of the population" (Emilia Justyna Powell, *Islamic Law*

and *International Law: Peaceful Resolution of Disputes* [Oxford, UK: Oxford University Press, 2020: 1]). See Emilia Justyna Powell, “Not So Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea,” in Anthea Roberts, Pierre Verdier, Paul Stephan, and Mila Versteeg (eds.), *Comparative International Law* (Oxford: Oxford University Press, 2017), pp. 571–594; and Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes* (Oxford, UK: Oxford University Press, 2020). We also recognize the contested nature of the term “Islamic law state.” See, for instance, Wael Hallaq, *The Impossible State* (New York: Columbia University Press, 2013).

41. Glenn 2014; Powell 2020.

42. The concept of sharia is distinct from the concept of Islamic law *sensu stricto*. Sharia is a more encompassing concept and refers to the expression of God’s will for humans. Thus, sharia cannot be equated merely to a system of laws. See Khaled Abou El Fadl, “Conceptualizing Shari’a in the Modern State,” *Villanova Law Review* 56(5) (2012), pp. 803–817. As Bassiouni explains, “the *shari’a* and Islamic law are distinct from one another. The latter is complementary to the *shari’a*, which is the primary source, or *aṣl* (*uṣūl*, plural).” See Bassiouni M. Cherif, *The Shari’a and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), <https://doi.org/10.1017/CBO9781139629249>.

43. The Qur’an is the sacred book of the Muslims, the Sunna records the practices, sayings, and silences of the Prophet Muhammad. Judicial consensus (*ijma*) and analogical reasoning (*qiyas*) constitute juridical techniques and serve as subsidiary sources in the Islamic legal tradition.

44. For in-depth analysis of Islamic law of the sea, see H.S. Khalilieh, *Islamic Maritime Law: An Introduction* (5) (1998). For an analysis of the Islamic milieu’s relation with UNCLOS, see Powell 2017.

45. Article 284 identifies conciliation as a tool for dispute settlement. The clause has a *ratione temporis* limitation, though, because it applies only to disputes that arise after UNCLOS enters into force. See Anne Sheehan, “Dispute Settlement Under UNCLOS: The Exclusion of Maritime Delimitation Disputes,” *University of Queensland Law Journal* 24 (2005), pp. 165–190.

46. Wael B. Hallaq, *Sharia: Theory Practice Transformations* (Cambridge: Cambridge University Press, 2009), <https://doi.org/10.1017/CBO9780511815300>.

47. Powell 2020.

48. If a state party does not make a declaration under Article 287, the default dispute settlement procedure is arbitration through Annex VII.

49. Several categories of law of the sea disputes deal directly with issues of sovereignty. Section 3 of UNCLOS lists these categories.

50. See Karaman 2012. The use of a binding forum of arbitration as the default dispute settlement strategy acts as a form of self-binding delegation for UNCLOS members (Alter 2008).

51. In that case, according to Article 281, UNCLOS dispute resolution procedures will apply only if “no resolution is reached through that means and if the parties did not exclude any further procedure in so choosing” (Klein 2005, p. 34).

52. Additionally, Article 283 of the Convention accords primacy to informal dispute settlement mechanisms, such as bilateral negotiations, or other diplomatic means.

53. While the four different binding settlement options in Article 287 are all third-party binding techniques, they are quite distinct from one another. These methods’ differences stem precisely from the fact that UNCLOS drafters could not agree on a single binding forum. This multiplicity of different binding forums listed in Article 287 is indeed “an open invitation for the potential applicants to race for the tribunal which is the best suited for them.” See Karaman 2012, p. 252. Different procedures suit different countries—this is the core of our argument. For instance, while the more general Annex VII arbitration operates according to procedures highly similar to traditional arbitration used in other areas of international law, the Annex VIII special arbitration is unquestionably unique. The special arbitration may be employed only for a specific set of disputes (dealing with fisheries, marine scientific research, navigation, and pollution from vessels and by dumping, preservation and protection of marine environment). Perhaps most importantly, law does not need to constitute the main bases for deciding a dispute, but it is “regarded more as another type of useful expertise.” See Merrills 2017, p. 191. Finally, these special arbitral tribunals are composed according to patterns largely characteristic to conciliation and not arbitration.

54. Gary Goertz, Paul F. Diehl, and Alexandru Balas, *The Puzzle of Peace: The Evolution of Peace in the International System* (Oxford: Oxford University Press, 2016), <https://doi.org/10.1093/acprof:oso/9780199301027.001.0001>.

55. The disputants can at any time abandon the UNCLOS settlement techniques and resort to any peaceful method of their own choice.

56. According to Goertz, Diehl, and Balas (2016, p. 178), in the context of territorial claims

(1816–1986), binding third-party methods have been the last choice for countries and are outnumbered by mediation and bilateral negotiations. For an insightful analysis of the use of non-formal and formal legal mechanisms in the context of land, river, and maritime claims, see Owsiak and Mitchell (2019).

57. Author's interview (EJP) with state counsel and consultant Ioannis Kostantinidis, Qatar, January 11, 2021. Also cited in Emilia Justyna Powell and Krista E. Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Book Manuscript, 2021).

58. For an in-depth analysis of international forum shopping, see Aletta Mondre, *Forum Shopping in International Disputes* (Basingstoke, UK: Palgrave Macmillan, 2015), <https://doi.org/10.1057/9781137466655>. For empirical analyses of forum shopping in the context of territorial disputes, see Emilia Justyna Powell and Krista E. Wiegand, "Strategic Selection: Political and Legal Mechanisms of Territorial Dispute Resolution," *Journal of Peace Research* 51(3) (2014): 361–374, and Krista E. Wiegand and Emilia Justyna Powell, "Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes," *Journal of Conflict Resolution* 55(1) (2011): 33–59.

59. See Black, Henry Campbell, Joseph R. Nolan, and Michael J. Connolly, *Black's Law Dictionary* (Eagan, MN: West Publishing Company, 1979).

60. Emilia Justyna Powell and Krista E. Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Book Manuscript, 2021).

61. See Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice," *New York University Journal of International Law and Politics* 31 (1999), pp. 809–820. Article 282 of the Convention states: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

62. Author's interview (EJP) with state counsel and consultant Ioannis Kostantinidis, Qatar, January 11, 2021. Also cited in Powell and Wiegand (2021).

63. Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003), pp. 22–23, <https://doi.org/10.1093/acprof:oso/9780199274284.001.0001>.

64. Nordquist et al. 1982, p. 41.

65. Jillaine Seymour, "The International Tribunal for the Law of the Sea: A Great Mistake?" *Indiana Journal of Global Legal Studies* 13(1) (2006), p. 12, <https://doi.org/10.2979/gls.2006.13.1.1>.

66. See Jonathan I. Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea," *American Journal of International Law* 90(1) (1996), pp. 69–75, <https://doi.org/10.2307/2203752>. The scholarship disagrees on whether forum shopping is a positive or a negative phenomenon. For instance, Karaman (2012, p. 313) writes that "forum shopping is in general a positive phenomenon, since it embodies one of the main principles of international law: settlement of disputes by any peaceful means of the States' own choice."

67. Rosemary Rayfuse, "The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention," *Victoria University of Wellington Law Journal* 36 (2005), pp. 683–711, <https://doi.org/10.26686/vuwlr.v36i4.5624>.

68. Boyle 1997, p. 47.

69. For discussion of predictability and flexibility of international maritime law, see Tanaka (2006). Also, see Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), <https://doi.org/10.1093/acprof:oso/9780199566532.001.0001>, for an argument that increased flexibility in the application of UNCLOS may be required in light of maritime security considerations.

70. Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Portland, OR: Hart Publishing, 2006), p. 5.

71. For more recent development of maritime law in specific areas, see, among others, Natalie Klein, Guilfoyle Douglas, Md Saiful Karim, and Rob McLaughlin, "Maritime Autonomous Vehicles: New Frontiers in the Law of the Sea," *International and Comparative Law Quarterly* 69 (2020), pp. 719–734, <https://doi.org/10.1017/S0020589320000226>.

72. Colin B. Picker, "International Law's Mixed Heritage: A Common/Civil Law Jurisdiction," *Vanderbilt Journal of Transnational Law* 41 (2008), pp. 1085–1140.

73. As Shaw argues, "One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule." See Malcolm N. Shaw, *International Law, 5th ed.* (New York: Cambridge University Press, 2003), p. 66.

74. Arguably, many provisions of UNCLOS have been clarified via subsequent caselaw. An example is

the concept of “unattributed rights” in the exclusive economic zone. According to Article 59 of the Convention, any conflict over these rights “should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.”

75. Tanaka 2006, p. 7.

76. For more information, see Massimo Lando, *Maritime Delimitation as a Judicial Process* (Cambridge: Cambridge University Press, 2019), <https://doi.org/10.1017/9781108608893>. He provides an in-depth analysis of the interplay between states and international tribunals in the evolution of the maritime delimitation process.

77. Richard B. Bilder, “International Dispute Settlement and the Role of International Adjudication,” in Charlotte Ku and Paul F. Diehl (eds.), *International Law: Classic and Contemporary Readings* (Boulder, CO: Lynne Rienner, 1998), pp. 233–256.

78. Karaman 2012, p. 247.

79. Powell 2020, p. 108.

80. *Prosecutor v. Dusko Tadić aka “DULE,”* Decision on In the Defense Motion for Interlocutory Appeal on Jurisdiction of October 2, 1995, 35 ILM 1996, 35–74, par. 11.

81. When we refer to an international court’s procedures, we are adopting a definition similar to Brown (2007, 8): “‘procedure’ includes not only the conduct of proceedings, including the power of international courts to rule on preliminary objections, the adduction of evidence, and the exercise of incidental powers, during and after the adjudication on the merits, but also the constitution of international tribunals and questions relating to their jurisdiction.”

82. John R. Hibbing and John R. Alford, “Accepting Authoritative Decisions: Humans as Wary Cooperators,” *American Journal of Political Science*, 48(1) (2004), pp. 62–76, <https://doi.org/10.1111/j.0092-5853.2004.00056.x>; Tyler 1990.

83. In an important way, domestic legal systems provide states with clues about a venue’s behavior and “the decision-making process itself” (Powell 2020, p. 108). Judge Hardy Cross Dillard of the ICJ has directly referred to the issue of familiarity: “[W]hile perhaps regrettable, it does not seem unnatural that those in charge of the foreign affairs of governments should prefer to settle disputes by processes with which they are familiar, that are flexible, and that remain under their control, rather than risk a settlement through processes with which they are less familiar, that appear more rigid, and that entail a loss of control.” See Hardy Cross Dillard, “The World Court: Reflections of a Professor Turned Judge,” *American University Law Review* 27(2) (1978), pp. 205–250.

84. Powell 2020.

85. See, for instance, Laurence R. Helfer and Anne-Marie Slaughter. 2005. “Why States Create International Tribunals: A Response to Professors Posner and Yoo,” *California Law Review* 93(3) (2005), pp. 901–956 and Eric A. Posner and John C. Yoo, “Judicial Independence in International Tribunals,” *California Law Review* 93(1) (2005), pp. 1–74.

86. Sara McLaughlin Mitchell and Emilia J. Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge: Cambridge University Press, 2011).

87. See Alter 2014; Davis 2012; Goertz, Diehl and Balas 2016; Huth, Croco, and Appel 2013; Scott 2014; Emilia Justyna Powell and Krista E. Wiegand, *Peaceful Resolution of Territorial and Maritime Disputes*, Sara McLaughlin Mitchell and John Vasquez, eds., *What Do We Know About War?* (Lanham, MD: Roman and Littlefield, 2021, 191–205.

88. Emilia Justyna Powell and Krista E. Wiegand, *The Peaceful Resolution of Territorial and Maritime Disputes* (Book Manuscript, 2021).

89. Author’s interview (EJP) with Hans Corell, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Stockholm, Sweden, January 13, 2021. Also cited in Powell and Wiegand (2021).

90. Interestingly, state counsels involved in international law of the sea cases are usually based in London, Paris, and the U.S. Frequently, therefore, litigation teams are designed to represent both civil law and common law approaches.

91. Sicco Rah and Tillo Wallrabenstein 2006. “Sustainability Needs Judicial Support: What Does the International Tribunal for the Law of the Sea (ITLOS) Offer in This Respect?” in Peter Ehlers and Rainer Lagoni (eds.), *International Maritime Organisations and Their Contribution Towards a Sustainable Marine Development* (Hamburg, Germany: Lit Verlag, 2006), pp. 285–316.

92. *Bona fides*, or the good faith principle has three constitutive moral elements: honesty, fairness, and reason. See Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (New York: Cambridge University Press, 2000). Good faith has been recognized by the ICJ in several judgments,

including the Norwegian Fisheries case (1951), the North Sea Continental Shelf cases (1969), and the Nuclear Test cases (1973). Following the ICJ, ITLOS has explicitly referred to *bona fides* several times, often referring to its treatment by the ICJ (The Volga case, 2002).

93. For the lack of official doctrine of the precedent, see Articles 33 and 124 of the Rules of UNCLOS and Article 59 of the ICJ Statute. These provisions limit the court judgment's binding force only to the disputants and to the case in question. Interestingly, the ICJ referred to "its settled jurisprudence on maritime delimitation" in a recent ruling (*Maritime Delimitation in the Black Sea [Romania v. Ukraine]*, Judgment February 3, 2009, ICJ Reports 2009, p. 61).

94. In this context we wish to highlight that the distance between common and civil legal traditions regarding formality of in-court proceedings has narrowed considerably. Particularly notable are changes in common law procedure since the late 1990s including, for example, the introduction of the uniform rules of civil procedure in the United Kingdom. For more information on this topic, see Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003); and Colin Lockhart, Andrew Hemming, and Tania Penovic, *Civil Procedure in Australia* (LexisNexis Butterworths, 2014).

95. For instance, ITLOS refers to the ICJ's treatment of international legal doctrines and rules and often cites its judgments to support its own legal reasoning (See, for instance, de la Fayette 2000). The ICJ has sent all of its publication to ITLOS "as a friendly gesture to a fellow judicial organ." See Rao 2002, p. 296.

96. Merrills 2017, pp. 200–201.

97. In this context it is interesting to note that ICJ and ITLOS proceedings are, in many aspects, similar. In particular, the practice of dispute settlement in either forum invariably has a formal presentation of the parties' oral arguments and the repeated exchange of complex written pleadings (both stages in rounds).

98. We describe only differences and similarities between ITLOS and the ICJ that pertain to our argument, and thus deal with legal characteristics of the two courts. We acknowledge that there are several other differences not associated with inter-legal traditions differences.

99. Rao, P. Chandrasekhara. 2002. "ITLOS: The First Six Years," in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law vol. 6* (Netherlands: Kluwer Law International), p. 217, <https://doi.org/10.1163/138946302775159389>.

100. In comparison, 109 Articles constitute the Rules of the International Court of Justice.

101. Yet, in comparison with domestic courts in either common or civil law jurisdictions, the ICJ and ITLOS are much less prescriptive in terms of their procedural rules. Indeed, disputes between states—sovereign entities—are unique, and international judges, regardless of their legal background, recognize the political sensitivities of maritime contentions. Also, there are very strict time limits before ITLOS in the special procedure for prompt release of fishing vessels.

102. Natalie Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (New York: Cambridge University Press, 2014), <https://doi.org/10.1017/CBO9781139062008>.

103. Also, state-parties can choose to set up an arbitral tribunal by agreement, pursuant to UNCLOS provisions that allow states to select any peaceful means of their choice. See Merrills 2017, p. 187.

104. The arbitrators are to be experts in the fields of fisheries, protection of the marine environment, marine scientific research, and navigation (Annex VIII, Art. 2).

105. UNCLOS, Annex VIII, Art. 5.

106. Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice," *New York University Journal of International Law and Politics* 31 (1999), p. 817.

107. Cassese, Antonio. *International Law*, 2d ed. (Oxford, UK: Oxford University Press, 2005); Louise De La Fayette, "ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute," *The International Journal of Marine and Coastal Law* 15(3) (2000): 355–392, <https://doi.org/10.1163/157180800X00163>.

108. Arbitrators do not have to be international judges. For example, in the ICJ *Argentina–Chile* case of 1966 (38 ILR, p. 10), the tribunal consisted of a lawyer and two geographical experts.

109. See Pieter H.F. Bekker, "Taking Stock Before ITLOS Takes Off: A Citation Analysis and Overview of the Maritime Delimitation Case Law," Paper presented at Sixth ABLOS Conference, Monaco, October 27, 2010. Interestingly, Annex VII arbitral tribunals, despite their relatively young age when compared with the ICJ, have referred to ICJ decisions and arbitral awards "even more frequently than the ICJ itself" (Bekker 2010, p. 6).

110. For example, the arbitral award in Barbados-Trinidad and Tobago contains "43 references to all available ICJ precedents and six references to four of the six 'pure' ad hoc decisions, while the award in Guyana-Suriname refers 39 times to all available ICJ precedents and 11 times to four ad hoc awards" (*Ibid.*).

111. Emphasis added by the authors.

112. In this context, it is important to note that many civil law states have adopted legislation that

introduces more flexible procedures of dispute settlement, including alternative dispute resolution (ADR). In general, ADR, such as mediation, provide less costly alternatives to in-court litigation. These methods are frequently seen as better able to further interests of all parties concerned. Moreover, the use of ADR reduces the pressure on often overburdened courts while providing cost savings for the parties. See Klaus J. Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2012).

113. Powell 2015, Powell 2020.

114. This is quite distinct from the behavior of Islamic law countries towards other international courts. Only five Islamic law countries have ratified the Rome Statute, whereas only six Islamic law countries have ever recognized the compulsory jurisdiction of the World Court (Mitchell and Powell 2011).

115. Oceans and Law of the Sea UN, "Settlement of Disputes Mechanism," August 30, 2019, http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm, accessed October 18, 2021.

116. The Correlates of War Project, <http://www.correlatesofwar.org/>, accessed October 18, 2021.

117. This data is taken from Mitchell and Powell (2011) which describes the histories and characteristics of each major legal tradition. Mixed legal systems combine elements from two or more major legal traditions (e.g., common and Islamic law). Importantly, in our dataset, following an accepted methodology in the scholarship, we use only major legal systems, as defined by Gamal Moursi Badr, "Islamic Law: Its Relation to Other Legal Systems," *American Journal of Comparative Law* 26(2) (1978), p. 187, <https://doi.org/10.2307/839667>. A major legal system must have a substantial geographical influence, and its influence over state governance must be long-lived (see Mitchell and Powell 2011, 22). We recognize that there are other domestic legal systems, or traditions, that do not meet these requirements, such as the Confucian legal tradition, or socialist law. See Glenn 2014.

118. We should point out that President George W. Bush also pushed for the United States to finally ratify UNCLOS, yet the Senate did not agree.

119. Mitchell and Powell 2011.

120. New Zealand has not made an Article 287 application; Australia declared ITLOS and then ICJ as its choices of venues. Award on Jurisdiction and Admissibility rendered 08/04/2000, available at Reports of International Arbitral Awards, "Reports of International Arbitral Awards: Southern Bluefin Tuna (New Zealand–Japan, Australia–Japan)," https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf, accessed October 20, 2021.

121. Award by the Permanent Court of Arbitration, April 11, 2006.

122. Mitchell and Powell 2011; Emilia Justyna Powell, "Not So Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea," in *Comparative International Law*, Anthea Roberts, Pierre Verdier, Paul Stephan, and Mila Versteeg, eds. (Oxford: Oxford University Press, 2018, pp. 571–594).

123. George E. Irani and Nathan C. Funk, "Rituals of Reconciliation: Arab-Islamic Perspectives," *Arab Studies Quarterly* 20(4) (1998), 53–73.

124. Our multivariate models show that Islamic law states are more likely than common law states to select Annex VII or Annex VIII arbitration under Article 287.

125. Article 284 of the Convention states: "A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure."

126. Oceans and Law of the Sea UN, "Settlement of Disputes Mechanism," August 30, 2019, http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm, accessed October 18, 2021.

127. 75% of states rank the ICJ first, 18% rank it second, while 7% rank it third. We should note that three countries declared the ICJ to be an unacceptable forum: Cuba, Guinea-Bissau, and Algeria. We code the ICJ variable as zero for these cases.

128. Mitchell and Powell 2011.

129. The capabilities measure is each state's CINC score in the year they ratified or acceded to UNCLOS. The CINC score reports a state's percentage of total systemic military (personnel, expenditures), economic (energy consumption, coal/steel production), and demographic capabilities (total/urban population); the average for our sample is .005. For regime type, we use the Polity score (in ratification year) which subtracts a state's autocracy (0–10) score from its democracy (0–10) score. These dimensions are based on the competitiveness of political participation, the level of constraints on the chief executive, and the openness and competitiveness of chief executive recruitment. The average for our sample is 2.4. Inclusion of regime type removes several common law countries from the analysis because many island states do not have Polity scores, but this does not bias results on our other variables of interest.

130. Common law states are the reference category. Mixed law countries also get removed from the model because none have signed an Article 287 declaration. We get similar results using the La Porta et al.

(1999) categorization for legal systems based on colonial legacy; countries with British colonial legacy are less likely to recognize ITLOS or the ICJ through Article 287 declarations than countries with other colonial legacies (French, German, Socialist, or Scandinavian).

131. ICJ Judgments 12/13/2007, 05/04/2011 (*Nicaragua v. Colombia*), and 10/08/2007 (*Nicaragua v. Honduras*), available at: <https://www.icj-cij.org/en/case/124/judgments>. However, because of the timing of UNCLOS ratification by the disputing parties, Seymour (2006, p. 13) argues that “it is not clear that they [these cases] necessarily demonstrate a general preference for the ICJ.”

132. See ITLOS, “Declarations of States Parties Relating to Settlement of Disputes in Accordance with Article 287 (Choice of Procedure),” 2011, <https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/>, accessed on October 20, 2021.

133. Posner and Yoo 2005.

134. These sentiments contributed to the size of ITLOS bench being substantially larger than that of the ICJ. On developing states’ preferences more generally, see Klein (2014) and Douglas Guilfoyle, “Governing the Oceans and Dispute Resolution: An Evolving Legal Order?” in Danielle Ireland-Piper and Leon Wolff (eds.), *Global Governance and Regulation: Order and Disorder in the 21st Century* (New York: Routledge, 2020).

135. Noyes 1998, p. 115.

136. Mitchell and Powell 2011.

137. William Dixon, “Democracy and the Peaceful Settlement of International Conflict,” *American Political Science Review* 88 (1) (1994), pp. 14–32, <https://doi.org/10.2307/2944879>.

138. Todd L. Allee and Paul K. Huth, “The Pursuit of Legal Settlements to Territorial Disputes,” *Conflict Management and Peace Science* 23 (4) (2006), pp. 285–307, <https://doi.org/10.1080/07388940600972644>.

139. Mitchell and Powell 2011.

140. Stephen C. Nemeth, Sara McLaughlin Mitchell, Elizabeth A. Nyman, and Paul R. Hensel, “Ruling the Sea: Managing Maritime Conflicts Through UNCLOS and Exclusive Economic Zones,” *International Interactions* 40(5) (2014), pp. 711–736, <https://doi.org/10.1080/03050629.2014.897233>.

141. Mitchell and Owsiak (2021) confirm these out of court bargaining patterns. The authors find no cases of binding settlement in dyads where both states have accepted the ICJ or ITLOS through Article 287 declarations. Thus, states can avoid going to court in situations where it is most plausible.

142. Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, UK: Cambridge University Press, 2005), p. 2.

143. Noyes 1998, p. 175.

144. Charney 1996, p. 71.

145. Bilder 1998.

146. Mitchell and Owsiak (2021) find that states who jointly declare the same Article 287 forums (e.g., both prefer ITLOS) are more likely to utilize bilateral negotiations to resolve ongoing maritime disputes. Thus, states do bargain more effectively in the shadow of international courts. However, this article does not examine how domestic legal traditions interact with UNCLOS commitments to influence maritime disputes.

147. Hensel et al. 2008; Hensel and Mitchell 2017.

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